SLIDES: Modifying Prior Appropriation: The Spectrum of Experiences

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Modifying Prior Appropriation:
The Spectrum of Experiences

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Key Tenets of Prior Appropriation

• Protect the water rights of other users
  Along with an imperfect understanding of historic consumption, it:
  • Slows the transfer process
  • Makes time and place of use less flexible
  • Limits prospects for conserved water

• Avoid speculation: forfeiture/abandonment
  – Poses a disincentive to water conservation
  – Limits options for use of water
A Variety of Responses

• Particularly in recent years, Western states have amended their laws and established programs to reduce some of these influences of prior appropriation.

• Examples:
  – Expand the definition of beneficial use or what is exempted from forfeiture/abandonment
  – Allow the use or sale of saved water
  – Accelerate the transfer process
Nevada: No Forfeiture

• In 1999, Nevada removed forfeiture from its laws governing surface water rights

• It still applies to groundwater rights

• 2004 SE Ruling made non-use “some evidence” of abandonment, but not a rebuttable presumption

• Results: efficiency of use has improved for surface water more so than groundwater
Idaho: Forfeiture Exemption

• In 2002, the Idaho Legislature added depositing a right in the water supply bank to its list of exceptions and defenses to forfeiture

• The water need not be rented, just deposited in the bank, to receive this protection

• Results: the success of Idaho’s statewide water bank has been widely attributed to this forfeiture exemption for deposited water rights
California: Beneficial Use

• In 1977, the California Legislature made water conservation equivalent to a beneficial use

• The amount of conserved water must be noted on the periodic reporting form in order to receive this protection from forfeiture

• Results: Not invoked much since most users reduce use just enough to avoid the need for new appropriations, not enough for new uses
Montana: Beneficial Use

• In 2007, Montana redefined “beneficial use” to include aquifer recharge and mitigation

• This expands the options for meeting the requirement that newly appropriated groundwater in a closed basin be replaced or the hydrologic effects be mitigated

• Results: already, the use of several water rights has been changed to “recharge” to mitigate the effects of wells on river flows
Oregon: Rights to Saved Water

- Conserved water may be reserved in stream for future use or otherwise used or disposed of.

- Oregon’s Conserved Water Program relies on this right to use to provide economic incentives for improving water use efficiency.

- Results: The number of projects grows slowly, mostly in areas where significant “conservation” is unlikely to affect other water rights.
Colorado: Expedite Process

- In 2002, Colorado created special temporary review procedures for changes in water rights

- If filed with court: SE may approve a contract, plan, or change for one year or less; may renew

- If not filed with court: SE may approve it so long as the project effects will not last beyond 5 years

- Results: Rather effective, fairly commonly used
Washington: Expedite Process

- The Yakima Basin Water Transfer Working Group arose in 2001 as part of the Yakima Emergency Water Bank and continues today.

- Members: DOE & USBOR (authority over transfers) and parties likely to sue or raise objections to transfers composed the WTWG.

- If the WTWG recommends a proposal, the Yakima County Superior Court often approves it.

- Results: 15 days when drought, 45 days if not.
Oregon: Split-Year Lease

• In 2001, the Oregon Legislature authorized the split of a water right between its historical use and instream flow use

• The split may occur in time but not amount: the two uses shall not occur simultaneously

• Results: Not very common in Oregon, largely because of required measuring; more common in Washington (no additional requirements)
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