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Changing Patterns of Water Use in the West:
Pressures on the System

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Western Water: Expanding Uses/Finite Supplies

Natural Resources Law Center
University of Colorado School of Law
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I. The Changing World of Western Water


1. The West is urbanizing.

2. Agricultural demand is stable or declining.


   a. Recreation and tourism is a growth industry.

   b. Environmental consciousness is stronger than ever.

   c. The federal government is claiming water for instream flows based on reserved rights.


B. Traditional sources of new supplies are becoming unreliable.
   a. Carbon dioxide increase in the atmosphere is causing warmer temperatures and decreased precipitation.
   b. Serious reductions in the quantities and quality of water can be expected in most western rivers.

2. Most proposed large water storage projects are becoming infeasible.
   a. Federal funding for new projects is virtually unavailable.
   b. Environmental problems prevent development of many sources.
   c. Most proposed projects cannot be financed with private capital because of unfavorable benefit-cost ratios.
e. Evaporative losses are so great from storage of water on many western rivers that further new reservoirs development will not increase firm yield. Hardison, "Potential United States Water-supply Development," *Journal of the Irrigation and Drainage Division, American Society of Civil Engineers* 479 (1972).

3. Nonrenewable groundwater is being mined and contaminated.
   a. "Fossil water" is potential insurance against drought.
   c. Contamination can render aquifers useless for some or all purposes.

II. A trend toward more efficient water use is responding to pressures caused by increased demands and finite supplies.

A. Municipal water demand can be greatly reduced.
1. Technology can assist in reducing demand for inhouse uses without impacting lifestyles.
   a. Plumbing devices.
   b. Reuse.

2. Great opportunities exist for reducing outdoor uses.
   a. Although only about half of the water used by a municipal water system is for outdoor uses (lawn watering, car washing, pools) nearly all the consumption of municipal systems is from these purposes. LTW Associates, Water and Growth: An Inquiry Into the Potential Impacts of Municipal Water Use Restrictions Upon Future Growth of the Colorado Front Range Corridor, reprinted in Colorado Department of Natural Resources, Colorado Water Study (draft 1981).
   b. Low water demand landscaping ("xeriscape") can be very effective.

3. Systemwide improvements can make water already in the system go farther.
a. Reuse of secondarily treated sewage for irrigation.
b. Recycling of potable treated water.
c. Leak detection.

Critical Water Problems Facing the Eleven Western
States (1975); U.S. Water Resources Council, The

1. Great reductions in use may be made through
technology (ditch lining, laser leveling of
fields, computer scheduling, moisture sensing,
drip irrigation, gated pipe, etc.). See U.S.
Office of Technology Assessment, Water-related
Technologies For Sustainable Agriculture in U.S.
Arid/Semi-Arid Lands (1983); E.g., U.S. Department
of Agriculture Soil Conservation Service, Onfarm
Irrigation Improvements -- McElmo Creek Unit
Salinity Control Study (1983).

2. Better management of water within a basin through
exchanges and cooperation can greatly increase the
usability of existing sources within a prior
appropriation system. Colorado Water Resources
Research Institute, A Voluntary Basinwide Water
Management: South Platte River Basin Colorado
(1984); Howe, Schurmeier and Shaw, Innovations in
Water Management: Lessons From the Colorado-Big
Thompson Project in Northern Colorado Water
Conservancy District in Scarce Water and
Institutional Change (Frederick, ed. 1986).
3. Low water demand crops and conservation tillage can increase yields and use the same or less water. See Lacewell and Collins, *Implications and Management Alternatives For Western Irrigated Agriculture*, Technical Article 17807 of the Texas Agricultural Experiment Station (nd.).


C. Municipal supplies can be expanded through innovative arrangements with agricultural users.

1. Municipalities can finance water conservation measures that otherwise would be beyond the economic reach of agriculture.
   a. Imperial Irrigation District-Metropolitan Water District Proposal.
   b. Casper-Alcova transaction.

2. Contractual arrangements such as dry year leases can provide drought security for municipalities without extinguishing agricultural uses.

3. Physical solutions such as exchanges and augmentation plans allow greater uses of the same sources without any reduction in use. See

D. Instream flows and natural values can be protected in an efficient system.
   1. Fewer diversion and impoundment facilities need to be built.
   2. Care must be taken to assure that wetlands are not drained and streams dried up in the name of efficiency.

E. The requisites of an efficient water allocation system should be:
   1. Water must have an ascertainable value.
   2. Water must be freely transferable.
   3. The system must address environmental problems.
   4. The system must deal with equities.

III. Economics plays the most important role in achieving efficient water use.

A. Market transfers of water can move the resource to the uses most important to society. Howe, Schurmeler and Shaw, Innovative Approaches to Water Allocation: A Potential For Water Markets 22 Water Resources Research 439 (1986); Wahl and Osterhoudt, Transactions in Water (Review Draft 1985).
   1. There is a great disparity in values of agricultural uses and municipal uses.
2. Much western water is locked in low-value uses, possibly preventing some desirable development and certainly increasing costs of new supplies.

B. The wisest choices among possible sources of water are the least cost alternatives.

C. There are several barriers to market transfers.
   1. Legal impediments to transferring of water exist in many states. Pring and Tomb, supra.
   2. Transaction costs required for transfer of water rights or changes of use often drive the expense of the transaction beyond the value of the water.
   3. Psychological and social barriers to transfers are great.

D. Uncritical reliance on the market is misplaced.
   1. People do not always behave rationally, especially where water is concerned.
   2. Short-run profits may not be in the best long-run interests of the public.
      a. Social issues, such as dislocations caused by removing water from one part of the economy or one part of the state to others, may not be addressed by the market.
      b. The interests of unborn generations are not well reflected in the marketplace.
c. Environmental protection is not automatically assured in a water market.

3. Instream flows for public use are unlikely subjects of free market transactions without government intervention or regulation.

IV. What is the role of government in promoting efficient water use in a prior appropriation state?

A. State government should facilitate transfers.

1. Remove barriers to transfers.
   a. Outright prohibitions.
   b. Obstacles such as excessive transaction costs.

2. Define water rights.

   a. Area of origin protections may be necessary, e.g., sinking funds or trust funds to deal with regional economic declines, loss of agricultural heritage, etc.
   b. The poor should not be denied water for their basic needs.

4. Institutions that discourage transfers should be reformed.
5. Agencies and programs may be created to act as brokers in trading water.
   a. Idaho water bank.
   b. Pending legislation in California.

B. Policies and laws should encourage efficiency.

1. "Beneficial use" should be defined to allow rights only in the consumption required to achieve the purposes for which water was appropriated in a reasonably efficient manner. Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 494 P.2d 1029 (1972); A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57 (1978).


3. Physical solutions, including a requirement that senior water users accept a substitute supply (CRS § 37-80-120, should be encouraged. See Dunning, supra.

4. Effective pollution controls increase the amount of water that is available.

5. Pricing policies can discourage excessive use.

6. States should have a policy against public subsidies for water development except where they are needed to achieve clear social goals.
7. A requirement that least cost alternatives be selected for public water supplies would help overcome the price insensitivity of public agencies. See generally Welsh, How To Create A Water Crisis (1985).

8. Sale and reuse of salvaged water should be allowed. E.g., Calif. Water C. §§ 382, 383, 1009-1011.

C. Regulation of water use is needed to protect the value of property rights in water.

1. Pollution control.

2. Enforcement of rights as against other users is needed to prevent excessive or improper use of water.

D. Comprehensive planning is essential to efficient use of water and western states.

1. Most western states have largely abdicated their planning function to the federal government.

2. Planning should not be limited to identifying and setting priorities for water development opportunities; it includes:
   a. projecting growth patterns.
   b. predicting per capita use.
   c. studying and identifying the extent of needs for instream flows.
d. setting policies for public investment.
e. indicating regions of the state where certain water uses will and will not be permitted.

3. Wise public investments require planning.

E. Institutions that hold water rights and distribute water may have to be reformed.
1. Public agencies and entities are able to resist market forces and often make uneconomic decisions.
2. Special water districts often enjoy the benefits of public agencies and of private enterprise without the burdens of either. See generally, Special Project -- Irrigation Districts, 1982 Arizona State Law Journal 345-327.

3. Water courts and administrative agencies build in delays and costs that are unnecessary.

F. Government participation in markets may be desirable.
1. Instream flows are best owned and protected by government entities.
2. State interests must be represented in interstate transactions.
   a. States have special interests in their future growth and the health and welfare of their citizens.
b. States cannot absolutely ban water exports. 
Sporhase v. Nebraska, 458 U.S. 941 (1982); 
El Paso v. Reynolds, 583 F.Supp. 379 (D.N.M. 

c. A recent study has concluded that New Mexico 
should hold and market rights to major sources 
of groundwater. Water Resources Research 
Institute and University of New Mexico Law 
School, State Appropriation of Unappropriated 
Groundwater: A Strategy For Ensuring New 
Mexico A Water Future (1986).

d. Amendments to Montana law in 1985 provide for 
the state to be the sole appropriator and 
tessor of large quantities of water (Mont. 
Code Ann. § 85-2-205) subject to certain 
public interest criteria (Mont. Code Ann. § 
85-2-311). See Montana Select Committee on 
Water Marketing, Report to the 49th Montana 
Legislature (December 1984).

3. The law of equitable apportionment may require 
states to insist on greater efficiency or else 
lose a portion of the water to which they are 
entitled to another state. Colorado v. New 
Mexico, 459 U.S. 176 (1982); See Grant, The Future 
of Interstate Allocation of Water, 29 Rocky Mtn.
G. Federal laws and policies must be reformed to allow freer transfer of federal project water and Indian water.


2. Indian water rights, while largely unutilized, exist in quantities that cast doubt on the value of many private water rights.

3. Questions about transferability of Indian water rights should be resolved by Congress.

V. Conclusion: Western water will be adequate for all foreseeable uses -- primarily municipal growth and instream flows -- without major capital investments if available means of efficient water management and use are applied.