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ALIVE BUT IRRELEVANT: THE PRIOR APPROPRIATION DOCTRINE IN TODAY'S WESTERN WATER LAW

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The Prior Appropriation Doctrine has long been the foundation of laws governing water allocation and use in the American West, but it has been under pressure from forces both external and internal to the western states. Twenty years ago, Prior Appropriation was pronounced dead in a provocative essay by Charles Wilkinson. Other scholars argued that it was still alive, but it now appears to have lost its force as the controlling doctrine of western water law. This Article analyzes three recent cases upholding state laws that undermine a fundamental Prior Appropriation principle, then considers the water policy implications of the western states' departure from Prior Appropriation.

INTRODUCTION

The Prior Appropriation Doctrine appeared in the water law of the western United States in 1855 when the California Supreme Court applied the rules of the frontier mining camps to a water dispute between miners who had staked their claims on public lands.[1] Thus, Prior Appropriation (PA) was adopted, rather than born, in the water law context. But PA was soon embraced by the courts and legislatures of the western states and territories.[2] Several interior western states even enshrined PA in their state constitutions.[3] And most of the western states adopted fairly comprehensive water codes in the late nineteenth or early twentieth century,[4] largely codifying PA principles with certain modifications.

The central idea of PA is that a person who applies water to a useful purpose, or "beneficial use,"[5] thereby acquires a right to use enough water to serve that purpose. The earliest

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* Professor, University of New Mexico School of Law. The author acknowledges the fine scholars cited herein—including Michael Blumm, David Getches, Gregory Hobbs, Janet Neuman, Dan Tarlock, and Charles Wilkinson—who have eloquently debated the meaning, utility, and viability of Prior Appropriation. Although none of these six contributed directly to this piece, they have all assisted the author both personally and intellectually over the years. The author is especially grateful for all the help, support, and inspiration he received from the late David Getches, longtime professor and dean at the University of Colorado Law School, and one of the greatest voices for reform of western water law.

1. *See* Charles Wilkinson, *Introduction to the Culture of Water Symposium*, 6 WYO. L. REV. 287, 288 (2006) (briefly telling the story of the leading case of *Irwin v. Phillips*, 5 Cal. 140 (1855)).

2. *See* Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RESOURCES J. 347, 349–51 (1989).

3. *See* 2 WATERS & WATER RIGHTS § 11.02(d) n.56 (Robert E. Beck & Amy K. Kelley eds., LexisNexis/Matthew Bender 3d ed. 2010) (citing constitutional provisions from Alaska, Colorado, Idaho, Montana, Nebraska, New Mexico, and Wyoming).

4. *See* Johnson & DuMars, *supra* note 2, at 352 (noting enactment of statutes in fifteen western states from 1890 through 1919).

5. *See* Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENVTL. L.J. 343, 349 (1995) (describing beneficial use as "the constitutional hallmark of a water right" under prior appropriation, but noting that state constitutions do not fully define the term, leaving it with a "flexible meaning" that can reflect current priorities).

uses give rise to the best rights, as "senior" rights take priority over "junior" ones at times when water supplies are insufficient to satisfy all users.[6] These PA principles strongly encouraged people to take water from its natural course and put it to use at the earliest possible date. Thus, by the early twentieth century, many western rivers were "fully appropriated" during the growing season—that is, irrigators and other users had already obtained rights to as much (or more) water than the river typically carried in the summer and fall months.[7]

By allocating so much of the region's limited water early on, and by giving top priority to the oldest uses, PA was sure to come under pressure as the West changed during the twentieth century. And indeed the pressure came from diverse forces, such as explosive population growth in many western states, assertion of water right claims for federal and tribal lands, and demands for water to serve long-neglected environmental purposes.[8] Scholars warned that unless the western states moved to reform their water laws to address these pressures, the system of private water rights might be jeopardized.[9]

Twenty years ago, Charles Wilkinson—a leading western water scholar and advocate for reform—pronounced PA dead in a memorable "In Memoriam" essay.[10] Wilkinson gave human life to the PA doctrine in the form of an old-school but indefatigable western character named Prior Appropriation, and the essay largely told the life story of Prior and his wife Ramona.[11] The essay announced that Prior had died in 1991 of a heart attack over Denver's decision to accept the U.S. Environmental Protection Agency's veto of a permit for the

6. *See* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 108 (4th ed. 2009).

7. *See* David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 9–10 (2001).

8. *See* Johnson & DuMars, *supra* note 2, at 352–76 (describing various factors influencing the development of western water law).

9. For example, David Getches wrote that Colorado water law had to provide greater protection to public values, and that it could do so while protecting those "attributes of Colorado's present system that have served private water allocation needs. Inaction is the greatest enemy of the system because it will license the courts and others to impose remedies that may be incompatible with private rights. Federal agencies may also attempt to fill the policy vacuum." David H. Getches, *Pressures for Change in Western Water Policy*, *in* WATER AND THE AMERICAN WEST: ESSAYS IN HONOR OF RAPHAEL J. MOSES 143, 161 (David H. Getches ed., 1988).

10. *See generally* Charles F. Wilkinson, *In Memoriam, Prior Appropriation, 1848–1991*, 21 ENVTL. L., at v (1991).

11. *Id.*

city's proposed Two Forks Dam.[12] It noted, however, that Prior had been in failing health for many reasons, including environmental demands for water, the end of the federal dam-building era, and the adoption of state laws providing legal protection for water left to flow in its natural course.[13]

Wilkinson's entertaining and provocative essay prompted a lively academic debate over the ongoing viability of PA, led by Michael Blumm and Gregory Hobbs.[14] Several years later, Dan Tarlock wrote that reports of Prior's death were premature. "The system is not dead. Rather the question is its continuing relevance"[15]—relevance that PA had maintained by constantly evolving to meet the needs of a changing West.[16]

Twenty years after his obituary, is crusty old Prior still alive and well? I would suggest that he is not actually dead,[17] but that he has lost his practical relevance. Western water law has indeed evolved, and that evolution continues to move the law further from the most fundamental PA principles of beneficial use and priority.[18] The law today consists of statutes and rules that remain consistent with certain aspects of PA, but increasingly deviate from its core principles, even in states

12. *See id.* at xvi. Wilkinson tied Prior's demise to an action by a federal agency, applying federal environmental law, to block a water supply project that had valid, longstanding water rights under state law. *Id.*; *see also* Daniel F. Luecke, *Two Forks: The Rise and Fall of a Dam*, 14 NAT. RES. & ENV'T 24 (1999) (telling the story of the controversial Two Forks Dam permit veto by the U.S. Environmental Protection Agency).

13. Wilkinson, *supra* note 10. Wilkinson listed many factors contributing to Prior's death (and several parentheticals with Prior's pithy comments about them), including:

> Indian water settlements ("They don't deserve a single drop."). Environmentalists—just the mere existence of them. Academics who relentlessly criticized Prior's ideas ("The bastards wouldn't know the real world from a beachball."). Federal reserved water rights. State water planning ("We've got a plan. It's called 'first in time, first in right.' "). An especially cruel blow was when they adopted an instream flow program—in Utah.

Id. at xvii.

14. *See* Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 38–41 (2002).

15. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 894 (2000).

16. *See* A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770 (2001).

17. Perhaps, like the hero Westley in the 1987 movie THE PRINCESS BRIDE (Metro-Goldwyn-Mayer Studios 1987), he is only "mostly dead."

18. *See* Tarlock, *supra* note 16, at 770–71 (noting that PA's "basic principles, priority and beneficial use, have remained constant").

with PA language in their constitutions.[19] In these states especially, PA retains its exalted status but has largely lost its legal power. The aged Prior is like the now-feeble patriarch who founded a family business, and although he retains the title of president and his giant portrait hangs prominently in the boardroom, he no longer controls the company. The new managers do things their own way, and while they still honor some of old Prior's policies, they do so based on their own choices rather than his presence. He is not dead, but the enterprise would function much the same if he were—and so it is today with PA and water in the West.

This Article begins by identifying the most fundamental PA principles, both under the original common-law doctrine and under western water codes based on PA. Part II describes the forces, ranging from federal law requirements to population growth and environmental demands, that have put PA under pressure in the modern West. Part III then analyzes recent cases from Idaho, Washington, and New Mexico demonstrating how western water law is increasingly moving away from basic PA principles, with judicial approval. Part IV concludes by asking if the western states' departure from PA is good or bad from a water policy standpoint.

I. KEY PRINCIPLES OF THE PRIOR APPROPRIATION DOCTRINE

This Part focuses on what PA is, summarizing some of the original principles and the ways they have been revised by statute. It begins, however, with a brief mention of what it is not: the riparian rights doctrine, which governed water use across the U.S. at the time of westward expansion. Riparian rights to use water arise from ownership of land alongside a natural stream or lake.[20] Every riparian landowner enjoys a right to make "reasonable" use of water, and although many factors are relevant to a determination of whether a particular use is reasonable, a key criterion is whether that use would harm or destroy another riparian owner's use.[21] All owners along a watercourse have equal rights as against each other,

19. Christine Klein has identified ten western states with constitutional provisions regarding prior appropriation, although some are more specific than others in requiring that water allocation be based on PA. *See* Klein, *supra* note 5, at 347 & n.22.

20. *See, e.g.*, Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827).

21. *See* GETCHES, *supra* note 6, at 34–37.

and all reasonable uses of water on riparian lands are also considered equal (except for certain small uses which enjoy a preference).[22] For the most part, then, no user is "first in right" under the riparian rights doctrine, and all riparian owners may use water in a way that is reasonable.

The western states and territories rejected riparian rights early on, viewing the old common-law doctrine as unsuited to the realities of a region short on both water and economic activity.[23] They perceived a need for a new allocation regime that would promote the use of water for productive enterprises such as mining and irrigation, and they believed that PA would facilitate and encourage such uses.[24] Eager to promote settlement and development, the early West turned to PA to promote an all-important goal: maximum beneficial use of the resource.

A. Original Fundamentals

Given this imperative to put water to work, it is not surprising that PA's bedrock principle is that *beneficial use is "the basis, the measure and limit of* [*a water*] *right.*"[25] Most fundamentally, PA awards water rights to those who apply water to a specific beneficial use—that is, some purpose that the law regards as productive or useful.[26] Water rights are measured by beneficial use because the quantity of the right is primarily determined by the amount of water needed for that use. And because no one who uses water for a particular use can obtain a right to more water than is fairly required for that use, beneficial use is also the limit of a water right.[27] Thus, if a

22. *See id.* (small uses such as water supply for household and garden use).

23. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704 (1899) (explaining how mining and irrigation needs for water in the early West "compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands").

24. *See id.* (describing western states' choice of prior appropriation to serve mining and irrigation needs); Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446–48 (1882) (stating policy rationale for refusing to recognize riparian rights in Colorado).

25. 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(c)(4)(A) (emphasis added).

26. Traditional beneficial uses would include irrigation, mining, domestic, manufacturing, and hydropower generation. *See* Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 927–28 (Idaho 1974) (discussing Idaho constitutional provision listing those five beneficial uses, but holding that the list is not exclusive).

27. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 12.02(c)(2).

farmer diverts water from a stream and uses it to irrigate his hundred-acre pasture, he will obtain a water right for the purpose of irrigating that specific parcel. The quantity of right will be no greater than the amount actually diverted for that purpose, and it may be less if the actual diversion exceeds what is reasonably needed to irrigate those one hundred acres.

This foundational principle of beneficial use has many implications for water rights under PA, but two corollary principles are worth noting here. First, because water rights are measured and limited by beneficial use, no one has a right to waste water—that is, to take more water than needed for the specific use that gave rise to the right, or to use water in a way that would not serve that beneficial purpose.[28] Statutes in at least nine states explicitly prohibit waste as part of the bedrock principle, stating that "beneficial use, without waste, is the basis, measure, and limit of . . . water right[s]."[29] Second, because water rights are based on beneficial use, they may be lost if water is not actually applied to beneficial use for an extended period. This "use it or lose it" feature may not be an obvious outgrowth of the foundational beneficial use principle, but it shows the extent to which PA has been designed to serve the goal of promoting water use.[30]

Another original PA principle is the diversion requirement: for most purposes, a would-be user must divert water from its natural course or location in order to establish a right.[31] In rejecting a non-diversionary appropriation for flows to support fish and recreation, the Colorado Supreme Court stated that "the rule is elementary that the first essential of an appropriation is the *actual diversion of the water* with intent to apply to a beneficial use."[32] The rule is not absolute, however, as the same court five years earlier had recognized an appropriation for livestock watering even though water had

28. *See* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 933 (1998).

29. *See id.* at 923–24, 924 n.12.

30. *See id.* at 928–33.

31. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 12.02(c)(1).

32. *See* Colo. River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798, 800 (Colo. 1965) (quoting City & Cnty. of Denver v. N. Colo. Water Conservancy Dist., 276 P.2d 992, 998 (Colo. 1954)).

never been diverted, reasoning that diversion was less important than beneficial use.[33]

Perhaps the most familiar original PA principle, however, is *first in time, first in right*.[34] Whereas the riparian rights doctrine gave every owner of riparian land—old or new, large or small—an equal right to "reasonable" use of water, PA establishes a firm and specific hierarchy among users.[35] Roughly speaking, the earliest beneficial uses obtain the most senior rights. In times of shortage those with senior rights are allowed to continue taking their full allotment of water, while those with junior rights must reduce or halt their uses in order to leave water for their "elders."[36] While the priority principle can lead to harsh results as some users are cut off entirely while others continue getting their full supply, that result is fully consistent with the original design of PA and should be generally expected in a region where PA has been the foundation of water law for over a century.[37]

B. Statutory Refinements

Beginning with Wyoming in 1890, the western states began enacting statutes that altered the traditional PA system.[38] Most significantly, these statutes required that anyone seeking to commence a new water use must first apply to a state agency and obtain a permit authorizing that use.[39] They established a process for permit applications, including notice to other water users and an opportunity to object.[40] These permitting statutes also imposed substantive standards for the approval of applications: most commonly and

33. *See* Town of Genoa v. Westfall, 349 P.2d 370, 378 (Colo. 1960) (stating diversion "is not necessary in every case," and that "[t]he only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use").

34. *See* Tarlock, *supra* note 15, at 881 (calling this principle "the central dogma of western water law").

35. *See* GETCHES, *supra* note 6, at 108.

36. *See* Tarlock, *supra* note 15, at 882.

37. *See id.* at 885–86.

38. *See* Johnson & DuMars, *supra* note 2, at 352.

39. *See id.* Colorado is now the only state that allows new appropriations to proceed without a permit, although it provides for "conditional water rights" which fulfill many of the same purposes as a permit. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.05.

40. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(a).

importantly,[41] a new permit would be denied if there was no unappropriated water available or if the proposed use would adversely affect existing water rights.[42] The effect of these laws, then, was to allow for new, junior, water rights, while providing both procedural and substantive protection to senior rights.[43]

The statutes provide that a permit is an authorization to use water in accordance with its terms, but it is not a complete and final water right.[44] In order to obtain a full-fledged water right, the permit holder must actually apply water to a beneficial use in accordance with the permit terms and prove such use to the state agency. In other words, a permit represents only an inchoate right to use water and is never "perfected" until the state agency determines actual beneficial use[45] and issues a document (commonly called a certificate) confirming the right.[46]

Permitting, however, is only one of many responsibilities that state agencies received (and still bear) under the western water codes. Perhaps the most important duty is to administer existing water rights by priority—regulating water use by junior users to ensure that senior users receive the water they are due in times of shortage.[47] In response to a "call" by a water

41. Another common statutory standard is that the proposed use must not impair the public interest. *See id.* § 15.03(c)(3). I tend, however, to discount the practical importance of public interest standards. In practice, state agencies seem to base permitting decisions chiefly on factors such as water availability and harm to other users, while public interest standards rarely play more than a minor role. *See, e.g.*, Amber L. Weeks, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes*, 50 NAT. RESOURCES J. 255, 272 (2010) (describing Nevada State Engineer's practice of applying the public interest narrowly, as essentially restating requirements of traditional state water law).

42. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(c)(1)–(2).

43. *See* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 308 (6th ed. 2009) ("Virtually all water laws prevent new rights from being recognized or permits being granted if it would harm vested rights. This is the most fundamental way of protecting priorities. A related requirement is that there be water available for appropriation before a water right will be granted.").

44. *See* GETCHES, *supra* note 6, at 153.

45. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(d). "To perfect an appropriation in any prior appropriation state, . . . water must actually be put to a beneficial use." *Id.* § 15.03(d)(1).

46. *See* GETCHES, *supra* note 6, at 154.

47. *See* N.M. STAT. ANN. § 72-3-2 (1978) (authorizing the state engineer to appoint water masters having "immediate charge of the apportionment of waters" in a defined district, subject to state engineer oversight); GETCHES, *supra* note 6, at 163–64 (describing Wyoming system of administration by water commissioners employed by the State Engineer).

user with a priority date of, say, 1905, a state official in the field (commonly called a watermaster or water commissioner) orders users junior to 1905 to stop diverting so as to satisfy the caller's right.[48] In carrying out this duty, the state agency has some discretion in deciding when regulation is needed but has limited authority to deny a call when enforcing it would result in satisfaction of the senior right.[49]

Priority administration may be stymied, however, by the existence of water rights that pre-date the state water code. Where a person has actually and continuously applied water to a beneficial use, there is almost certainly a valid right, but its priority date and quantity are undetermined and may be disputed. To determine these pre-code rights, the statutes provide for general stream adjudications, which are massive, complex cases whereby all the valid older water rights in a particular river basin are confirmed and quantified.[50] Some states have essentially completed adjudication of their major river basins, but several major adjudications are ongoing,[51] and some—including the complicated Middle Rio Grande in New Mexico—have not yet begun.

As the preceding paragraph suggests, PA, in its most basic form, addresses two rather different things: water allocation and water use regulation. PA allocates water by setting the rules for the creation and recognition of water rights, and although permitting statutes have introduced new criteria for approval, the ultimate requirement for a water right has always been beneficial use.[52] PA also governs water use under established rights by providing a clear rule—first in time, first in right—that dictates which users get water in times of shortage.[53] These two functions of PA sometimes conflict, especially in basins with no completed adjudication, where priority administration is unavailable until there is a legal determination of the various users' priorities.[54]

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48. *See* GETCHES, *supra* note 6, at 111.

49. *See* State *ex rel.* Cary v. Cochran, 292 N.W. 239 (Neb. 1940).

50. *See* 2 WATERS & WATER RIGHTS, *supra* note 3, § 16.02.

51. *See* John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams* (pt. 2), 9 U. DENV. WATER L. REV. 299, 337–56 (2006) (describing status of water right adjudications in the various western states).

52. *See supra* notes 25–30 and accompanying text.

53. *See supra* notes 34–37 and accompanying text.

54. *See, e.g.*, Tri-State Generation & Transmission Ass'n v. D'Antonio, 249 P.3d 932, 938 (N.M. Ct. App. 2010); Rettkowski v. Dep't of Ecology, 858 P.2d 232, 240 (Wash. 1993); *see also* Hobbs, *supra* note 14, at 44 (noting that "adjudication

As refined by the early state water codes, the structure of PA has stood since the 1800s as the officially accepted framework for water allocation and use in the West.[55] There have certainly been some modifications, and the doctrine has evolved somewhat over the past century.[56] But given all that has changed in the West during that span, the longevity of the foundational principles of beneficial use and priority is rather remarkable, and the next Part addresses how these principles have managed to endure this long despite the pressures they have faced.

II. PRIOR APPROPRIATION UNDER PRESSURE

Scholars have been saying for many years that various forces are applying pressure for change in western water law, pushing the states away from traditional PA.[57] Some of these forces are external to the states, resulting largely from the requirements of federal law, while others arise from within the states themselves. In general, however, these forces seek to ensure adequate water supplies for certain uses that lack established senior water rights, contrary to traditional PA and its unquestioning protection for the oldest recognized uses.

Among the various forces for change, federal laws may have received the most attention. Since the Supreme Court decided *Winters v. United States*,[58] federal reserved water rights have caused significant consternation in the West.[59] These concerns grew more acute in 1963, when the Supreme

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and administration of rights through governmental action is essential to a functioning prior appropriation system").

55. Tarlock, *supra* note 16, at 769–75.

56. *Id.* at 770 ("The distinguishing feature of prior appropriation is its continual evolution in response to a changing West."); Johnson & DuMars, *supra* note 2, at 356–87 (describing various changes to western water law over time).

57. *See supra* text accompanying notes 8–9. *See generally* Charles T. DuMars & A. Dan Tarlock, Symposium Introduction*, New Challenges to State Water Allocation Sovereignty*, 29 NAT. RESOURCES J. 331 (1989).

58. Winters v. United States, 207 U.S. 564, 576–77 (1908) (recognizing a water right for an Indian Reservation in Montana based on a treaty that was silent regarding water, and establishing a basis in federal law to claim water rights for other Indian lands).

59. *See* Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENV. L.J. 473, 476–78 (1977) (describing reaction of western water lawyers and politicians to a 1955 Supreme Court decision that signaled an expansion of the reserved rights doctrine, and noting that in *Arizona v. California*, 373 U.S. 546 (1963), "[t]he chimera became a dragon: [r]eserved rights for non-Indian federal lands were declared to exist in real life").

Court first recognized reserved rights for federal lands such as national parks and wildlife refuges in *Arizona v. California*.[60] The Court had held in *Winters* that an Indian Reservation had a water right under federal law, but extending the *Winters* doctrine to other non-tribal federal lands posed a threat to the states and their water users: Reserved rights arise from federal rather than state law, based on the purposes of the federal land designation rather than actual beneficial use, with a priority tied to the date of the federal designation.[61] The 1970s saw Congress enact significant national environmental legislation, including the Federal Water Pollution Control Act amendments of 1972 and 1977 (creating the Clean Water Act in its modern form)[62] and the Endangered Species Act of 1973 (ESA).[63] These statutes raised the possibility of federal restrictions on water development and use that would otherwise be authorized under state law.[64]

For the most part, however, these federal laws have forced few major changes to existing water allocation laws and water uses. Federal reserved water right litigation has proceeded almost entirely in state courts since the 1970s, when the western states won a series of jurisdictional battles in the Supreme Court.[65] The great water law scholar Frank Trelease wrote in 1977 that he was still waiting to see a case where a water user suffered real and substantial harm from the operation of the *Winters* doctrine, and he declared that he was "tired of leaping into action at every call of 'Wolf!' "[66] Today, reserved water right claims are typically settled out of court,

60. Arizona v. California, 373 U.S. at 601 (holding that the rationale underlying reserved water rights for Indian reservations also supports reserved rights for other lands designated by the United States for particular purposes).

61. Trelease, *supra* note 59, at 474.

62. 33 U.S.C. §§ 1251–1387 (2006).

63. 16 U.S.C. §§ 1531–44 (2006).

64. DuMars & Tarlock, *supra* note 57, at 342–43.

65. *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 570 (1983); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818–21 (1976); United States v. Dist. Court, 401 U.S. 520, 524 (1971).

66. Trelease, *supra* note 59, at 492. Trelease wrote that "at one time . . . federal reserved water right[s]" were compared to the "great white shark" of the book and the movie "Jaws," but he was beginning to wonder if they were actually "insignificant and worthless," much like the "measly pupfish" at the center of the Supreme Court decision in *Cappaert v. United States,* 426 U.S. 128 (1976). Trelease, *supra* note 59, at 474–75.

consistent with a longstanding policy of the Western Governors Association (WGA).[67]

As for the Clean Water Act, its implementation (with rare exceptions) has focused exclusively on water quality rather than quantity,[68] despite a Supreme Court case calling that distinction "artificial" and upholding state authority to use water quality standards to protect minimum flows.[69] The ESA, by contrast, has created significant pressure in some locations to reallocate water from existing users to provide habitat for imperiled species[70]—which may explain why the WGA has made ESA reform a priority issue, in hopes of increasing certainty for water users and ensuring state control over water allocation.[71]

These federal pressures, however, have prompted the western states to take only modest steps in reforming their own water laws; David Getches wrote that the states' small advances in water policy during the 1990s were driven almost solely by federal regulatory pressure and local innovations and that while "the reasons for reform persist and are better

67. *See* Reed D. Benson, *A Bright Idea from the Black Canyon: Federal Judicial Review of Reserved Water Right Settlements,* 13 U. DENV. WATER L. REV. 229, 236–38 (2010).

68. For example, in recent years the U.S. Environmental Protection Agency has interpreted the Act's section 402 permitting requirements quite narrowly, choosing to leave certain pollution sources unregulated so as to avoid any potential conflicts with water supply activities. *See* Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009) (upholding EPA rule exempting certain water transfer activities from permitting requirements). The EPA's position on this issue is criticized elsewhere in this Volume. *See generally* Chris Reagen, Comment, *The Water Transfers Rule: How an EPA Rule Threatens to Undermine the Clean Water Act*, 83 U. COLO. L. REV. 307 (2011). Similarly, the states and EPA have not used their full authority under section 303 to address water pollution problems associated with "flow impairment," such as that caused by dam operations and water diversions. *See* Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 228–56 (2005) (describing reserved water right settlements, and citing the WGA policy in favor of tribal reserved water right settlements).

69. PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 719–20 (1994).

70. *See* Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities Between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 30–32 (2004) (summarizing notable conflicts between water use and the ESA).

71. *See* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 315 & n.517.

understood than ever, existing state legal and institutional frameworks endure virtually unchanged."[72]

Other forces for change in water laws and practices come from within the individual western states, reflecting each state's shifting demographics, economic bases, and popular values. As several western states experienced rapid population growth and associated economic change, they experienced pressure to ensure that water is available to serve new residents and new enterprises—including businesses such as whitewater rafting companies that rely on more-or-less natural outdoor amenities. In addition, support has grown within the West for laws allowing water to be left in its natural course, so that rivers and lakes can provide environmental, economic, and recreational benefits to a predominantly dry region.[73]

This latter push for reform has led most of the western states to enact statutes making some provision for preserving "instream flows," primarily by allowing state agencies to appropriate water in its natural course for environmental or recreational purposes, without the need for diversion.[74] The statutes were otherwise consistent with basic PA principles, however, in that they typically authorized instream flow rights for a specific beneficial use (typically fish habitat) and with a specific priority date.[75] They offered some legal protection for flowing rivers and the amenities they provide, and although protection has often been quite limited in practice, the instream flow laws did represent a significant policy reform for the western water codes.

Recognizing this fact, agricultural water users challenged some of the laws as being fundamentally inconsistent with PA, but courts rejected these challenges and upheld legislative authority to allow this new form of water right.[76] Despite PA language in their respective state constitutions, these courts held that diversion of water was not absolutely necessary for a valid appropriation, effectively allowing statutes to waive a

72. Getches, *supra* note 7, at 71.

73. *See* Tarlock, *supra* note 16, at 771–74.

74. *See* Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 179 (1998).

75. DAVID M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE 143–45 (1997).

76. *See generally* Neb. Game & Parks Comm'n v. 25 Corp., 463 N.W.2d 591 (Neb. 1990). The court relied on similar holdings from *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570 (Colo. 1979) and *Idaho Dep't of Parks v. Idaho Dep't of Water Admin.*, 530 P.2d 924 (Idaho 1974).

once-fundamental PA requirement.[77] Perhaps because they show that western water law can respond to changing needs and values, the instream flow statutes have been touted as a major advance.[78]

Even where state water law remains officially true to PA principles, however, some scholars have argued that the western states do not always apply those principles—even the most fundamental ones. For example, Dan Tarlock wrote in 2000 that the priority principle was "more bluff than substance," because "experience will demonstrate that priorities are seldom enforced in practice. In many situations, the strict enforcement of prior appropriation would raise substantial fairness and efficiency concerns," and therefore "it is not surprising that states have taken extraordinary steps to ensure that the rule is never applied in practice."[79]

Janet Neuman found a similar reluctance by states to enforce PA's rules banning wasteful uses and terminating water rights after years of nonuse—both key corollaries of the bedrock principle of beneficial use. Her 1998 article found that even though PA's "requirement of 'beneficial use without waste' sounds tight, as if water users must carefully husband the resource, using every drop of water completely and efficiently," the reality is that it has been applied loosely, showing great tolerance for inefficient old practices.[80] "The prohibitions against waste—even the threat of forfeiture for nonuse—are mostly hortatory concepts that rarely result in cutbacks in water use."[81]

One of my early articles suggested that the Pacific Northwest states followed a practice of protecting the water use status quo, rather than implementing PA principles:

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77. *Neb. Game & Parks Comm'n*, 463 N.W.2d at 601 ("Although a number of courts and authorities have stated that a diversion is a prerequisite [to a valid appropriation], this view has been criticized as being obsolete" in light of the permitting requirement for new water uses.).

78. Gregory Hobbs has called instream flow laws "the most dramatic innovation" in state water law. Hobbs, *supra* note 14, at 47. "Instream flows were traditionally considered to be a waste of water; today they are fundamental to the implementation of public values." *Id.* at 55.

79. Tarlock, *supra* note 15, at 883. New Mexico's efforts to gain compliance with the Pecos River compact and decree represent an extreme example of a state trying to avoid administering water rights by priority. *See generally* Joshua Mann, *Saving Water in the Pecos: One Coin, Two Sides, Many Overdrafts (And No Bail Outs?)*, 47 IDAHO L. REV. 341 (2011).

80. Neuman, *supra* note 28, at 922.

81. *Id.*

> In order to perpetuate current uses, state legislatures, courts, and agencies alike have refused to apply, and sometimes have even changed, legal requirements . . . . [B]y consistently choosing to protect established water uses rather than applying the familiar rules of prior appropriation, the Northwest states have significantly undermined those rules.[82]

In spite of the pressures for change, the reforms adopted by western states, and the failure to implement basic rules, PA remains widely accepted as the basis for water allocation and management in the western states. Although Tarlock identified a growing gap between the form of PA and actual water allocations,[83] he rightly acknowledged that PA "remains the primary water law of the western states and is likely to remain so for the foreseeable future."[84] The core principles of "beneficial use is the basis, measure, and limit of a water right"[85] and "first in time is first in right" are still recognized as the legal basis for water rights and management in the West, even when they are honored in the breach.[86] Thus, PA officially lives on—but even this formal commitment to its basic principles is now fading, as discussed in the next Part.

III. HOW THE WESTERN STATES HAVE UNDERMINED PRIOR APPROPRIATION

In Wilkinson's colorful memorial to PA, the death of Prior at age 152 was mostly the work of outside agitators: politicians in Washington D.C., academics, environmentalists, and others pushing for changes in the law and management of western water.[87] Surely the western states, having adopted Prior Appropriation, would stay true to a doctrine they had spent years defending against federal threats. It is rather ironic that when crusty old Prior was finally deposed, it proved to be a

82. Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 916, 918 (1998).

83. Tarlock, *supra* note 16, at 775.

84. *Id.* at 776.

85. 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(c)(4)(A).

86. Focusing on the "first in time, first in right" principle, Tarlock stated that PA "remains deeply entrenched in the states and in the courts," Tarlock, *supra* note 16, at 773, but also predicted that "the gap between the form of the doctrine and the actual allocation of water will continue to grow," driven by the evolving needs and values of a changing West. *Id.* at 775.

87. *See supra* notes 10–13 and accompanying text.

palace coup, done by the states themselves. This Part analyzes three relatively recent cases from three states in order to explain how the western states have departed from even the most fundamental PA principles.

A. Three Recent Cases Addressing Core Prior Appropriation Principles

The cases discussed in this Section are not the only ones in which state courts have deviated from the traditional PA doctrine.[88] These three decisions were chosen as the focus of this Article because they share certain notable characteristics. First, they all involve a conflict between PA principles and a state statute or rule. Second, they are all recent, having been decided within the last five years. Third, they all involve one of the core principles of PA—either "first in time, first in right" or beneficial use as the basis of a water right.

1. In Idaho, Making Prior Appropriation More "Reasonable" as Between Users

Idaho's departure from key PA principles, in the context of a dispute between senior surface water users and junior groundwater users, is in some ways the most remarkable of the three examples discussed here. Unlike the other two cases, the Idaho litigation involved rules promulgated by the state water agency, not an act of the state legislature. Moreover, not only is PA written into the Idaho Constitution,[89] but the Idaho Supreme Court had strongly reinforced the "first in time, first

88. *See, e.g.*, *In re* Adjudication of Existing Rights to Use Water, 55 P.3d 396, 406–07 (Mont. 2002) (holding that no diversion was needed to appropriate water for fish, wildlife, or recreational purposes under pre-1973 Montana law).

89. The most relevant language states:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

IDAHO CONST. art. XV, § 3.

in right" principle in a 1993 decision that spurred adoption of the rules.[90]

The 1993 dispute arose because the Idaho Department of Water Resources (IDWR) was then administering surface water and groundwater as separate resources—what might be called "disjunctive management."[91] Thus, the agency had no practice of curtailing groundwater pumping to benefit surface water users, regardless of their relative priority dates. When the Curran Tunnel ran short of water in 1993, users with senior (surface) rights to its water asked IDWR to reduce groundwater pumping from the hydrologically connected Snake Plain Aquifer. The agency refused, stating that it had made no "formal hydrologic determination that such conjunctive management is appropriate."[92] The surface users sued, asking the Idaho courts to order IDWR to fulfill its duty to administer water according to established priorities.

The Idaho Supreme Court concluded that IDWR had a clear legal duty to administer water by priority, and ordered the director to comply. The court acknowledged that the agency had some discretion as to the details, but still had a mandatory duty to distribute water in accordance with PA.[93] IDWR nonetheless insisted that "a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource"[94]—in other words, whether the call should be denied in order to enable continued pumping by the juniors. The court not only rejected that argument, but even required the state to pay the plaintiffs' attorney fees because the agency's position had "no reasonable basis in law or fact."[95]

IDWR then promulgated rules governing calls to reduce junior groundwater pumping.[96] These Rules for Conjunctive

90. Musser v. Higginson, 871 P.2d 809 (Idaho 1994), *abrogated on other grounds by* Rincover v. State, 976 P.2d 473 (Idaho 1999).

91. "Conjunctive management," by contrast, treats surface water and hydrologically connected groundwater as a single resource for management purposes. The Idaho rules define conjunctive management to mean "[l]egal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply." IDAHO ADMIN. CODE r. 37.03.11.010.03 (2011).

92. *See Musser*, 871 P.2d at 811.

93. *Id.* at 812.

94. *Id.* at 813 (quoting IDWR).

95. *Id.* at 814.

96. IDWR had no specific statutory authority for the conjunctive management rules, but had general rulemaking authority under section 42-603 of the Idaho

Management of Surface and Ground Water Resources[97] "acknowledge" all elements of PA under Idaho law,[98] but then immediately state a "traditional policy of reasonable use" governing water administration and use.[99] The rules declare that the reasonable use policy "includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe," as well as principles of "optimum development of water resources in the public interest" and "full economic development."[100] The rules specify procedures for responding to a delivery call,[101] consisting primarily of a potentially drawn-out "contested case" administrative hearing to determine the factual and legal issues involved in the dispute.[102] The rules also identify numerous factors IDWR could consider in determining whether relief was justified (including potential changes in the senior's water use facilities or practices),[103] and give the agency several options for addressing the issue.[104]

Surface water users sued, arguing that the rules were contrary to PA in various ways and therefore were facially unconstitutional.[105] Most of their arguments failed in the district court, but they did prevail on some issues,[106] and the district court held that the entire package of rules violated the state constitution. IDWR and groundwater users appealed to the Idaho Supreme Court, which held unanimously in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*[107] that the conjunctive management rules were not facially unconstitutional.

Code (authorizing IDWR to "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof"). *See also* IDAHO CODE ANN. § 42-1805(8) (2011).

97. IDAHO ADMIN. CODE r. 37.03.11 (2011).

98. *Id.* r. 37.03.11.020.02.

99. *Id.* r. 37.03.11.020.03.

100. *Id.*

101. *Id.* rr. 37.03.11.030–.031, .040–.041

102. *Id.* r. 37.03.11.030.02.

103. *Id.* r. 37.03.11.042.

104. *Id.* r. 37.03.11.030.07. Options listed in the rule include granting or denying the petition in whole or in part, designating the area as a type of district for management purposes, or prohibiting or limiting pumping from certain wells by summary order. *Id.*

105. Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 154 P.3d 433, 439 (Idaho 2007).

106. *See id.* (summarizing district court's ruling on summary judgment).

107. *Id.*

After complimenting the district court's opinion as scholarly, detailed, and "exemplary,"[108] the Idaho Supreme Court disagreed with its conclusion that the rule was unconstitutional in certain respects.[109] The district court had held that the rules' procedures for responding to a delivery call violated PA because the rules were silent on three issues: whether a presumption of injury exists in favor of senior users when juniors divert water during shortages, whether juniors bear the burden of proving that such diversions do not cause injury, and whether IDWR must timely respond to calls.[110] The Idaho Supreme Court held that the rules' silence regarding presumption of injury and burden of proof did not make the rules invalid, especially because they specifically recognized PA as established in Idaho law.[111] The *American Falls* court also denied that the rules must set a deadline for responding to calls. "Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call," but nothing in the rules would prohibit that, and neither the state constitution nor the statutes provide a specific timeframe for a response.[112] The court stated that delivery calls raise complex factual issues, and that it is "vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision."[113]

The district court also held the rules unconstitutional because they exempted all domestic and stockwater rights from delivery calls, effectively giving them priority over senior rights.[114] The Idaho Supreme Court, however, pointed to language in the Idaho Constitution that allows junior domestic uses to continue in times of shortage, but seems to require that they compensate senior users for lost water.[115] It then noted that both the constitution and the rules give priority to domestic uses, and although the rules make no provision for

108. *Id.* at 440.
109. *Id.*
110. *Id.* at 443–44.
111. *Id.* at 444–45.
112. *Id.* at 445.
113. *Id.* at 446. The court's statement is ambiguous: adequate time and information for the Director to make a correct decision is "vastly more important" than what? The court might mean that these factors are more important than a timely response, or that they are more important than specifying a timeframe for response in the text of the rules.
114. *Id.* at 451.
115. *Id.* at 451–52; *see also* IDAHO CONST. art. XV, § 3.

compensation to senior users, neither do they preclude it.[116] Again, the court gave the rules the benefit of the doubt in the context of a facial challenge to their constitutionality.[117]

Equally interesting is the list of issues that were decided against the plaintiffs in the lower court but not appealed. The Idaho Supreme Court made a point of saying that the district court had upheld the rules' provision allowing IDWR, in response to a delivery call, to consider "material injury; reasonableness of the senior water right diversion; whether a senior right can be satisfied using alternate points and/or means of diversion; full economic development; compelling a surface user to convert his point of diversion to a ground water source; and reasonableness of use."[118] The Idaho Supreme Court also noted that there was no appeal of the district court's rejection of the argument "that water rights in Idaho should be administered strictly on a priority in time basis."[119]

American Falls illustrates the difficulties of prevailing in a facial challenge, where the plaintiff must show that the law is unconstitutional in all possible applications.[120] But it also indicates that the court views "reasonableness" of water uses as a water law principle no less important than "first in time, first in right."

2. In Washington, Recognizing Water Rights Regardless of Beneficial Use

Washington's deviation from PA differs from Idaho's in that it involves a statute rather than a rule. Moreover, the Washington Constitution does not require allocation of water under PA,[121] so the statute did not face the same type of

116. *American Falls*, 154 P.3d at 452.

117. *Id.* The court did the same on another key issue: the provision of the rules which seemed to allow IDWR to limit the holders of storage water rights to a "reasonable" amount of carryover water—that is, water held in storage at the end of season, to be "saved" for the future. *Id.* at 449–51. The court noted that storage water rights should be protected in their priorities, but that stored water must also be applied to beneficial use, and that the director had discretion to balance those two PA requirements in a particular case. *Id.*

118. *Id.* at 440–41.

119. *Id.* at 441.

120. *Id.* at 442. The Idaho Supreme Court repeatedly indicated that its decision left room for later challenges to the rule as applied, based on a developed factual record. *Id.* at 446–47, 449, 451–52.

121. The Washington Constitution has only one sentence regarding water rights: "The use of the waters of this state for irrigation, mining and

constitutional challenge as the Idaho rules did. The Washington statute is remarkable, however, in that it alters the beneficial use requirement—the most fundamental of all PA principles.

Washington's move away from PA, like Idaho's, arose from a judicial decision that affirmed a key principle of the doctrine. In a 1998 opinion, the Washington Supreme Court reviewed conditions imposed by the Department of Ecology ("Ecology") on an extension of a water use permit held by a developer.[122] Ecology had originally issued the permit in 1973 for a development planned for 253 lots, but water lines had been extended to only ninety-three lots by the early 1990s. The developer, nonetheless, argued that he had a vested right to the full amount of his permitted water right under a policy, followed by Ecology for at least forty years, that provided final water rights for certain kinds of users based on completion of a water delivery system. This "pumps and pipes" policy quantified such vested (certificated) rights based on the capacity of the system rather than on actual beneficial use. Ecology came to doubt the legality of "pumps and pipes" and refused to apply that policy to the developer's permit renewal, imposing a new condition that the final certificate would be quantified based on actual beneficial use.[123] In *State v. Theodoratus*, the Washington Supreme Court upheld the challenged condition, based on statutes and case law requiring "that a water right must be based on actual application of water to beneficial use and not upon system capacity. . . . Perfection of an appropriative right requires that appropriation is complete only when the water is *actually applied* to a beneficial use."[124]

Five years later, the Washington Legislature partially undid *Theodoratus* by adopting a statute upholding the validity of existing certificates issued under the "pumps and pipes" policy.[125] The statute defined "municipal water supply purposes" to include supplying water for residential purposes

manufacturing purposes shall be deemed a public use." WASH. CONST. art. XXI, § 1.

122. *See generally* State v. Theodoratus, 957 P.2d 1241 (Wash. 1998). A water use permit typically requires the holder to construct facilities and apply water to beneficial use within a specified time (e.g., five years), but that deadline may be extended for cause. 2 WATERS & WATER RIGHTS, *supra* note 3, § 15.03(d)(1).

123. *Theodoratus*, 957 P.2d at 1243–44.

124. *Id.* at 1246.

125. H.R. 1338, 58th Leg., 1st Spec. Sess. (Wash. 2003).

to at least fifteen residences, thus extending coverage to many small, non-municipal water systems.[126] It then provided that a water right was "in good standing" if it was "represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes . . . where the certificate was issued based on an administrative policy" to administer such certificates after construction of the municipal water supply system, "rather than after the water had been placed to actual beneficial use."[127] Certificates issued after that date, however, were to be based only on "actual beneficial use of water."[128] The Washington Supreme Court noted that *Theodoratus* had raised questions about whether existing certificates based on "pumps and pipes" were valid, and it characterized the 2003 statute as having "essentially put the legislature's imprimatur on our holding in *Theodoratus* prospectively while confirming the good standing of water certificates issued under the former system."[129]

Two groups of plaintiffs sued, alleging that the municipal water supply statute was facially unconstitutional—but because Washington's constitution does not establish PA as the basis for water allocation in the state, they could not prevail by showing that the law was contrary to the bedrock principle of beneficial use. They instead argued that the statute violated separation-of-powers principles (partly based on what they saw as its retroactive effect in overturning *Theodoratus*) and denied them substantive and procedural due process. The trial court agreed with their separation-of-powers arguments and ruled the statute unconstitutional.[130]

The Washington Supreme Court unanimously upheld the statute in *Lummi Indian Nation v. State*.[131] In rejecting the lower court's holding regarding separation of powers, the Washington Supreme Court recognized that the legislature has clear authority to make policy, enact new statutes, and amend existing statutes.[132] The legislature exercised its power appropriately here, said the court, because the municipal water statute simply amended "an area of the law subject to ongoing

126. *See* Lummi Indian Nation v. State, 241 P.3d 1220, 1226 (Wash. 2010) (explaining provisions of the 2003 statute).

127. *Id.* at 1227 n.7.

128. *Id.* at 1225–26 (citations and quotation marks omitted).

129. *Id.*

130. *See id.* (summarizing the trial court's holding).

131. *Id.* at 1234.

132. *Id.* at 1229.

legislative refinement in the face of changing conditions."[133] And by confirming existing certificates that had been issued under the old "pumps and pipes" approach,[134] the legislature was not adjudicating the facts of any one water right, but rather, was making policy.[135]

The plaintiffs also argued that the statute denied them due process by defining the term "municipal water supply purposes" to include water suppliers serving as few as fifteen taps, thus giving many water suppliers significant advantages under state water law; for example, municipal water rights are not lost through nonuse, and the place of use is more flexible than it is for other kinds of rights.[136] Thus, the statute gave a new set of users the benefit of municipal status, but in doing so it imposed a burden on competing users. The court recognized that these changes could harm some junior users, whose "enjoyment of their water rights may be impaired without individualized notice or prior opportunity to comment."[137] But the court insisted that a facial due process challenge requires more than "mere potential impairment of some hypothetical person's enjoyment of a right," and that the statute did not change plaintiffs' status as "junior water rights holders who take water subject to the rights of senior rights holders whose status may be improved by these changes."[138] And since those changes did no more than confirm existing certificates and define a previously undefined term (municipal water supply), they did not violate due process.[139]

Interestingly, the *Lummi* court began its opinion by stressing the importance of beneficial use in Washington water law. "The beneficial and wise use of water has been a public concern since before we achieved statehood."[140] The court also

133. *Id.*

134. The court noted that *Theodoratus* had not involved a perfected (certificated) right—only a request to extend a permit—and therefore did not reduce or terminate any rights that had vested under the "pumps and pipes" policy. *Id.* at 1232. "While *Theodoratus* may have changed the expectations of those who acquired water rights after the date it was issued, it did not automatically divest or invalidate any vested or perfected rights." *Id.* Thus, the court read the statute only as confirming existing water rights, not as resurrecting them.

135. *Id.* at 1230.

136. *See id.* at 1230–31.

137. *Id.* at 1231.

138. *Id.*

139. *Id.* at 1232.

140. *Id.* at 1223.

noted that a water use permit represents an inchoate right that does not vest until the right is perfected, and that the state agency's "pumps and pipes" policy had created some confusion about the requirements to perfect a permitted right, even though early Washington cases had held that "rights were not perfected until the water was both appropriated and put to beneficial use."[141] After providing that background, however, the court analyzed the validity of the statute without discussing whether it was faithful to the beneficial use principle of PA.

Thus, the Washington Supreme Court rejected a constitutional attack on the municipal water supply statute, while explicitly leaving the door open for later challenges to the law as applied to specific facts.[142] Because PA does not appear in the state constitution, and the *Lummi* opinion therefore did not assess the statute's faithfulness to PA in a constitutional challenge, one might presume that the case has little bearing on the ongoing role of PA in western water law. But it is significant that the court, after faithfully supporting PA in *Theodoratus*, unanimously upheld a statute recognizing perfected water rights based on system capacity—directly contrary to the bedrock principle of beneficial use as the basis, measure, and limit of a water right.

3. In New Mexico, Allowing New Uses Despite Likely Harm to Existing Ones

As in the *Lummi* case, the recent dispute over water law in New Mexico involves a facial challenge to a legislative enactment that arguably contradicts a basic PA principle. In New Mexico, however, the prior appropriation doctrine is written into the state constitution, which states that "unappropriated water . . . [is] subject to appropriation for beneficial use, in accordance with the laws of the state," and that "[p]riority of appropriation shall give the better right."[143] Thus, *Bounds v. State*[144]—on appeal to the state supreme court

141. *Id.* at 1225 (citing Ortel v. Stone, 205 P.2d 1055 (Wash. 1922)).

142. *Id.* at 1229, 1234; *see also id.* at 1227 n.4 (noting at least one "as applied" challenge was pending at the administrative level).

143. N.M. CONST. art. XVI, § 2.

144. 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010), *cert. granted sub nom.* Bounds v. Dantonio, 2011-NMCERT-001, 263 P.3d 902 (2011), *and cert. granted sub nom.* N.M. Livestock v. State Eng'r, 2011-NMCERT-001, 263 P.3d 902 (2011).

as of this writing—raises the issue of whether a statute is unconstitutional because it conflicts with PA.

The statute at issue in *Bounds* requires the New Mexico State Engineer to issue permits to use groundwater for "household or other domestic use" without regard to the availability of unappropriated water or the impact of the new use on existing water rights.[145] The statute simply states that the State Engineer "shall issue" such permits, and exempts them from the usual standards because of "the varying amounts and time such water is used and the relatively small amounts of water consumed" by domestic wells.[146] This domestic well statute is relatively old, having remained on the books (with minor revisions) since 1953.[147]

Domestic wells might have been a minor matter in the New Mexico of the 1950s, but in recent years they have become a serious concern. The Office of the State Engineer (OSE) estimated that there were 137,000 domestic wells statewide in 2000, and that number continues to increase, with the OSE processing nearly 5,000 new domestic well permits in 2007.[148] The cumulative impact of these domestic wells on surface flows is a growing concern, given that most existing wells are within five miles of a stream, and the OSE has estimated that total annual withdrawals by domestic wells in the Rio Grande basin alone exceed 24,000 acre-feet.[149] Thus, by the early twenty-first century the stage was set for a challenge to the domestic well statute.

The New Mexico litigation began when Bounds, an irrigator with senior surface water rights in the Rio Mimbres stream system, sued to enjoin the OSE from issuing any further domestic well permits in the fully appropriated

145. N.M. STAT. § 72-12-1.1 (2011).

146. N.M. STAT. §§ 72-12-1 to -1.1 (2011). The New Mexico water code has nearly identical permitting provisions for livestock watering, *id.* § 72-12-1.2, and for certain small-scale temporary uses, *id.* § 72-12-1.3, but *Bounds* dealt only with the domestic well statute.

147. Paul Bossert, *Domestic Wells, in* UTTON TRANSBOUNDARY RES. CTR., UNIV. N.M. LAW SCH., WATER MATTERS! 11-5, 11-6 (2012), http://uttoncenter.unm.edu/pdfs/Water-Matters-2012/2012_water_matters_final_full-publication.pdf.

148. *Id.* at 11-8.

149. *Id.* This figure represents nearly one-fourth of the water used by New Mexico's largest metropolitan area. The Albuquerque Bernalillo County Water Utility Authority uses about 104,000 acre-feet per year to serve nearly 600,000 customers. ALBUQUERQUE BERNALILLO CNTY., WATER UTIL. AUTH., ANNUAL INFORMATION STATEMENT 6–7 (2011), http://www.abcwua.org/pdfs/2011AIS.pdf.

Mimbres basin. Bounds argued that the domestic well statute violated the state constitution by requiring issuance of permits without regard to water availability or injury to existing rights, resulting in new groundwater withdrawals that would reduce surface water flows to the detriment of senior users. After initially involving claims alleging harm specifically to Bounds, the case eventually came down to a facial challenge to the constitutionality of the domestic well statute.[150]

The district court granted summary judgment in Bounds' favor, holding that the statute gave senior water users no way to oppose new domestic well permits and allowed no determination of whether the new use would impair existing rights.[151] "It is not logical, let alone consistent with constitutional protections, to require the [State Engineer] to issue domestic well permits without any consideration of the availability of unappropriated water or the priority of appropriated water."[152] The court also noted that the State Engineer had "testified he would not subject domestic wells to a priority call notwithstanding this [was] a derogation of his [constitutional] duty."[153] The district court held the statute unconstitutional, and ordered the OSE to handle all domestic well applications on the same basis as other permit applications.[154]

The New Mexico Court of Appeals reversed, upholding the statute in a unanimous opinion by a three-judge panel.[155] The court reviewed relevant constitutional provisions, statutes, and rules,[156] then discussed cases addressing the protection

150. *See* Bounds v. State, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010), *cert. granted sub nom.* Bounds v. Dantonio, 2011-NMCERT-001, 263 P.3d 902 (2011), *and cert. granted sub nom.* N.M. Livestock v. State Eng'r, 2011-NMCERT-001, 263 P.3d 902 (2011).

151. *Id.* at 711.

152. *Id.* at 710 (alteration in the original) (quoting the trial court's findings).

153. *Id.* at 711 (alterations in the original) (quoting the trial court).

154. *Id.*

155. *Id.* at 719–22.

156. The court noted that the State Engineer had adopted rules in 2006 purporting to allow for priority administration of domestic wells, at least those issued after the date of those rules. *See id.* at 714. The court also quoted extensively from a State Engineer's order relating to the Mimbres basin (from whence the *Bounds* case arose), which provided that if water rights in the basin were to be administered by priority, all out-of-priority domestic rights "shall be curtailed and limited to essential indoor domestic uses and all outdoor uses shall cease." *Id.* The order similarly provided for curtailment of "out-of-priority" stockwatering uses "in order to limit such diversions to the relatively small amounts of water required for essential livestock watering." *Id.* at 713–14.

afforded to senior water rights under New Mexico law.[157] The court quoted from cases involving the statutes for issuing non-domestic water use permits; in one recent decision, the New Mexico Supreme Court had held that under the surface water permitting statute, water availability is the dispositive threshold issue and that the OSE must summarily reject an application if water is not available.[158] In a much earlier case,[159] the New Mexico Supreme Court held that existing statutes allowed the State Engineer to deny groundwater permits that would lead to reduced flows in the fully appropriated Rio Grande, saying that it would be "anomalous for the [L]egislature to enact laws designed to permit water, which would otherwise reach the stream in substantial quantities, to be withdrawn by pumps and thereby attempt to deprive the prior appropriators of their vested rights."[160] The court of appeals said that these cases show that the OSE generally cannot and does not issue new permits where no water is available but do not establish that PA "forbids the Legislature from enacting a law making an exception" to that principle for new domestic wells.[161]

The court of appeals decision in *Bounds* turns on two fundamental points. First, and most fundamentally, "[t]he Constitution's priority doctrine establishes a broad priority principle, nothing more. The prior appropriation provision is not self-executing."[162] Second, "[t]he Legislature establishes the administrative process required for adherence to the broad constitutional principle. Thus, the Legislature has the authority to enact laws setting out the process *and to enact exceptions to or deviate from those laws.*"[163] In other words, the constitution leaves the legislature free to create exceptions

157. *Id.* at 715–17.

158. The court of appeals quoted from the supreme court's opinion in *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, ¶25, 226 P.3d 622, 632 (N.M. 2009):

> "Whether water is available for appropriation is the threshold issue that is dispositive of a permit application when water is not available for appropriation. The Legislature . . . mandated in Section 72-5-7 that the State Engineer 'shall' summarily reject water rights applications upon a determination that water is unavailable for appropriation."

Bounds, 252 P.3d at 716.

159. City of Albuquerque v. Reynolds, 379 P.2d 73, 79 (N.M. 1962).

160. *Bounds*, 252 P.3d at 717 (alteration in the original) (quoting *Reynolds,* 379 P.2d at 79).

161. *Id.*

162. *Id.* at 719.

163. *Id.* (emphasis added).

from the normal rules of PA, including rules regarding denial of new permits in fully appropriated basins.[164] The court declared that the domestic well statute "is such an exception or variation, ultimately leaving for the State Engineer, as difficult as it looks to be, the administrative determination whether to curtail domestic use when senior water rights are impaired or threatened with impending impairment because of water shortages."[165]

This power to create "exceptions" to the priority principle does not, however, free the legislature to ignore the rights of senior water users.[166] The court of appeals presumed that the legislature understood the need to balance the demand for domestic wells against the protection of senior rights,[167] and further presumed that the legislature

> sees the hydrological expertise of the State Engineer as the preferable, if not the only reasonable way to attempt to reach the right balance of priorities and needs. It is up to the Legislature and the State Engineer to create an efficient, effective, and fair administrative process to reach the required balance and to protect senior water rights.[168]

The court then noted a New Mexico statute providing for administrative appeals of "acts or decisions" of officials subordinate to the State Engineer, followed by judicial review,[169] thus providing a process for senior water users to protect themselves against the effects of domestic wells. The court of appeals concluded that even in fully appropriated basins,

> we do not see how the Legislature is forbidden under a facial constitutional attack from nevertheless enacting an exception to its existing statutory regime permitting additional appropriation for domestic purposes as long as senior water rights are not in fact impaired or subject to impending impairment.[170]

164. *See id.* at 721.
165. *Id.* at 720.
166. *Id.* at 721.
167. *Id.* at 720.
168. *Id.* at 721.
169. *Id.*
170. *Id.*

Like the Idaho and Washington cases, *Bounds* reached a result that not only undermined PA but also differed from a recent decision from its state supreme court. Like the other two courts, the New Mexico Court of Appeals rejected a failed facial challenge to a law but left disappointed water users free to attack it as applied to them. And, as in Idaho, the court determined that the law did not violate the PA provisions of the state constitution. But the *Bounds* decision (if it stands) may have the greatest implications of the three because it holds that one of the most fundamental elements of PA—"first in time, first in right"—is only a broad principle subject to legislatively created exceptions.

B. Assessing the Damage: Analysis of the Three Cases

American Falls, *Lummi*, and *Bounds* all uphold state laws that contravene basic PA principles. In Idaho, the conjunctive management rules diminish "first in time, first in right" by emphasizing the need for "reasonableness" in all uses, and by subjecting delivery calls to a potentially lengthy administrative process that allows IDWR to weigh many factors in reaching a decision.[171] In Washington, the statute legitimates water rights based on "pumps and pipes" capacity rather than actual beneficial use, not just for cities but also for entities supplying water to as few as fifteen taps.[172] In New Mexico, the domestic well statute gives senior users no protection from harm that could result from issuing new permits, requiring the OSE to authorize new domestic wells without the usual process or standards.[173] Thus, each of these three cases weakens PA as the fundamental doctrine of western water law by undermining one of its most essential principles.[174]

171. *See supra* Part III.A.1.

172. *See supra* Part III.A.2.

173. *See supra* Part III.A.3.

174. I do not suggest that all of the recent western water cases undermine PA principles; to the contrary, some decisions tend to support them. *See, e.g.*, Kobobel v. State, 249 P.3d 1127 (Colo. 2011) (rejecting groundwater users' claim that curtailment of their groundwater pumping in favor of senior users effected a taking of their property rights, because even though State Engineer had allowed them to pump for years, PA always made their use subject to being curtailed for the benefit of senior users); Simpson v. Bijou Irrigation Co., 69 P.3d 50 (Colo. 2003) (holding that State Engineer's rules for temporary plans to replace stream depletions caused by junior groundwater wells exceeded his statutory authority); Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation, 133 P.3d 224 (Mont. 2006) (rejecting agency's statutory interpretation which provided

Some might argue that these three cases do not, in fact, reflect any trend toward abandonment of PA by the western states. Most obviously, none of the cases represents the last word on the validity of the law at issue given the availability of as-applied challenges, as well as the pending appeal in *Bounds*. Given that a facial challenge to a law must fail unless there is *no* potential application that would be constitutional,[175] the three reported decisions certainly do not provide an unqualified endorsement of the disputed statutes and rules.

The Idaho Supreme Court very recently upheld IDWR's application of the conjunctive management rules,[176] and because the agency ordered curtailment of junior groundwater uses for the benefit of senior surface water rights, that case suggests that PA remains relevant in Idaho despite the rules. The court's opinion in *Clear Springs Foods v. Spackman* seems to support that view, as it repeatedly indicates that senior users in Idaho are constitutionally protected against harm caused by junior users[177]—although most or all of those statements are apparently dicta.[178] Rhetoric aside, however, the court in *Clear Springs Foods* did not simply apply "first in time, first in right" as it had in *Musser v. Higginson*.

Most fundamentally, the court upheld the IDWR Director's reliance on a groundwater model in determining the impacts of

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minimal protection to senior water users from proposed new groundwater wells). The latter two cases turned on statutory interpretation rather than application of basic PA principles, but their results are consistent with the protection of senior users from the impacts of junior groundwater pumping.

175. American Falls Reservoir v. Idaho Dep't of Water Res., 154 P.3d 433, 441 (Idaho 2007); Bounds v. State, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010), *cert. granted sub nom.* Bounds v. Dantonio, 2011-NMCERT-001, 263 P.3d 902 (2011), *and cert. granted sub nom.* N.M. Livestock v. State Eng'r, 2011-NMCERT-001, 263 P.3d 902 (2011); Lummi Indian Nation v. State, 241 P.3d 1220, 1227 (Wash. 2010).

176. Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71 (Idaho 2011).

177. *Id.* at 79, 81–82.

178. The court made most of its statements about PA in rejecting the groundwater users' argument that a document called the Swan Falls Agreement essentially protected all rights prior to October 1, 1984 from a senior call, and thus precluded IDWR's order curtailing their pumping. *Id.* at 79. The court held that the Swan Falls Agreement did no such thing, only subordinating certain hydropower water rights held by Idaho Power. *Id.* at 79. Thus, the court's grand statements about how the groundwater users' arguments would contradict PA in Idaho are rather clearly dicta. *Id.* at 78–79, 81. Similarly, the court seemingly did not need to invoke Idaho constitutional and statutory provisions regarding PA to reject the groundwater users' argument that the IDWR order violated a statute protecting "full economic development" of groundwater resources. *Id.* at 82–84. The court correctly held that the statute simply did not apply in the context of a call by senior surface users against junior groundwater users. *Id.* at 84.

pumping and the amount of curtailment needed. Despite some limitations of the model and uncertainty in its application, the Director chose to rely on the model as the best available science, and the court upheld that decision as being "within the outer limits of his discretion" under the applicable law.[179] Similarly, the court rejected the senior water users' argument that the Director should have ordered a greater curtailment of pumping than he did, holding that he did not abuse his discretion by effectively applying the model's ten percent margin of error in favor of the groundwater users.[180] The Director's decision not to curtail pumping within the margin of error was partly based on the "public interest" provision in the conjunctive management rules, although the Idaho Supreme Court did not comment on that aspect of his decision.[181] Thus, while *Clear Springs Foods* might seem like a vindication of PA, it is primarily a victory for IDWR and its authority to exercise its considerable discretion in applying the conjunctive management rules.[182]

Believers in the ongoing viability of PA may also offer a couple of arguments based on established water law. They may point to well-aged and well-recognized judicial decisions to support the contention that PA has always included (or at least accommodated) some of the principles involved in these three cases. For example, in *Schodde v. Twin Falls Land & Water Co.*,[183] the U.S. Supreme Court held a century ago that it was not "reasonable" for an Idaho irrigator to command essentially the entire flow of the Snake River to run water wheels that delivered water to his 430 acres.[184] And the so-called "growing

179. *Clear Springs Foods*, 252 P.3d at 95.

180. *Id.* at 97–98.

181. *Id.* The district court upheld the decision without regard to the "public interest" factor, and the Supreme Court affirmed the district court and accepted its rationale, so the higher court never considered whether the Director validly based his decision partly on the public interest.

182. IDWR did lose on one issue, as the court held that the groundwater users had been entitled to a hearing before the agency ordered curtailment of their pumping. *Id.* at 95–97. The court stated that "the circumstances of a particular delivery call or curtailment" will dictate whether a prior hearing is required. *Id.* at 96. This holding is another aspect of *Clear Springs Foods* that may cut against the court's PA rhetoric, because it may tend to delay pumping curtailment orders to allow time for prior hearings, agency decisions, and appeals.

183. 224 U.S. 107 (1912).

184. *Id.* at 114–23; *see also* Jeffrey C. Fereday & Michael C. Creamer, *The Maximum Use Doctrine and Its Relevance to Water Rights Administration in Idaho's Lower Boise River Basin,* 47 IDAHO L. REV. 67, 71–74 (2010) (discussing

cities doctrine"—allowing municipalities to hold rights to water they had not yet beneficially used—dates at least to the 1930s, when the Colorado Supreme Court held that it was "the highest prudence on the part of [Denver] to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time."[185]

While such old cases may contain relevant principles, however, they hold much truer to PA basics than the new laws do. Thus, it is one thing to hold that the water-wheel irrigator in *Schodde* was unreasonable to demand the full flow of the Snake to irrigate one farm; it is a very different thing to suggest that "reasonableness" is a principle equal in importance to priority[186] and a valid basis to deny a call by a senior surface water appropriator using conventional irrigation techniques.[187] And it is one thing to hold, as the Colorado Supreme Court did, that an incorporated municipality could maintain inchoate water rights for future growth, conditioned on the water eventually being applied to beneficial use;[188] it is another thing to allow any entity supplying more than a few

"maximum use" principles under Idaho water law, including the prohibition on wasteful uses).

185. City & Cnty. of Denver v. Sheriff, 96 P.2d 836, 841 (Colo. 1939); *see also* TARLOCK ET AL., *supra* note 43, at 97 (identifying *Sheriff* as a case applying the growing cities doctrine).

186. In the PA context, the principle of reasonableness has applied most strongly in the context of disputes between groundwater appropriators, where courts and statutes have protected senior users from interference only to a "reasonable" extent. *See, e.g.*, Wayman v. Murray City Corp., 458 P.2d 861, 865–66 (Utah 1969) (rejecting absolute protection for senior users in favor of a "rule of reasonableness"). The *Wayman* court noted that several western states had enacted statutes codifying such a rule. *Id.* at 866 & n.8 (citing statutes from Alaska, Colorado, Idaho, Kansas, Montana, Nevada, and Wyoming).

Even in this context, however, priority has trumped reasonableness when the two have directly conflicted. For example, in *Baker v. Ore-Ida Foods, Inc.*, the Idaho Supreme Court noted that senior users were protected only in the maintenance of "reasonable [well] pumping levels." 513 P.2d 627, 636 (Idaho 1973) (citing IDAHO CODE ANN. § 42-226). But it flatly rejected the arguments of junior users that they were entitled to a pro rata share of the available supply of an aquifer they shared with senior users. That sort of "correlative rights" approach, the court said, was "repugnant to our constitutionally mandated prior appropriation doctrine." *Id.* at 635. Because the aquifer was insufficient for all users, only those with senior water rights got to continue pumping. *Id.* at 636–37.

187. The requirement that all water uses be "reasonable" is a core principle of the riparian rights doctrine, which the western territories and states rejected long ago. *See supra* notes 20–24 and accompanying text.

188. The *Sheriff* court noted, "[t]hat such water must first be applied to a beneficial use by the city before it has any property right in it is not disputed." *Sheriff*, 96 P.2d at 842.

customers to retain perfected, permanent rights to water *regardless* of actual beneficial use.

The PA faithful might also contend that the results of *Lummi* and *Bounds*, at least, are consistent with many western water statutes. As the Washington Supreme Court noted, "municipal water rights . . . often receive separate treatment in water law."[189] The Washington water code, for example, exempts municipal water rights from being lost for nonuse.[190] Several states have statutes that essentially codify the "growing cities doctrine," allowing municipalities to hold water rights in excess of their current needs in order to plan for future growth,[191] although none go as far as the Washington law in disregarding beneficial use. As for the New Mexico domestic well statute at issue in *Bounds,* it has counterparts in several western states, including Oregon and Washington.[192]

While this statutory context does indicate that the three recent cases are within the mainstream of western water law, they also show that the mainstream has been shifting away from PA. Municipal water rights and domestic wells are two areas in which the states have long been willing to deviate from PA in order to accommodate other important goals. By enacting and retaining these kinds of statutes, legislatures have essentially decided that sticking to PA principles is less

189. Lummi Indian Nation v. State, 241 P.3d 1220, 1223 (Wash. 2010) (citing State v. Theodoratus, 957 P.2d 1241, 1247 (Wash. 1998)).

190. *Id.* at 1231 (citing WASH. REV. CODE § 90.14.140(2)(d)).

191. *See, e.g.*, N.M. STAT. ANN. § 72-1-9 (2006) (providing for water rights for municipalities and other public water suppliers based on 40-year planning horizon); OR. REV. STAT. § 537.230 (2005) (giving municipalities a standard period of 20 years—instead of the 5 years allowed for other uses—to complete construction activities under a water supply permit, and allowing for extensions of that twenty-year period under certain conditions); Christopher H. Meyer, *Municipal Water Rights and the Growing Communities Doctrine,* WATER REPORT, Mar. 15, 2010, at 1, 4–8 (describing 1996 Idaho municipal water rights statute, including provision allowing water rights to be held by municipalities for "reasonably anticipated future needs" as defined in section 42-202B(8) of the Idaho Code).

192. OR. REV. STAT. § 537.545(1)(d) (2009) (groundwater permit exemption for "[s]ingle or group domestic purposes" using up to 15,000 gallons per day); WASH. REV. CODE § 90.44.050 (2011) (same, with limit of five thousand gallons per day). The Montana water code generally exempts small groundwater uses of no more than thirty-five gallons per minute and ten acre-feet per year, and agency implementation of this exemption is the source of ongoing controversy in that state. *See* Declaratory Ruling on Petition to Amend Rule 36.12.101(13) (Mont. Dep't of Natural Res. Aug. 17, 2010), *available at* http://www.dnrc.mt.gov/wrd/declaratory_ruling/declaratory_ruling.pdf (declaratory ruling regarding agency interpretation of scope of small-scale well exemption).

important than assuring adequate water supplies for growing cities and for landowners' domestic needs.[193] The fact that some such statutes have been around for many years—the New Mexico domestic well law, for example, was first enacted in 1953[194]—only shows that the ongoing exodus from PA is not a recent development. In reality, the western states have been quietly moving away from PA for many years, abandoning it in stages.

I wrote in 1998 that the Pacific Northwest states followed a policy of maintaining the status quo—that is, preserving established water uses, even when such uses should have been curtailed under established state water law.[195] That article identified the Idaho conjunctive management rules, then relatively new, as a prime example of a state seeking to maintain status quo water uses in spite of the "first in time, first in right" principle and IDWR's mandatory duty to administer water by priority.[196] Another example was the enactment in Montana and Washington of statutes that allowed water users to file claims in ongoing water right adjudications *after* the original statutory filing deadline, effectively reviving time-barred claims for existing uses.[197]

The *Lummi* and *Bounds* cases, however, do not quite fit the model of states protecting status quo water uses. The Washington Supreme Court upheld a statute that preserved existing water right certificates, but not necessarily existing *uses*; indeed, the main beneficiaries of the law would be those who had never beneficially used a portion of their allocated water, and were, therefore, at risk of losing that portion.[198] The New Mexico domestic well statute, of course, protects those who have neither an existing use nor any form of water right, but who may want to drill a new well.[199] Both these statutes could leave some existing users worse off than they would be

193. Domestic well exemptions may also be justified based on the small size of each individual use, *see* N.M. STAT. ANN. § 72-12-1.1 (2003), and on the administrative burden that would be imposed by requiring a full-blown permit review process for thousands of domestic well applications each year. But as the cumulative effect of pumping by thousands of (individually small) users becomes known, the states can no longer pretend that domestic wells present no real concerns for surface flows and senior users. *See* Bossert, *supra* note 147.

194. *See supra* note 147 and accompanying text.

195. Benson, *supra* note 67.

196. *Id.* at 895–96.

197. *Id.* at 897.

198. *See supra* Part III.A.2.

199. *See supra* Part III.A.3.

under established PA principles, as acknowledged by the courts.[200]

These two statutes are best understood not as maintaining existing uses, but as preserving a perceived right of access to water. The Washington Legislature acted to ensure that the water suppliers with "pumps and pipes" certificates did not lose any of their paper entitlements, which probably seemed secure to them prior to *Theodoratus*.[201] New Mexico's domestic well law ensures that property owners have continued access to the groundwater beneath their land for purposes of meeting their basic household needs—access they have enjoyed for decades, predating even the 1953 statute.[202] These statutes are therefore similar to those creating exceptions to the forfeiture rule, which otherwise provides that failure to use water for a fixed period of years will result in loss of the right.[203] Unlike PA—which vigilantly protects existing beneficial uses—all of these statutes benefit those who believe they have a right to a certain quantity of water, even though they have not been using all (or perhaps any) of that water.

The Idaho conjunctive management rules do benefit existing (junior) users, and thus at least can reasonably claim to further the maximum beneficial use of water resources.[204] But promoting this underlying goal of PA sometimes means clashing with the core principles of PA,[205] and the Idaho rules

200. *See supra* notes 144, 167 and accompanying text.

201. *See supra* notes 125–36 and accompanying text.

202. *See* Bounds v. State, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010) (noting 1953 domestic well statute codified pre-existing administrative practice of exempting certain groundwater applications from permit requirement), *cert. granted sub nom.* Bounds v. Dantonio, 2011-NMCERT-001, 263 P.3d 902 (2011), *and cert. granted sub nom.* N.M. Livestock v. State Eng'r, 2011-NMCERT-001, 263 P.3d 902 (2011).

203. *See* N.M. STAT. ANN. § 72-5-28 (2002) (providing for loss of water right after four years of nonuse, but providing multiple exceptions to the usual rule); Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility,* 28 ENVTL. L. 1137, 1142–46 & n.67 (1998) (explaining "use it or lose it" principle and Oregon statutory exceptions; listing 13 exceptions to the usual rule in section 540.610 of Oregon's revised statutes).

204. *See* IDAHO ADMIN. CODE r. 37.03.11.010.07 (2011) (defining "[f]ull [e]conomic [d]evelopment of [u]nderground [w]ater [r]esources"); *id.* r. 37.03.11.020.03 (2011) (incorporating "full economic development" principle into "reasonable use" requirement).

205. *See, e.g.*, Se. Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321 (Colo. 1974) (denying request for new appropriation, free from priority calls, based on clearing water-wasting streamside vegetation, despite arguments that recognizing such appropriations would promote beneficial use of water and would cause no harm to senior users).

do just that, effectively replacing IDWR's mandatory duty to enforce priorities with a complex framework that allows the agency to consider many factors and choose various remedies in response to a priority call.[206] Groundwater users may see that as entirely fair, because for many years they pumped without ever being subjected to a call, which surely caused many to believe that their uses would not be curtailed for the sake of surface water users regardless of priority. In this respect, then, all three of the recent cases have the same result: they all preserve continued access to water for those who had an *expectation* of that access, even if PA would not have recognized a *right* to ongoing access or use.

Thus, not only do all three cases depart from PA, they go in the same direction, away from the principles that impose specific restrictions on water usage for certain purposes. By upholding statutes and rules that ease those restrictions, the cases accept that water rights may be created or protected in ways that classic PA would not allow. The cases also recognize that such laws may disadvantage existing (junior or senior) users who would be better protected by PA, but that effect does not necessarily render the laws invalid, even in states where PA is written into the constitution. For those water users who perceive that they will be disadvantaged—such as the disappointed plaintiffs in *American Falls*, *Lummi*, and *Bounds*—the western states' move away from PA is clearly a problem. The benefited users, of course, would see it differently. But the larger question, to which the conclusion turns, is whether this move should be seen as a good thing or a bad thing for water policy in the West.

CONCLUSION: IMPLICATIONS OF THE FALL OF PRIOR APPROPRIATION

This Article has shown how Prior Appropriation has lost its hold over western water law as courts have upheld deviations from even the most fundamental PA principles, even in states with PA provisions in their constitutions. From a policy standpoint, that is a positive development—that is, in general and on balance, the states' willingness to depart from PA is likely to benefit water policy. Western water law has long been criticized for its various shortcomings, and despite some

206. *See supra* notes 96–104 and accompanying text.

recent progress, the states have made only limited headway in resolving them.[207] Letting go of PA may liberate the states to enact stronger policies to address its failures, such as promoting efficiency and flexibility in water use, protecting public values such as recreation and environmental quality, and strengthening state authority to manage water.

Of course, this new freedom from PA may also allow the states to move in the opposite direction, making it legally easier to secure water rights for consumptive, more-or-less private uses without regard for impacts on other users or the sustainability of the resource. The New Mexico domestic well law and the *Bounds* decision do exactly that; the Washington statute upheld in *Lummi* arguably does too, by expanding the universe of "municipal" water suppliers and preventing scrutiny of their potentially unused water rights.[208] If the states depart from PA only to make it easier for people to obtain or retain entitlements to consume water, they will make things worse rather than better—especially as the effects of climate change make it increasingly difficult to balance the West's water supplies and demands.[209]

The question is whether the western legislatures will enact—and the courts will uphold—statutes that move in the other direction by protecting public values, providing flexibility, advancing efficiency, or promoting forward-looking water management in ways that PA would not. The widespread legal recognition of instream flows is cause for optimism, or at least an indication that positive reforms are indeed possible.

Colorado offers an encouraging example in this regard, and not simply because the legislature enacted an instream flow statute that its supreme court upheld as constitutional.[210]

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207. *See* Getches, *supra* note 7, at 23–42 (describing limited progress toward western water reforms in the 1990s).

208. In fairness to the Washington statute, it also established certain water conservation requirements for municipal water suppliers. *See* H.R. 1338, 58th Leg., 1st Spec. Sess. (Wash. 2003); Sarah E. Mack, *Washington's Municipal Water Law Upheld by State Supreme Court,* 15 W. WATER L. & POL'Y REP. 35, 36 (2010). Thus, the measure arguably advanced progressive water policy goals as well as addressing the concerns of developers and cities.

209. The literature regarding the effects of climate change on western water is extensive. For a recent article dealing with both the projected impacts and the legal and policy implications, see Robert H. Abrams & Noah D. Hall, *Framing Water Policy in a Carbon Affected and Carbon Constrained Environment,* 50 NAT. RESOURCES J. 3 (2010).

210. Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd., 594 P.2d 570, 574–75 (Colo. 1979) (upholding Colorado's 1973 instream flow statute known as Senate Bill 97).

Colorado has beneficially used this authority to develop a relatively robust instream flow program, establishing protected levels in over 1,900 stream segments and lakes by 2005—more than in any other state.[211] Moreover, Colorado has taken steps to revise its laws and invest resources, clearing away obstacles to instream flow protection and restoration.[212] Although Colorado's instream flow program is certainly not an unqualified success, and further revisions could improve its effectiveness,[213] it shows that western states are capable of reforming their water laws and programs to address the chronic deficiencies of PA.

A related question is whether western state water agencies will take actions that deviate from PA in the absence of specific legislative direction to do so, and whether the courts will uphold such actions. Here there may be less reason for optimism, given that state water officials in the West have rarely been famous for taking risks—especially for the sake of protecting public values.[214]

Idaho's conjunctive management rules are one example of an agency taking action without specific statutory authorization, but IDWR was already between a rock and hard place after *Musser v. Higginson*. And when the Idaho Supreme Court upheld the rules in *American Falls,* the primary

211. SASHA CHARNEY, COLO. WATER CONSERVATION BD., DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES 18 tbl. 15 (2005), http://cwcb.state.co.us/public-information/publications/Documents/ReportsStudies/ISFCompStudyFinalRpt.pdf. Oregon was next with 1,550 protected reaches and lakes as of 2005; no other state had as many as 500 at that time. *Id.*

212. *See* Reed D. Benson, *"Adequate Progress," or Rivers Left Behind? Developments in Colorado and Wyoming Instream Flow Laws Since 2000,* 36 ENVTL. L. 1283, 1302–03 (2006).

213. *Id.* at 1304–09.

214. *See* Neuman, *supra* note 28, at 961 (noting that state water agencies play a largely passive role as to existing water uses, and "do not actively seek to define and enforce against waste or inefficient water use . . . . The agencies do not go looking for either forfeiture or waste but simply react to the worst of the complaints brought to them"); Benson, *supra* note 212, at 1301–02 (describing how Wyoming State Engineer Pat Tyrrell denied the Town of Pinedale's request to transfer some of its water to instream use—even though the transfer would not have harmed any other water user—based on a narrow interpretation of Wyoming's instream flow statute). Statutory provisions requiring new permits or transfers to accord with the "public interest" offer another example of state agencies' reluctance to use their authority. *See generally* Reed D. Benson, *Public on Paper: The Failure of Law to Protect Public Water Uses in the Western United States*, 1 INT'L J. RURAL L. & POL'Y, no. 1, 2011, at 1, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984062.

beneficiaries were the private groundwater users who had intervened in the case. In contrast, the New Mexico Court of Appeals recently struck down key portions of the State Engineer's "Active Water Resource Management" rules geared toward strengthening the agency's powers to administer priorities in times of shortage; the court held that the rules exceeded the State Engineer's statutory authority, even though the legislature had specifically directed him to adopt rules to address the serious lack of water management in unadjudicated basins.[215] The court insisted that the legislature could have authorized the state engineer to adopt the rules that he did, but found that it had failed to do so in "direct, clear, and certain terms"[216]—effectively negating an express legislative directive, and blocking the responsible agency from applying its expertise to address the critical problem of water management.

One thing is clear: the state legislatures can now choose to reshape water law to address the problems facing the West today, and tomorrow, without too much concern for the constraints traditionally imposed by PA principles. In making those choices, legislators may be influenced by the expectations created during the years when PA prevailed as state water law, or by the loyal support that PA still has in the agricultural community, especially.[217] But those are political arguments; as a legal doctrine, PA has lost its force. Like the centenarian who founded the company but now has only an honorific title, Prior Appropriation has more symbolic importance than practical influence. In today's western water law, old Prior may still be alive, but he is no longer in charge.

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215. Tri-State Generation & Transmission Ass'n v. D'Antonio, 2011-NMCA-015, 249 P.3d 932, 939–43 (N.M. App. Ct. 2010), *cert. granted,* 2011-NMCERT-002, 150 N.M. 617, 264 P.3d 129 (2011). The legislature had passed a 2003 statute declaring that "the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the [S]tate [E]ngineer has authority to administer water allocations in accordance with . . . priorities," *id.* at 935 (quoting N.M. STAT. ANN. § 72-2-9.1(A) (2003)) (alteration in the original), and directing the state engineer to adopt rules for priority administration, N.M. STAT. ANN. § 72-2-9.1(B). The court held, however, that the legislature had misperceived the state engineer's existing authority. *Tri-State Generation & Transmission Ass'n,* 2011-NMCA-015, 249 P.3d at 937–39.

216. *Tri-State Generation & Transmission Ass'n,* 2011-NMCA-015, 249 P.3d at at 942.

217. *See* Tarlock, *supra* note 15, at 885–86.