

Currents in Water Resources Law and Policy: How is “Prior” Coping with New Stresses?

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- I. An Urbanizing and Greener West Faces New Challenges
 - A. Stresses on Water Allocation and Management
 - 1. End of Reclamation Era
 - 2. Climate Change
 - 3. Demand for Instream Flows
 - 4. Urbanization
 - B. Stresses Have Become Greater Recently
 - 1. Water Agencies No Longer Step in to Solve Problems with Subsidized Development
 - 2. Cities Compete with Irrigated Agriculture
 - 3. Environmental Interests Compete with All Consumptive Users and with Hydropower
- II. Responses to Stresses
 - A. Outside-the-Box Approaches
 - 1. Peeking Out of the Box from Within
 - a. Out of Priority Use: Sharing Replaces Strict Priority
 - i. Exchanges, Substitute Supply, Rotation, etc.
 - ii. Augmentation
 - b. Statutory Softening of Priority System
 - i. Public Interest Requirements: Efficiency, Environment, Future Uses
 - ii. Instream Flow Regimes: Doctrine Gives Way to Fish and Fun
 - 2. Multi-Issue Watershed-Based Solutions: The Belated Legacy of Powell
 - a. River Basin Scale
 - i. California: Bay-Delta
 - ii. Colorado River: Adaptive Management Work Group.
 - iii. Platte River Endangered Species. See J. David Aiken, *Balancing Endangered Species Protection and Irrigation Rights: The Platte River Cooperative*

Agreement, 3 Great Plains Nat. Resources J. 119 (1999).

- b. Localized. See Natural Resources Law Center, University of Colorado, *The New Watershed Sourcebook: A Directory and Review of Watershed Initiatives in the Western United States* (2000).
 - c. General Stream Adjudications
 - i. Early efforts mended patchworks of appropriations
 - ii. Modern examples provide solutions to multiple problems
 - a. Idaho: Snake River Basin Adjudication
 - b. Arizona: Gila River Adjudication
 3. Indian Water Rights Settlements: Wrapping Solutions in an Indian Blanket. Truckee River: Pyramid Lake. See, e.g., A. Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement*, 25 Ecology L.Q. 674 (1999).
 4. Dam Removal: Taking a Sledge Hammer to the Past. See, e.g., Michael C. Blumm, et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows*, 28 Env'tl. L. 997 (1998).
- B. Cities as Water Planners
1. First Round of Planning: Federal Development-Driven
 2. Second Round: Statewide; Also Focused on Development
 3. Missing: Adaptation
 - a. Drought
 - b. Climate Change
 - c. Unrealistic Expectations in Water Project Delivery Contracts
 4. Cities as Providers Assume Responsibility
 - a. Requirements for "Adequate Water Supply"
 - i. CAP
 - ii. Arizona Groundwater Act
 - iii. East Bay MUD
See A. Dan Tarlock and Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should we Still Worry About Water Supplies*, 27 Public Land and Nat. Res. L. Rev. 33 (2006).
 - b. Flawed Environmental Impact Analyses, e.g. Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, 150 P.3d 709 (Cal. 2007).
 - c. Coordination of Land Use Planning and Water Planning.

- III. Prior Appropriation Remains Alive, If Not Well
 - A. A Doctrine Never Complete; Early Skeptics. E.g., Moses Lasky, *From Prior Appropriation to Economic Distribution of Water by the State*, 1 Rocky Mtn. L. Rev. 161 (1929), 2 Rocky Mtn. L. Rev. 35 (1929); Samuel Weil, *Water Rights in the United States* (3rd ed. 1911); Elwood Mead, *Irrigation Institutions* (1910).
 - B. Reclamation Era: Federal Supremacy Trumps State Water Law. E.g., *Arizona v. California*, 373 U.S. 546 (1963); *City of Fresno v. California*, 372 U.S. 627 (1963). See also, *California v. FERC*, 495 U.S. 490 (1990).
 - C. Late 20th Century Water Reform: Reports of Prior's Demise Were Exaggerated. See Charles F. Wilkinson, *In Memoriam: Prior Appropriation, 1848-1991*, 21 *Envtl. L.* i (1991).
 - D. Priority Notions Survive
 - 1. Organizing Principle for Administering Old Rights and Granting New Rights
 - 2. Default Rule in Permit Systems
 - 3. Embedded Economic Value
 - 4. Market Transfers Maintain the Doctrine's Vitality
 - E. Outside-the-Box Solutions Have Bucked Against Pure Priority. E.g.,
 - 1. General Stream Adjudications: E.g., *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999) (striking down legislation intended to benefit retroactively seniors over more efficient junior users).
 - 2. Groundwater Conflicts: Venerable Waste vs. Modern Efficiency
 - F. Conclusion: Priority Defines Basic Rights but Cannot Solve Modern Problems.