

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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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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