# Water & Law

Irrigation Association
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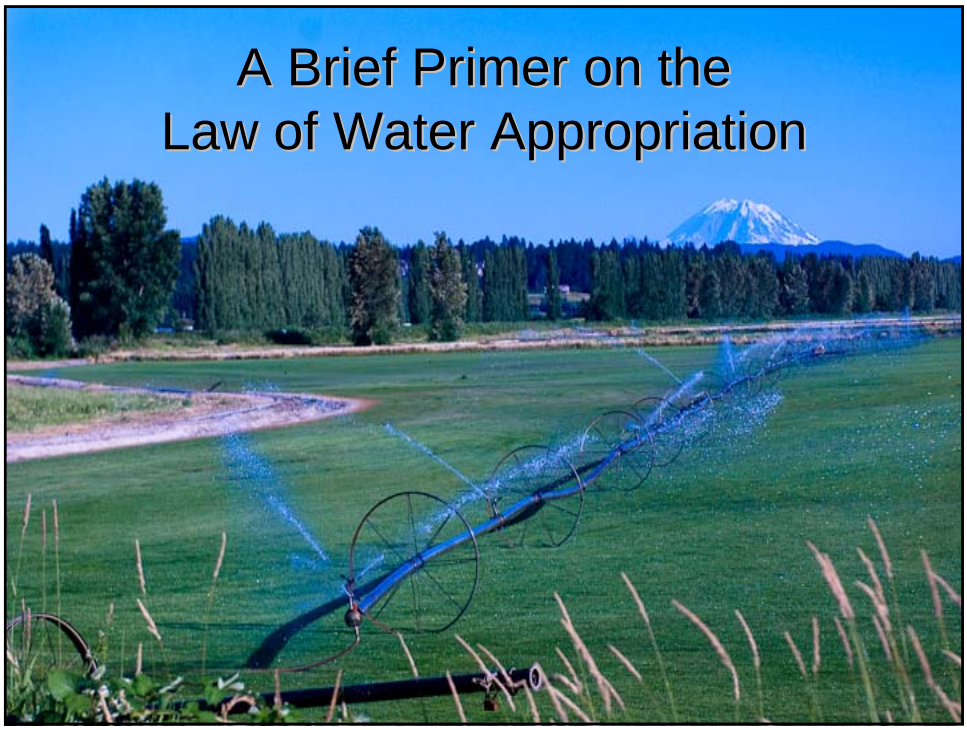

# A Brief Primer on the Law of Water Appropriation

# Riparian Rights

- The owner of land that abuts a natural stream, river, lake, or pond has a number of rights, including a right to use the water
- The right to use water often is unlimited for “natural” purposes - drinking, washing, and meeting modest animal and garden needs
- “Artificial” uses, such as irrigation, often are limited to “reasonable use” and shall not interfere with “reasonable use” by others

## Prior Appropriation

- The first to use the water (or acquire a permit) is perpetually the first in line to receive all the water necessary to fulfill that original purpose of use
- Subsequent users have a right to the water to meet the original purpose in the original place in order of first usage
- Water rights are limited to use for a “beneficial” purpose – the definition of which varies by state



## Hybrid System

- California adopted both doctrines from the start
- The other nine states initially adopted the riparian rights doctrine and later converted to prior appropriation
- All hybrid states limit the exercise of existing riparian rights and restrict, if not prohibit, the assertion of new riparian rights

# Groundwater

- Absolute ownership doctrine - landowner may draw unlimited water beneath that land
- Correlative rights doctrine - landowner may draw a reasonable amount of water given total supply
- Prior appropriation doctrine
- Permits may vary by water source, whether connected to surface waters or isolated, or if in aquifers of particular concern

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## Water Reclamation

- A key tenet of prior appropriation is protection of other right holders; water reclamation can impair rights by consuming more water, out of priority
- Most western states have legislatively or judicially set a balance between reclamation and protecting water rights: Washington is close to a strict adherence to prior appropriation requirements, while Arizona is close to an absolute right to reuse water
- Broadly speaking, this means that water reclamation is more feasible when there are no downstream users

## Water Banking

- 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
- The success of Idaho's statewide water bank has been widely attributed to this forfeiture exemption for deposited water rights

## Response to Changing Conditions

- In 2002, Colorado created special temporary review procedures for changes in water rights
- The State Engineer may approve a contract, plan, or change for one year or less – an applicant need not wait for review by a court
- It will be the means of temporarily transferring water under the leasing program known as the "Super Ditch," which is designed to maximize the short- and long-term use and value of irrigation water and retain water rights in the hands of farmers

## Conjunctive Management

- 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
- Already, the use of several water rights has been changed to "recharge" to mitigate the effects of wells on river flows

## Water Conservation

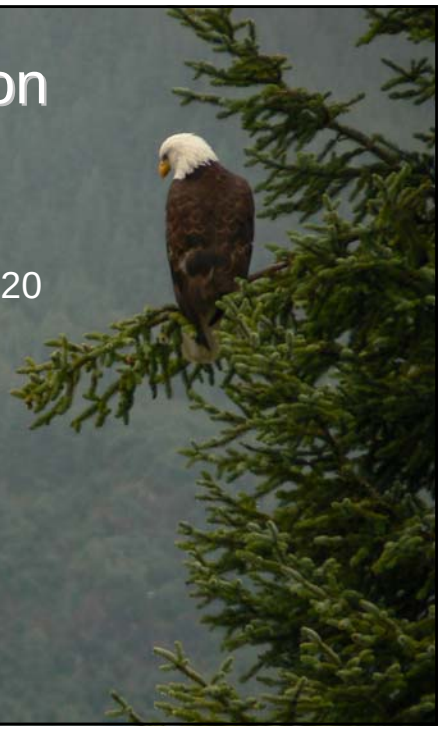
- Most western states classify water conservation as a “beneficial use,” but what qualifies as conservation varies from state to state
- Several states go further and allow a right holder to transfer or otherwise put conserved water to a new use, which can introduce market influences
- The catch is ensuring that the amount conserved is actually reduced consumption

## Environmental Protection

- In 2001, Oregon authorized the split of a water right between its historical use and instream flow use (in time but not amount), used to protect flows for salmon runs
- In Washington, the Yakima Basin Water Transfer Working Group facilitates water transfers for fish protection. It is composed of DOE and USBOR and parties likely to sue or raise objections to transfers
- If the WTWG recommends a proposal, the Yakima County Superior Court often approves it. 15 day total turnaround period when drought, 45 days if not

## Protecting Third Parties

- When reviewing a change of use or place of use petition, the Wyoming State Board of Control must consider:
  - The economic loss to the community and the state if the use from which the right is transferred is discontinued
  - The extent to which such economic loss will be offset by the new use
  - If other sources of water are available for the new use
- The more info showing the minimization of these losses, the greater the likelihood of approval

## Contact Information

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