University of Nevada Cooperative Extension

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Water: *Use it or lose it* in the West

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Introduction

In the western United States, hydrological cycles have changed considerably in the last 50 years. This is largely due to anthropogenic intervention (human involvement), and research predicts water supplies will reach a crisis stage (Barnett et al., 2008). As populations in western states increase, urban and commercial water demand increases competition for available supplies for agricultural uses (Diaz and Anderson, 1995).

Water is an increasingly scarce commodity in the West. As more water is diverted from agricultural use to residential and industrial purposes, producers in the Great Basin are facing the challenge of sustaining the economic viability of their enterprises with less water. A professional development program was funded by the Western Sustainable Agriculture Research and Extension to look at water and low-water producing crops in the Great Basin. This fact sheet focuses on the "use it or lose it" water policy in the four different states, which include Nevada, Utah, Idaho and Oregon.

Water in the West

Managing fresh-water resources is complex and intriguing, as water rights and allocation methods are derived from a mixture of common-law heritage, constitutional and statutory law (federal, state and local), local custom, judicial decisions and international convention (Adams, 1993).

Prior appropriation was developed in the western United States due to water scarcity in the mining camps. The foundation of prior appropriation is seniority, "first in time, first in right." The first user is guaranteed supply (subject to flow and water availability); the next senior has the second priority, the process continues down the line, as long as the water still flows. Only utilitarian extractive uses such as mining; farming; ranching; and municipal,

industrial and domestic uses that physically take water out of the river are eligible. Once the water is diverted, a water user automatically acquires a vested property right protected by the state constitution (Wilkenson, 1997). This vested right means that the recipient is legally entitled to the water (benefit) and may seek relief in the court system if the benefit is not given.

Current Water Law in West

Each state in the West regulates its water through state statutes and governmental departments. Investigation of four different states illustrated water law is not much different among the four states. Specific focus was on whether or not a state had a "use it or lose it" policy.

Nevada

Current water law in Nevada contains a "use it or lose it" policy for groundwater rights. Groundwater rights, once granted by the state engineer, are subject to abandonment and forfeiture as described in NRS 534.090. For groundwater rights, the forfeiture time is five years of non use. Surface water rights are subject to abandonment but only after a period of 10 years of non use. As described in NRS 533.060, the right to use surface water has not been abandoned if, within the 10 years preceding the forfeiture claim, the owner of the right can show receipts or other documentation that any of the following occurred: "*(a) The delivery of water; (b) The payment of any costs of maintenance and other operational costs incurred in delivering the water; (c) The payment of any costs for capital improvements, including works of diversion and irrigation; or (d) The actual performance of maintenance related to the delivery of the water."*

Utah

The "use it or lose it" law also applies Utah. The current law states as follows in Utah Code Section 73-1-4: "When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of seven years, the water right or the unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c). . ..". As long as the child eats the full gallon of ice cream at least once every seven years, the child retains the right to the full gallon.

Idaho

Idaho water law Title 42-104 states:"The appropriation must be for some useful or beneficial purpose, and when the appropriator or his/her successor in interest ceases to use it for such purpose, the right ceases."

Oregon

According to information provided by the state of Oregon Water Resources Department, "Except for municipal rights and in certain other cases, if any portion of a water right is not used for five or more consecutive years that portion of the right is presumed to have been forfeited and is subject to cancellation. For example, if your water right is for irrigation of 40 acres and you irrigate only 20, the portion of land not irrigated for five consecutive years is subject to cancellation. However, diverting less than the full amount of water allowed under your right to irrigate the full 40 acres will not result in forfeiture, if you are ready, willing and able to use the full amount. If you have reduced the capacity of your water delivery system, you may lose any water *not used beyond the capacity of your system*."

If I could lose my water rights, why would I consider conservation?

As water rights are possibly the most valuable asset owned by a producer in the western region, it is important that

Extension educators and other consultants know the answer to this question. Although most water legislation in western states has not historically promoted using less water than was appropriated, this is changing due to conservation efforts. Some states in the western region have compiled differing strategies to reduce agricultural water use without penalizing those producers attempting to conserve.

Nevada

According to the Nevada State Water Plan (1999), "Water users have expressed a desire to obtain credit for water they save through conservation. With this credit, the water user could be allowed to use the saved water on additional lands or for additional homes, lease or sell the saved water, or dedicate the saved water to instream flows.

The State Engineer has explained that this option is already available under existing water law. In fact, the State Engineer has approved applications allowing the use of existing water rights for expanded uses, as long as the expanded uses do not increase the total consumptive use, does not impact other water right holders, are not located in a fully-appropriated basin, and actual water savings can be demonstrated over time. Data shows that few water users have taken advantage of this option or even know it exists."

Utah

Bill HB0051 was brought before the General Session of the Utah State Legislature in 2008. This bill changed the nonuse period of a water right from five to seven years and protected a water right from forfeiture if the land where the water is used is under a fallowing program. This bill is now part of Utah Code Section 73-1-4.

Idaho

Idaho law allows for leasing of rights under Title 42-108B. This would allow a producer to implement a low-water-use crop and lease the unused portion of allocated water without forfeiting the right to its use.

Oregon

Oregon is the least restrictive with regard to forfeiture and water use. As stated in the previous section, you need not use the full amount of your allocation. The law only requires that you be "*ready, willing and able*" to utilize the entirety of your water rights.

Conclusions

Although agricultural producers in the West may be willing to adopt conservation practices and crop mixes that conserve water, current water law across the western states may reduce producer incentives to do so. The real question is what the incentives for conserving water are. A 2007 survey of Walker River Basin agriculture producers shows that nearly half of surveyed producers are interested in alternative water-saving crops and/or irrigation strategies (47 percent alternative crops, 48 percent irrigation strategies).

The survival and success of ranching and farming operations in the West will depend on innovative and insightful producers who are willing to adapt production techniques and diversify products based on profitability and available resources (Bazen et al., 2006). Water acquisition poses risk to the economics of farming and cattle ranching, and different use-it-or-lose it strategies may be utiltized to lessen the impact to agriculture and maintain production and economic profitability. Additional agricultural producer input and involvement is needed in designing appropriate tools and educational materials and programs to enable agricultural producers to successfully transition to different conservation and irrigation strategies.

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