

# 1993 Annual Legislative Review: Reinventing State Water Rights Systems

There was a bumper crop of important water bills in 1993. Of the 203 major water bills tracked by *WS* this year, 78 passed and were signed, 44 bills were carried over to next year's session (in California, Nebraska, and Oklahoma), and 81 failed (including 2 that were vetoed). Last year, 33 out of 113 tracked bills passed and were signed into law.

Twenty tracked bills dealt with water transfers, out of which 11 passed; 13 dealt with conservation (8 passed); 32 dealt with the definition and protection of water rights (14 passed); 14 dealt with issues related to water quality (5 passed); 21 with groundwater (8 passed); 34 with public trust issues (11 passed); and 69 with planning and policy (21 passed). These results, by issue area, are summarized in the *WS Legislative Scorecard* (below). The bills that passed are briefly described in the Table beginning on page 4.

The busiest issues were changes in the administration of water policy and planning responsibilities, in clarifying the definition of and in protecting water rights, and in public trust. Water quality and water conservation were much lower legislative priorities this year.

As usual, most of the activity was in California. The legislature considered 60 bills (later reduced to 58 when two bills were amended into others). A total of 22 passed, of which two were vetoed. Bills were debated that would make water leasing easier, create new water quality authorities, encourage conservation, and propose bond issues for water reclamation, desalination, and wetland protection.

After California, the Oregon legislature enjoyed the most productive session — passing eight bills. Idaho and Nebraska passed seven each. Arizona passed six; Montana, Nevada, and Washington passed five each; Texas passed four; North Dakota and Oklahoma passed three each; Kansas passed two; Colorado, South Dakota, and Wyoming passed only one each; and New Mexico passed none of the major water bills it considered. The Utah legislature was in session but considered no major bills.

### WATER TRANSFERS (20 bills: 11PS 6C)

Opponents of transfers pushed through important legislation in two states. The Oklahoma legislature passed three bills (*SCR 20: Stipe*), (*HR 1007: Mass*) and (*SR 18: Stipe*) — all intended to block the transfer of water from the Kiamichi River Basin and Sardis River to the state of Texas. Arizona is still the site of strong opposition to groundwater exports. The state passed (*SB 1086: Arzberger et al*) prohibiting the transportation of any groundwater out of any basin.

But legislation encouraging transfers was passed in five states. California passed (*AB 1593: Cortese*), which explicitly includes state and local governments as possible contractors for transferred water, (*AB 1316: Richter*) allowing the Yuba County Water Agency to enter into long-term contracts for water use outside its boundaries, and (*AB 1641: Cortese*) which authorizes water suppliers to transfer, for use outside their service areas, water voluntarily foregone during the transfer — if it is surplus to the agency's needs. The legislature delayed consideration of a more flexible bill (*AB 97: Cortese*) that would have permitted user-initiated transfers (see *WIM September 1993*).

Kansas passed (*HB 2070: Committee on Energy and Natural Resources*), which substantially modifies water transfer procedures. The legislature and the Kansas Water Authority are removed from any role in transfers. A water transfer hearing panel would be established consisting of the chief engineer of the Division of Water Resources (as chair), the director of the Kansas Water Office, and the secretary of the Department of Health and Environment. A water transfer is defined as the diversion or transportation of at least 2,000 *af/year* for a distance of 35 miles or more. The panel will select an independent, knowledgeable hearing officer to preside for each application. No transfer will be approved unless it offers net benefits to the state and the chief engineer recommends (and either the panel concurs or the governor declares) that an emergency exists affecting the public health, safety, or welfare. The hearing officer must also determine that the applicant has had conservation plans and practices in effect for at least twelve months and will continue the practices after the transfer. The hearing officer may assess "costs to the applicant before the hearing and may order reimbursement of the applicant by other parties for the parties' fair and equitable portion of the costs."

Texas has created a water bank designed to encourage buying, leasing, or exchanging water rights. (*SB 1030: Armhrister*) sets up the bank, which will be operational as early

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1993 WS Legislative Scorecard				
Subject	Passed	Failed	Carryover	Total
Water transfers	11	3	6	20
Conservation	8	5	0	13
Water rights	14	17	1	32
Water quality	5	5	4	14
Groundwater	8	11	2	21
Public trust	11	14	9	34
Planning/policy	21	26	22	69
<b>Total</b>	<b>78</b>	<b>81</b>	<b>44</b>	<b>203</b>

Table 1  
 WS Selected Western States Water Legislation, 1993  
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WASHINGTON (18 Bills tracked; 5PS)

- (PS) *SIIB 1309: Fisheries & Wildlife Committee* ..... Creates interagency committee to develop strategy to reduce fishing impacts on salmon stocks (PT)  
 (PS) *SIIB 1236: Natural Resources & Parks Committee* ..... Changes filing fees and procedures for water rights applications (PP)  
 (PS) *SIIB 1785: Environmental Affairs Committee* ..... Creates interagency council to create jobs by restoring the state's environment and forests (PT)  
 (PS) *SIIB 1787: Natural Resources & Parks Committee* ..... Makes permanent pilot programs to test market mechanisms for water transfers (WT)  
 (PS) *IJIM 4003: Mastin* ..... Memorializes Congress and President to limit drawdowns on Columbia Snake Rivers (PT)

WYOMING (4 Bills tracked; 1PS)

- (PS) *HB 213: Diercks* ..... Names horned toad as state reptile (PT)

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as January 1994, coordinated by the Texas Water Development Board. The Board will act as a water information clearing house. The bank will assist in negotiations between buyers and sellers, encourage conservation by encouraging "saved water" to be deposited into the bank, and will have the power to establish regional banks. Water rights holders will be able to deposit up to half the amount they have been allocated into the bank, where they will be protected from cancellation for 10 years. They may be extended an additional 10 years after the Texas Natural Resources Conservation Commission approves a water transfer. The Texas Water Resources Institute concludes that the "bank could be useful in helping smooth the development of the Trans-Texas Diversion Project, which proponents hope will market water from east Texas rivers to Houston, San Antonio, and Corpus Christi. It will be utilized to help coordinate the rush of buyers and sellers that are expected to participate in the Edwards Aquifer water market created under *SB 1477* (see below).

In Idaho, (*II 111: Resources and Conservation Committee*) was passed, continuing the authority granted under (*IIB 4*) during the last session to allow the director of DWR to permit emergency transfers of water. And Washington passed (*SIIB 1787: Natural Resources and Parks Committee*), which replaced the pilot programs testing market mechanisms for water transfers and conservation with a permanent program.

### CONSERVATION (13 Bills: 8PS 1PV 0C)

Despite above average rainfall and record snowpack, conservation remains an important issue in California — although a low priority item elsewhere. Of the 13 bills considered, eight have passed, seven in California. (*SB 7: Kelley*) allows the state's water suppliers to "acquire, store, provide, sell and deliver reclaimed water for any beneficial use" consistent with statewide reclamation regulations. (*SCA 4*) places before the

voters an amendment to the constitution, declaring water conservation devices exempt from property taxation — while (*SB 50: Thompson*) excludes such devices from taxation legislatively. (*SB 129: Kelley*) creates separate PUC rule-making and rate-making procedures for reclaimed water and (*SB 365*), by the same sponsor, declares the use of potable water for landscape irrigation, cooling towers, or air conditioning devices a waste if reasonably-priced reclaimed water is available (*AB 1201: Cortese*) provides authorization for loans to be made from the 1988 Water Conservation Fund. And (*AB 1712: Lee*) authorizes water suppliers to include rate structures as a water conservation technique. The Governor vetoed (*AB 958: Bronshvag*), which would have allowed public water suppliers to offer preferential rates to customers who undertake all practicable water conservation measures.

In Oregon, (*SB 92: Department of Water Resources*) passed, establishing a preference during droughts for water used for stock watering, human consumption, and public health needs.

### WATER RIGHTS (32 Bills: 14PS 1C)

Clarifying, redefining, and protecting water rights was the subject of 32 bills this session, of which 14 have passed.

California passed (*SB 235: Ayala*), repealing the sunset provisions on SWRCB's program to register small, domestic water users. The state also passed (*AB 2014: Cortese*), prohibiting the forfeiture of conserved water rights through non-use or transfer. Idaho, still concerned over drought, passed (*SB 1054: Resources and Environment Committee*), authorizing the DWR director to approve short-term uses of water for minor projects without creating a permanent water right. Montana closed to further consumptive appropriations the Jefferson River and Madison River basins with the passage of (*SB 282: Swysgool*) and the Upper Missouri basin with the passage of (*IIB 395 Foster*). The actions were a response to the growing number of applications that had exceeded the state's capacity to process.

Nebraska has solved the technical problems of irrigators

in the panhandle who had failed to transfer water rights, by passing (*LB 302: Wickersham*), which gives them three years to complete the necessary paperwork. With the passage of (*LB 789: Natural Resources Committee*), the state will now issue permits for temporary appropriations of water. After similar bills failed in previous years, the legislature passed (*LB 301: Beutler*), allowing municipalities to appropriate surface water to protect the quantity and quality of their groundwater recharge. This is the first time Nebraska law explicitly recognizes the connection between surface and groundwater supplies.

Nevada passed (*AB 314: Government Affairs Committee*) increasing fees charged by the state engineer for water right applications and hearings.

Oregon wrestled with 18 water rights bills and passed six. (*HB 2107: Water Resources Department*) allows the registration of water use in lieu of permits if the use is for wetlands or stream restoration. (*HB 2344: Norris*) establishes special, limited, water use licenses for *de minimis* human or livestock uses; (*HB 2109: Water Resources Department*) authorizes the Water Resources Department to negotiate with any federally-recognized Indian tribe that may have a federal reserved water right claim. And (*HB 3273*) exempts from permits water for ponds used for firefighting, while (*HB 2153: Water Resources Department*) also exempts from permits water used for road construction and maintenance, and (*HB 2970*) exempts from permits certain small ponds built before May 1991.

### WATER QUALITY (14 Bills: 5PS 1PV 4C)

Six bills dealing with water quality issues passed, three of them in Montana. But one was vetoed.

In Montana, (*SB 280: Grosfield*) implements a part of the 1992 State Water Plan that adds water quality criteria to the factors the Department of Natural Resources and Conservation must consider when issuing permits and change authorizations and when considering petitions to close or control groundwater basins. The Act also gives the Department of Health and Environmental Services the power to petition for controlled groundwater areas. (*SB 401: McClernan*) defines water degradation as "a change in water quality that lowers the quality of high-quality water by a parameter" and transfers from the Board of Health to the Department of Health and Environmental Sciences the power to authorize actions that would lead to the degradation of state waters. And (*HB 388: Gilbert*) lets the Department collect fees to cover some of the costs of administering its water quality programs.

In Idaho, (*HI 153: Environmental Affairs Committee*) creates the Big Payette Water Quality Council, with nine members jointly by the Governor. It will be funded through grants, gifts, and donations. And in California, (*AB 468: Jones*) exempts from certain types of reports some poisons in groundwater. The Governor vetoed (*AB 1182: Sher*), which would

have authorized the Secretary of California's EPA to establish a standardized data base for all environmental data required by the state.

### GROUNDWATER (21 Bills: 8PS 2C)

There were significant groundwater bills passed in Texas and Arizona. One of the most significant pieces of legislation this year was the passage of (*SB 1477: Armbrister*) in Texas (see "Texas Regulates Edwards Aquifer," *WS July 1993*). After decades of controversy over proposals to prevent groundwater overdrafts, a federal judge forced the legislature to regulate pumping. The act creates the Edwards Aquifer Authority to limit withdrawals to protect endangered species at springs fed by the aquifer. But the creation of the new Authority has been delayed while the U.S. Department of Justice determines whether its appointed board threatens the rights of minority electors (see *WIM October 1993*). The underground water district that the new authority is scheduled to replace had an elected board. An alternative bill also passed, (*SB 1334: Carriker*), which gave to the Texas Water Commission the power to regulate withdrawals of aquifer water — but the Commission had repeatedly denied interest in administering this power and so the new act is unlikely to be implemented.

Five other groundwater bills have been passed — three in Arizona. (*SB 1425: Salmon*) requires the Central Arizona Water Conservation District to create a groundwater replenishment authority (composed of the CAWCD board and serving CAWCD's multi-county area) to replenish groundwater with Central Arizona Project water. The creation of county water augmentation authorities, in AMA counties with populations of less than 150,000, is now allowed with the passing of (*SB 1260: Day*). The legislature also passed (*SCM 1004: Arzberger*), asking the President and Congress to negotiate with Mexico for cooperative management of the Santa Cruz River Basin.

California passed (*AB 1152: Costa*), letting flood control districts, groundwater management agencies, and groundwater replenishment agencies implement groundwater management plans, but only if a local water service agency has formally declined to do so. (*AB 1583: Richter*) also passed, setting up the Willow Creek Valley Groundwater Management District in Lassen County. And Nebraska passed (*LB 131: Beutler*), changing technical provisions related to drilling and permitting of water wells.

### PUBLIC TRUST (34 Bills: 11PS 9C)

Eleven of the thirty four bills dealing with public trust issues have passed.

California passed three bills, two extending the time period under the California Endangered Species Act during which lead agencies must consult with the Department of Fish and Game — (*AB 426: Cortese*) extends the period until

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January 1998 while (*AB 399: Campbell*) extends the period until January 1999. At the last minute, the legislature passed (*SB 936: McCorquodale*), setting up a state wetlands bank. The act requires the Department of Fish and Game to adopt regulations for a wetlands bank for the Sacramento-San Joaquin Valley. The first annual report from Fish and Game to the legislature is due in January 1996.

In Idaho, where legislative approval is required for applications for instream flow permits, (*SCR 105: Resources and Environment Committee*) approves the Water Resources Board's application for a minimum flow of 59 cfs in Crystal Springs, Gooding County. (*HB 259: Resources and Conservation Committee*) approves the Upper Boise River component of the State Water Plan. Kansas has established a Task Force on Biodiversity, intended to identify the steps needed to retain and preserve it by passing (*HB 2356: Plummer*). Nevada has established a legislative committee to review the use of public waters in the state under (*SB 327: James*). Washington has passed three public trust bills. (*SHB 1785: Environmental Affairs Committee*) sets up an interagency coordinating council to promote job creation by restoring the state's environment and forests, but appropriated only \$6.5 million (split between the Departments of Ecology and Natural Resources), much less than the \$30 million the governor had requested. The legislature also cut appropriations to the Centennial Clean Water fund. (*SHB 1309: Fisheries and Wildlife Committee*) creates an interdepartmental committee including Indian tribes to develop, in consultation with the federal government and other states, a strategy to reduce impact of fishing on salmon stocks. (*HJM 4003: Mastin*) memorializes the Congress and the President to limit drawdowns on the Columbia and Snake River system because of the damage to salmon and to navigation on the streams. And Wyoming named the horned toad as the state reptile with the passage of (*HB 213: Diercks*).

### PLANNING AND POLICY (69 Bills: 21PS 22C)

The largest number of successful bills dealt with issues changing state policy, planning, and governance. Out of 69 bills considered, 21 have passed and been signed into law.

Arizona passed (*SB 1359: Day*), making the 11th member of AMA boards elected at large rather than appointed by county supervisors. (*SB 1053: Buster, Keegan*) amends the water code by delaying until January 1995 the calculation of farmers' intermediate water duties, licensing well-drillers, allowing the conveyance of storage and recovery permits to irrigation districts, and allowing the initial board of groundwater management districts to put tax levies on the ballot. California passed (*AB 385: Hannigan*), requiring SWRCB to establish fees for water discharges, (*AB 892: Frazee*), which revises the required elements in urban water plans to include plans for dealing with

shortages, and (*SB 452: Craven*), which allows the creation of habitat maintenance districts. Colorado passed (*SB 130: Norton*), which allows state and local government entities to create water "enterprises" under Article X, Section 20, of the state Constitution to issue bonds, impose levies and assessments, and enter into contracts.

In Idaho, (*II 260: Resources and Conservation Committee*) allows corporations managing irrigation projects alternative assessment procedures — a combination of (1) an equal assessment per share, (2) an additional assessment based on the minimum amount of water per share (regardless of use), and (3) a charge for extra water. They may also exempt federal cropland and small parcels. Under (*SB 1101: Resources and Environment Committee*), irrigation districts may set up improvement districts within their boundaries to finance construction of urban water distribution systems.

Nebraska passed three policy and planning bills: (*LB 439: Cudaback*) changes technical provisions in methods for regulating water use in management areas; (*LB 626: Beutler*) eliminates the responsibility of DWR for flood plain management; and (*LR 273: Hillman*) calls upon the state's U.S. senators and representatives to help defeat any attempt by Congress to impose water surcharges on deliveries of water from federal projects.

In Nevada, (*SB 127: Committee on Natural Resources*) requires the state environmental commission to coordinate regulations of underground storage tanks and the department of taxation to implement fee collection procedures for tanks. (*AB 337: Dini*) ratifies past decisions of the state engineer and clarifies technical aspects of water appropriation procedures. And (*SB 19: Committee on Finance*) raised the bonding limitation of the Colorado River Commission.

North Dakota passed three bills. (*SB 2203: Agriculture Committee*) transfers administration of groundwater from the state water commission to the state engineer. (*HB 1110: Agriculture Committee*) grants the commissioner of agriculture the power to enter into agreements with landowners for the conservation and preservation of wetlands. And (*HCR 3054: Aarsvold et al*) directs the legislative council to study the problems of water supplies in rural areas and small towns.

Oregon passed (*HB 2215: Governor Roberts*), which encourages local governments to set up voluntary partnerships for water shed management. South Dakota passed (*SB 84: Agriculture and Natural Resources Committee*), changing filing fees and procedures. Texas passed (*HB 997: Oliveira*), targeting funds from the state's water assistance fund to distressed areas. And Washington passed substitute bill (*SHB 1236: Natural Resources and Parks Committee*) changing filing fees for water right applications and procedures.

### CONCLUSION

1993 has been the most active year for water policy since

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WS began tracking. Several bills — particularly in the area of water transfers — are simply the latest episodes in long-standing conflicts between different interest groups. But most of the activity is aimed at improving the administration of water rights systems and modernizing water policy procedures to reflect a balancing of economic and public trust considerations. The issue of streamlining the process by which permits are obtained or modified, for example, was tackled in several states. This process reflects the continuing evolution of water policy in the west from one that once emphasized the development of new water sources to one that now emphasizes systems for allocating existing water more efficiently among competing users. □

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## Litigation Update

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it was unconstitutional for the Board not to impose fees on parties that *indirectly* discharged pollution—e.g., parties distant from the water bodies who discharge pollution that ultimately reach the water bodies specified in the statute.

**Issues:** (1) Was the Board's decision to limit fees to direct dischargers an unreasonable interpretation of the statute? (2) If the statute allows for this exclusion, does this violate equal protection? (3) By making the failure to pay a fee potentially punishable by imprisonment, does the law violate the California Constitution's protection against imprisonment in a civil action for debt or tort? (4) Do the fees constitute an unconstitutional state-mandated cost on local government?

**Decision:** The court said no. (1) While the court acknowledged that the statute could be interpreted as either requiring fees on direct and indirect dischargers or only direct dischargers, it decided that the statute does not require imposition of fees on indirect dischargers. During the legislative process, the court observed, the Legislature struck language that had explicitly required that fees be imposed on indirect dischargers.

(2) The Board's fee schedule did not violate equal protection because the Legislature avoided imposing "an unworkable administrative burden on the Board" to levy fees against all dischargers, "no matter how geographically remote from the protected body of water into which their discharges ultimately flow. . . . Thus, requiring the Board to assess fees only against those persons and entities whose contribution to the 'toxic hot spot' problem is easily traceable because their discharges flow directly into a bay or estuary was a permissible 'rough accommodation'" of the purposes of the statute.

(3) The court concluded that the statute did not unconstitutionally impose imprisonment for debt because the willful non-payment of fees would constitute an act of fraud, the imprisonment for which is constitutionally permissible. (4) Since the plaintiffs did not file a claim with the Commission on State Mandates, they did not exhaust administrative remedies before challenging in court the 1990 law on the grounds that it imposes state-mandated costs.

**Implication:** With growing public concerns about the environment, legislatures may impose fees to create economic incentives to reduce pollution discharges. Should the scope of fee schedules coincide with the scope of activities contributing pollution? The answer is to be found in the legislature, not the judiciary. □