



ADDRESSING WATER SHORTAGES WITH PRIOR APPROPRIATION PRINCIPLES

BY PAUL G. TAGGART, ESQ.

Nevada’s water law is based on the doctrine of prior appropriation.¹ That doctrine is easy to understand. The first person to initiate the use of water from a particular source has priority. Early-priority water rights have a legally protectable interest against any users that come to a water source later. For instance, when the Carson, Truckee, Walker or Humboldt Rivers do not have enough water in a particular year to meet all water rights, existing river supplies are delivered only to senior water right holders until the supplies run out. Unlike a pro-rata system where all owners would suffer the same quantum of shortage, prior appropriation cuts junior rights to zero and allows senior rights to be met in full.

The economic rationale for the prior appropriation system is sometimes forgotten. In the west, water is scarce and often needs to be moved from its original location to its place of use. Activities like mining and agriculture require water, and moving that water to where it is needed often requires a substantial investment. Before a market participant will invest in

such infrastructure, adequate assurances are needed to protect that investment. Early Nevadans made these investments in reliance on the system of laws that protected their right to water against those who arrived later.

Francis Newlands, as a U.S. senator from Nevada, illustrated this principle when he sponsored the Reclamation

Act of 1902, which authorized the construction of federal water projects across the west.² To protect the U.S.’s investment in its first reclamation project (Nevada’s Newlands Project), the U.S. initiated quiet title actions to adjudicate the water rights that had been initiated from the Truckee and Carson Rivers. Those actions resulted in the Orr Ditch and Alpine Decrees that govern those rivers today and protect the water rights made possible by the U.S.’s investment.

The priority system also creates clear rules that allow economic markets to operate with limited transaction costs. Buyers and sellers can understand the relative value of water rights based on their priority. Thousands of water-right transactions have been executed in reliance on this system, and substantial sums have been invested to build infrastructure. In this sense, the effective enforcement of priority rights is critical to protect investment-backed expectations.

Early Nevadans initiated water rights based on prior appropriation principles, before Nevada adopted a statutory water code. Water rights initiated prior to the adoption of the statutory water law are known as “vested rights,” and are protected from any impairment by statutes put in place later (NRS 533.085). This protection has constitutional dimensions. When the water statutes were adopted, the Nevada Supreme Court, with Justice Patrick McCarran concurring, clearly stated that the new statutes cannot empower the Nevada State Engineer to identify, quantify or impair the rights that were initiated before the enactment of those statutes. Only Nevada’s courts have the power to finally determine those rights.³

These pre-statutory rights are often referred to as “vested water rights.” Surface water rights initiated before 1905, and groundwater rights initiated before 1939, are in this category. The term “vested” connotes two ideas. The first is the common notion that the rights came into being based on common law rules that existed before water statutes were adopted. The second is more important because it implicates the Due Process Clauses of the Nevada and United States Constitutions. A threshold question in due process cases is whether or not the claim involves the impairment of a right that has vested. If it does, the right is a property right protected from being taken by the government, without due process of law and just compensation.⁴ Pre-statutory water rights vest based on compliance with the pre-statutory water law.

When Nevada’s Legislature adopted statutes to create the Office of the State Engineer, it created a statutory permit system that incorporates the principles of the prior appropriation system. NRS chapter 533 governs surface water and NRS chapter 534 governs groundwater. Those chapters codified the common law principles of prior appropriation, and gave the Nevada State Engineer the responsibility for administering statutory water rights. The engineer grants statutory

water rights based on a priority system that protects senior right holders against conflicts caused by holders of junior rights. The system does not prevent granting permits to junior appropriators, as long as, “the rights of holders of existing appropriations can be satisfied.”⁵

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In fact, “[p]riorities are only meaningful in times of shortage (NRS 534.110(6)),” and “[t]o deprive a person of his priority is to deprive him of a most valuable property right.”⁶

Water shortages can occur based on drought or over-appropriation. Over-appropriation occurs when too many water rights are issued. For example, in Diamond Valley, Nevada, the Nevada State Engineer’s Office has issued 130,000 acre-feet

of groundwater water rights. Currently, estimates indicate that only about 30,000 acre-feet are naturally replenished to the aquifer each year.⁷ Because of this, groundwater levels in Diamond Valley have fallen more than 100 feet since the 1970s.⁸ These conditions led the Nevada State Engineer to designate Diamond Valley the first Critical Management Area in Nevada in 2015 (NRS 534.037, NRS 534.110(7)). That designation requires the engineer to curtail over-appropriated water rights if a groundwater management plan for Diamond Valley is not approved within 10 years (NRS 534.110(7)(b)). But the Nevada State Engineer also retains the discretionary ability to curtail over-appropriated water rights before the expiration of that 10-year period.

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TRUCKEE RIVER, DOWNTOWN RENO.
Photo by Scott G. Wasserman, Esq.

Groundwater pumping in Diamond Valley has caused natural springs to go dry.⁹ Vested water rights exist at many of those springs. The largest is Shipley Spring, which provided water for Sadler Ranch. Reinhold Sadler, who served as Nevada’s governor from 1896 to 1903, operated Sadler Ranch. The spring flow at Shipley Spring is currently at only one-tenth of what it was during Sadler’s time. Sadler Ranch’s owners have sought a mitigation water right to remedy the impact to Shipley Spring; those efforts have been opposed by Eureka County and junior groundwater pumpers in Diamond Valley.

Groundwater users in Diamond Valley are developing a groundwater management plan (GMP) to avoid the curtailment of junior water rights otherwise required by prior appropriation.

The draft GMP is based on an Australian model. In one part of Australia, a water-share system was developed through which water rights were converted to shares in a corporation. Each shareowner gets a proportionate share of the entire water supply, controlled by the corporation based on the number of shares they own. Under this system, shareholders participate equally in pro-rata reductions in the water supply, instead of cutting off junior water users completely.

The Australian plan’s departure from prior appropriation principles raises a number of obvious concerns. First, senior groundwater holders have protectable property rights. If their appropriations cannot be satisfied, they are entitled to see junior appropriators curtailed. To convert to a share system, these senior water rights holders would have to voluntarily waive their senior status. Second, the Australian plan does not address the impact of junior groundwater pumping on senior vested water rights. Since those pre-statutory water rights cannot be impaired by new statutes, a GMP cannot be approved that will impact vested water rights. Nor could a GMP force the conversion to shares of mitigation groundwater rights that are issued to replace impacted vested water rights.

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Prior appropriation principles can resolve modern water shortages. Junior water right holders can respond to water shortages by:

- Purchasing senior water rights,
- Paying to improve the efficiency of senior water use, or
- Providing either monetary compensation or replacement water, if they capture senior water rights.

For instance, in Utah, a junior water-user can take water from a senior water right-holder in order to satisfy municipal water needs, as long as the holder of the senior right is given just compensation.¹⁰ In Nevada, these options require better administrative tools to increase the ease of acquisition and limit transaction costs. If such tools are used, junior water users can effectively address water shortages without altering the prior appropriation system that has served Nevada so well. **NL**

1. *Lobdell v. Simpson*, 2 Nev. 274 (1866).
2. See 43 U.S.C. § 383.
3. *Ormsby County v. Kearney*, 37 Nev. 314, 142 P. 803 (1914).
4. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Wal-Mart Stores, Inc. v. County of Clark*, 125 F.Supp.2d 420 (1999).
5. *Phillips v. Gardner*, 469 P.2d 42, 2 Or 423 (1970).
6. *Whitmore v. Murray City*, 154 P.2d 748, 107 Utah 445 (1944).
7. State Engineer Ruling 6290, pages 10-11.
8. State Engineer Ruling 6290, page 23.
9. State Engineer Ruling 6290, page 31.
10. Utah Code § 73-3-21.1 (2014).



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