Water Rights Transfers:

Pitfalls, Traps and Loss of Rights

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Doctrine of Prior Appropriation

- First in time is first in right
- Measure of right is amount put to beneficial use without waste
- Water right may be forfeited or abandoned

Water Codes

- Appropriation doctrine is codified in all Western States
- Water belongs to state citizens
- States may authorize the beneficial use of water
- Permitted use of water is a property right and may be transferred

Water Right: Parameters

- **Timing**: Seniority and Season
- **Quantity**: Rate and Duty
- **Use**: Must be Beneficial
- **Location**: Source, Point of Diversion, Point of Application

Water Right Transfers

- Proponent must apply to transfer time, type of use or points of diversion/application
- Notice and comment
- Inchoate and paper rights may not be transferred

Barriers to Transfer

- Appurtenance
- “No Harm” rule
- Adjudication

“No Harm” rule

- Most important factor for transfer approval
- If water right holder protests, burden is on the applicant
- Third parties generally cannot protest
- Foreign Water

Adjudication

- Judicial quantification and prioritization of water rights
- Provides degree of certainty
- Federal water rights

Loss of Water Rights

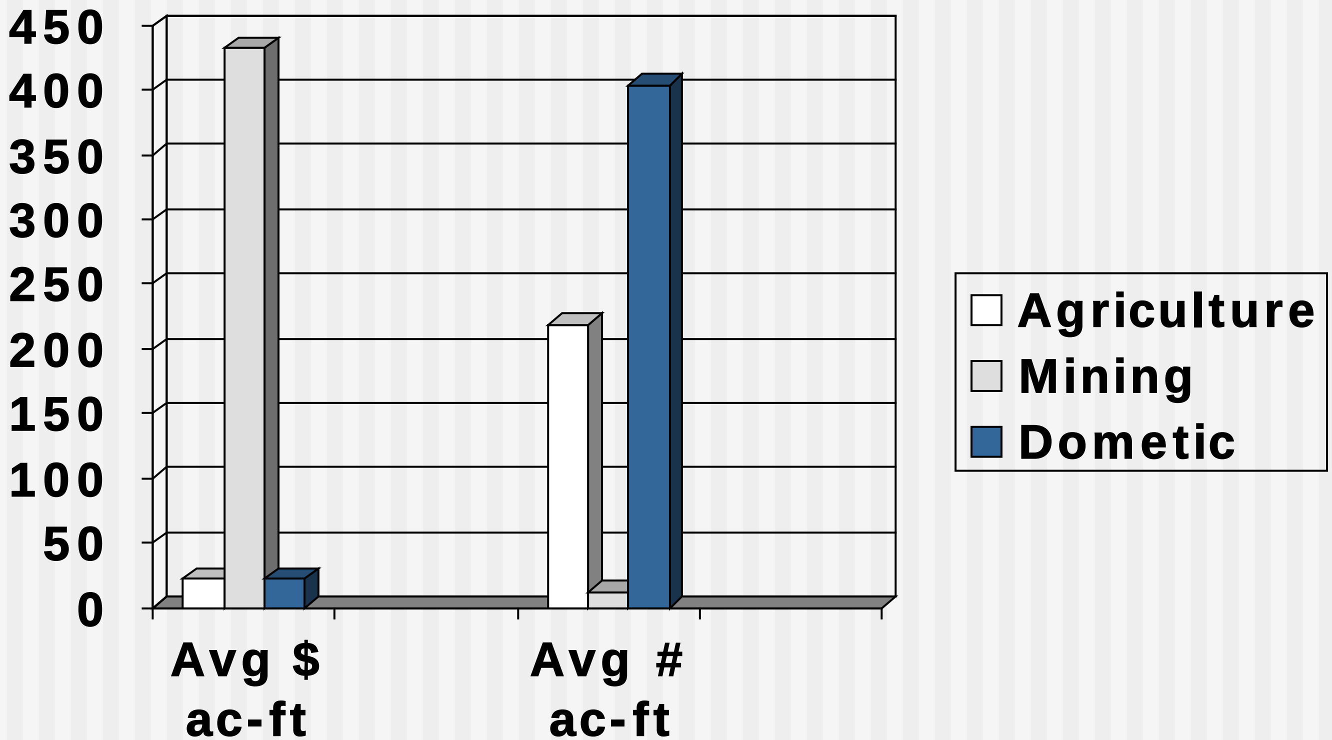
- Forfeiture
  - Revival
- Abandonment
- Prescription

Reallocation

- Water Banks
  - Leases
  - Sales
- Conserved Water
- Regulatory Efforts

Acquisition of Water Rights by Market Transactions

Yoskowitz (Feb., 2001)



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Bibliography

- **David W. Yoskowitz**, *Markets, Mechanisms, Institutions and the Future of Water,* Env. Law Reporter (Feb., 2001)
- **Adam Gravley**, *New Water Rights Legislation Intended to Facilitate Water Transfers,* UPDATE (Summer 2001)
- **Dan Tarlock**, *Law of Water Rights and Resources*, West Group (July, 2001)
- **Janet C. Neuman**, *Adaptive Management: How Water Law Needs to Change*, Env. Law Reporter (Dec. 2000)
- National Research Council, *Water Transfers in the West: Efficiency, Equity and the Environment* (NAP, 1992)