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### SLIDES: Modifying Prior Appropriation: The Spectrum of Experiences

Adam Schempp

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A scenic landscape photograph of a mountain valley. In the foreground, there are large, reddish-brown rocks on the left. A calm lake occupies the middle ground, surrounded by a dense forest of evergreen trees. In the background, majestic mountains rise, some with patches of snow and partially shrouded in mist. The sky is filled with soft, white clouds.

# Modifying Prior Appropriation: The Spectrum of Experiences

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Boulder, CO

**Adam Schempp**  
**Environmental Law Institute**

# 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)

# Contact Information

Adam Schempp  
Environmental Law Institute  
2000 L Street, N.W., Suite 620  
Washington, DC 20036  
schempp@eli.org  
(202) 939-3864