



# The Future of Western Water Law:

## Will Prior Appropriation Survive Changing Priorities in Western Water Use?

BY PETER D. MOHR

“Prior appropriation does not distinguish or show preference for one beneficial use over another.

More than 100 years ago, the increasing development of the arid West spurred the creation of informal rules to allocate the region’s scarce water resources among competing users. These rules of local and regional custom were eventually incorporated by the courts into a common law doctrine that became known as “prior appropriation.” The doctrine sought to achieve fairness and order in allocating water to those who had invested their efforts in the reclamation of arid lands through irrigation and other practices. For those who could show they had successfully diverted and applied the

water to such uses, the doctrine provided some certainty in exchange for their labors, confirming in them a water right of a specified amount subject to the demands of older, or more “senior” water rights within the same basin. When water right demands among numerous users exceeded available flows within a particular stream or river, such a priority system allowed for curtailment of the more recently confirmed, or “junior” rights to satisfy the needs of the more senior priorities, thus the genesis of the maxim “first in time, first in right.”

This principle of priority, however, did not entitle the holder of the right at the outset to the entirety of a stream or its remaining flows following the satisfaction of more senior priorities. Rather, such an amount was established subject to the doctrine’s principle of “beneficial use”

which limited the right to that necessary to achieve the “reasonable and economic use of the resource in consideration of other existing and future demands.”<sup>1</sup> Beneficial use therefore determined the “basis, the measure, and the limit of the right” as a means to both maximize and avoid waste of the resource.<sup>2</sup>

By awarding a water right to be met in temporal priority in times of lesser flows, prior appropriation provided a level of risk management that is often credited with fueling the economic engine, which subsequently drove western development. The doctrine became so widely accepted that it would be codified in statute by most western states by the early part of the 20th century. Today, prior appropriation remains firmly entrenched within the laws administered by state courts and

administrative agencies as they address the establishment, continued ownership and use of rights in surface water and (to a more limited extent) ground water throughout much of the west, approximately 75 to 80 percent of which remains dedicated to agricultural use.<sup>3</sup>

Although the last three decades have seen an increasing change of irrigation water rights to non-farming and largely urban uses, this transition is of little or no legal significance to the future of the doctrine itself. Unlike many state and local zoning laws which dictate preferred land use patterns, prior appropriation does not distinguish or show preference for one beneficial use over another. The type and place of use of a water right may typically be changed subject only to the limitation that the proposed use is both beneficial and will not diminish or result in “injury” to another water right.<sup>4</sup> And although the use and place of use of a water right may be altered, the original priority date—as the most valuable characteristic of the right—remains the same. Therefore, once having successfully changed a water right, and regardless of what the new use may be—industrial, commercial, instream use for the improvement of fish habitat, etc.—the entitlement to water under the original priority date remains and, with it, the market value associated with such a priority based on its relationship in time with other competing rights in the basin.

Given this ability to change water rights to a variety of non-farming uses, and that senior and junior rights alike may be bought and sold like other property for application to any beneficial use, proponents of prior appropriation argue the doctrine will remain viable well into the future. It is notable that such arguments are made in the face of a western economy showing an increasing reliance on more commercial and urban development and federal laws emphasizing the need for improved protections for endangered species. There are critics of course who advocate prior appropriation be stricken from the law

altogether, often claiming that because the doctrine currently vests a large percentage of control and use of the water in a relatively small percentage of private interests, too little opportunity exists to dedicate such resources to more public interests such as the protection of endangered species. The same critics, however, fail to consider the orderly administration and certainty that prior appropriation affords compared to what might occur if the West were somehow compelled to proceed without it. Few if any reasonable alternatives exist that would maintain such a high level of orderly distribution in the management of western water supplies.<sup>5</sup>

History provides plenty of evidence that prior appropriation can accommodate the transition to uses that the modern West increasingly demands, including those uses dedicated to the protection of endangered species.<sup>6</sup> Still, many question how the doctrine can and will respond to federal laws which increasingly preempt it, thereby restricting vested water rights from diverting otherwise available flows. This article submits that there is no need for prior appropriation to be altered or changed to address existing and future western water supply issues. Rather, the past and the present show that prior appropriation “as-is” can accommodate such demands and will remain the foundation for allocation of the resource for the foreseeable future.

Currently, the most substantive challenge to any strict application of the doctrine is the Endangered Species Act (ESA) with its demand for instream flows sufficient to protect listed species. Therefore, particular consideration will be given to the ESA not because it is the only factor that will affect future allocations under prior appropriation, but because it has become the most significant to date.

With some exceptions,<sup>7</sup> prior appropriation has historically determined the allocation of water throughout much of the western United States. Entrenched as it has become, however, strict application of the

doctrine has not fared well in response to water demands to protect listed species under the ESA. Most courts have held the ESA preempts any application of state authorized water rights, regardless of priority, in cases where such diversions would result in the “take” of a listed species.<sup>8</sup> See, e.g., *United States v. Glenn-Colusa Irr. Dist.*, 788 F.Supp. 1126, 1134 (E.D. Cal. 1992)(stating in part that the ESA “provides no exemption from compliance to persons possessing state water rights, and thus . . . state water rights do not provide . . . a special privilege to ignore the Endangered Species Act [.]” Hence, while prior appropriation still governs the allocation of water throughout the West, it can be trumped by the ESA for a specified period of time to ensure necessary flows for endangered fish. However, such events should hardly be construed as evidence of the doctrine’s future demise.

Significant conflicts continue to arise where water right diversions have either been subordinated to such “super priority” rights of the ESA, or diminished due to the intervention of federal reserved water rights in recognition of Native American tribal claims.<sup>9</sup> However, when evaluating options to resolve such disputes, it is prior appropriation that has provided solutions to meet both ESA and Tribal needs while still providing relative security for users’ affected water rights interests. Two good examples of this exist in Idaho with the implementation of the Lemhi Conservation Plan and the 2004 Snake River Water Rights Agreement.<sup>10</sup>

In the case of the Lemhi Conservation Plan, an instream flow right and an accompanying water right leasing program were established to avoid further dewatering of the Lower Lemhi River and the resultant harm to salmon. As a result of the plan, legislation was enacted enabling the establishment of an instream water right for the affected portion of the Lemhi River and to allow senior water rights to be leased to the state water bank. Once leased to the state water bank, the senior water

rights are then applied to maintenance of the state instream flow right. In doing so, the instream flow right also enjoys the protection of senior priority dates thus assuring the maintenance of sufficient flows for fish to the exclusion of more junior water interests. While the plan prevented the initiation of any ESA litigation, it has also provided security for senior water rights which users lease or, in some cases, permanently convey, to the state water bank in consideration of payments funded through a variety of different programs.<sup>11</sup>

The 2004 Snake River Water Rights Agreement addresses water demands for ESA listed species, federal reserved water rights to Nez Perce tribal claims, and existing and future demands for state and private water needs. The Agreement consists of three components – the Upper Snake River Component, the Salmon Clearwater Component, and the Tribal Component. In the Upper Snake River Component, the Bureau of Reclamation leases up to 427,000 acre-feet of water from willing sellers for flow augmentation for fish below Hells Canyon Dam. Similarly, under the Salmon Clearwater Component, the Bureau leases from the State of Idaho 60,000 acre-feet of water to create reliable flow augmentation to cover the 30-year biological opinion addressing the operation of Bureau projects under the ESA. The State of Idaho was able to lease the water as a result of its prior purchase of 75,000 acre-feet of direct flow water rights previously used to irrigate lands lying at an elevation more than 500 feet above the Snake River. And under the Tribal Component, the Nez Perce were assured of water under reserved rights possessing an 1855 priority date while also avoiding any adverse affect to existing water rights. As with the Lemhi plan, all three of the 2004 Snake River Agreement components demonstrate how the flexibility of prior appropriation can be used to address the water demands of the ESA and Tribal claims while still protecting private water rights.<sup>12</sup>

Finally, increasing restriction of water diversions to avoid harm to listed species

has brought an increase in Fifth Amendment takings litigation. The success of any Fifth Amendment takings claim is often dependent on whether the government action at issue can be considered a “physical” or “regulatory” taking. Most simply stated, a physical taking requires evidence that the government has taken control of or seized property for its own use. A regulatory taking requires a different analysis altogether, instead considering the extent to which the economic and otherwise productive use of private property has been so diminished by regulation as to effectuate a taking of such interests.

In 2008, a very much divided United States Court of Appeals for the Federal Circuit in *Casitas Municipal Water District v. United States*, 543 F.3d 1276 (Fed. Cir. 2008), rehearing denied, 556 F.3d 1329 (Fed. Cir. 2009), addressed the distinction between a physical and a regulatory taking when water and related water rights are at issue. In 2005, the district sued the United States in the Court of Federal Claims after having been compelled under a biological opinion issued by the National Marine Fisheries Service to annually forgo up to 3,200 acre-feet of the district’s water right from the Ventura River that it otherwise would have stored in the Lake Casitas reservoir. Once the water in dispute was diverted, the biological opinion required that it not continue on throughout the length of the existing canal to then be stored into the reservoir, but rather be rerouted for the sole purpose of operating a fish ladder for listed steelhead trout. The *Casitas* majority held that by rerouting the water from the canal to the fish ladder, the government took exclusive possession of the water, which in turn amounted to a physical taking of the district’s property. The dissent countered that the diversion of the water to the fish ladder could only be analyzed as a possible regulatory taking since the government did not “invade, seize, convey, or convert *Casitas*’ property to a consumptive or proprietary use,” but rather imposed regulatory operating criteria to ensure compliance with the ESA.

While the decision was sent back down to the Court of Federal Claims for further

proceedings, it remains uncertain whether the majority’s opinion in *Casitas* will be limited to the particular facts of that case. Some speculate that may be possible given the water to which the district was entitled was rerouted to the fish ladder as compared to the more typical ESA enforcement dispute where water rights are simply restricted from further diversion as a means of maintaining instream flows. It is also worth noting that there are two other water rights takings cases currently pending before the Federal Circuit, which may result in further clarification of the *Casitas* holding. See, *Klamath Irrigation District v. United States*, 532 F.3d 1376 (Fed. Cir. 2008); and *Stockton East Water Dist. v. United States*, 583 F.3d 1344 (Fed. Cir. 2009), rehearing pet. pending. Regardless, any compensation award resulting from a physical taking determined under any of these cases is apt to only further entrench rather than diminish the doctrine and the property interests vested thereunder. As aptly stated in a recent article by the attorney who argued the cause for the federal government in *Casitas*, “If construed more broadly to apply to any restrictions on water diversions, . . . *Casitas*’ impact could be substantial, as the competition for water between fish protection and consumptive use grows.”<sup>13</sup>

### Conclusion

Prior appropriation will continue to provide for the orderly allocation of western water supplies as well as provide the necessary flexibility to accommodate the changing water needs of the West including those that seek to ensure the protection of endangered species. However, where negotiated solutions cannot be reached to address the increasing conflict between vested rights to divert water and the maintenance of instream flows, more Fifth Amendment takings claims can be expected to follow. With the *Casitas* decision presenting a significant yet somewhat uncertain marker in the development of takings jurisprudence related to water and water rights, it is too difficult to determine just how much affect this and other takings cases will have on the future relationship between prior appropriation and the ESA.



Hell's Canyon and the Snake River.

In addition, any existing challenges in meeting western water demands are apt to become even more pressing in the event of anticipated climate change. There is an expectation that climate change will more likely than not alter precipitation patterns that will produce basin flows appreciably different from what we experience today. Any future changes in climate that increasingly challenge year round access to surface and ground water supplies are apt to be accompanied by an ever-louder call for greater efficiencies to maximize the resource. If prior appropriation's own measure of a water right—as established under the principle of beneficial use—could be fully enforced, the resulting curtailment of wasteful practices could go a long way to achieving among the greatest of public interests in the West: the availability of a more certain water supply. ■

### About the Author

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### Endnotes

<sup>1</sup>F. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 *Wyoming L. J.* 1, 6 (1956). Author's note: Although a core element of prior appropriation, such a principle is also commonly referred to as the "doctrine of beneficial use." See, note 2, *infra*.

<sup>2</sup>*Id.* See also, Janet C. Neuman, *Beneficial Use, Waste and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 *Envtl. L.* 919, 978 (1998) for discussion about obtaining efficiencies under the doctrine of beneficial use.

<sup>3</sup>See Congressional Budget Office, *Water Use Conflicts in the West: Implications of Reforming the Bureau of Reclamations Water Supply Policies* (1997) at <http://www.cbo.gov/doc.cfm?index=46&type=0&sequence=0>.

<sup>4</sup>By example only, see Oregon Administrative Rule 690-380-0100(3) which defines "Injury" or "Injury to an existing water right" within a transfer or change of use proceeding to mean when a proposed change of use "would result in another, existing water right not receiving previously available water to which it is legally entitled."

<sup>5</sup>See Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 *Natural Resources Journal* 769, 778 (2001) (discussing the principles of riparian law, reliance on ad hoc judicial determinations, and the public trust doctrine as wholly ineffective substitutes to prior appropriation for allocating water in the West.)

<sup>6</sup>For example, Washington State among others has enacted statutes that fund water conservation in return for title to the water conserved, which is then held in the state trust water rights program where it can be applied for maintenance of instream flows. *Wash. Rev. Code Ann.* § 90-42-030(2) (2004).

<sup>7</sup>See *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). This case further discussed at note 9, *infra*.

<sup>8</sup>The ESA prohibits any person from taking, possessing, selling, importing, exporting or transporting a protected species. The ESA also provides for identification of a critical habitat for each species and adoption of regulations which will conserve and enhance the population of the species. 16 U.S.C. § 1533(b)(2) and (d). Under the ESA, "take" means "to harass, harm, pursue, hunt, capture, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

<sup>9</sup>See *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908) (holding held that federal reserved water rights, although not previously established under prior appropriation, nevertheless existed for future use in an amount necessary to fulfill the purpose of Native American reservation treaties and assumed a priority date equal to the date the reservation was initially established). Such rights are often vigorously contested since they typically assume among the most senior priority dates in any affected basin.

<sup>10</sup>The Klamath Basin Restoration Agreement entered into just this past February among the Klamath Basin Tribes, the federal service agencies, the States of California and Oregon, public interest groups, and private water users may prove to be yet another example of such effective cooperation among the traditionally divergent interests of species protection and the diversion of water for consumptive use.

<sup>11</sup>Of the 35 c.f.s. that is required to maintain minimum flows for fish, 14 c.f.s. has been permanently committed to such use through outright acquisition of senior water rights. Phone conversations with the Idaho Dept. of Water Resources Staff (April 27, 2010).

<sup>12</sup>Such an approach also coincides with the congressional policy directive of the ESA "that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C.A. § 1531(c)(2). See also, Clive Strong, *Is the Prior Appropriation Doctrine a Relic of the Past or the Foundation for Resolving 21st Century Water Supply Demands?*, paper submitted to the ABA 24th Annual Water Law Conference (Feb. 2006).

<sup>13</sup>For a summary discussion of Casitas, see Katherine J. Barton, *Takings and water rights: Casitas Municipal Water District v. United States*, *TRENDS*, ABA Section of Env., Energy, and Resources Newsletter, at p. 6 (March/April 2010).