Is Prior Appropriation Dead?

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Editor's Note: The following is an unedited, direct transcription of the presentation by Em Hall.

Thanks very much. It's nice to be here. It's also nice to come relatively late after a series of speakers. John Shomaker said that I would answer all of the questions, and I was terrified at that prospect. Then State Engineer Scott Verhines came on and answered all of the questions that Shomaker might have had. So I am working on a blank slate, which is where I am better off, especially at this time of the day, after we all have had lunch and probably need to take a nap.

Cathy Ortega Klett asked me to speak at this year's conference. She gave me the title for the talk—is prior appropriation dead? It's hard to swallow a mouthful like that, especially in the twenty minutes provided to me, but Cathy and I decided I would focus on the priority part—the part of Article 16 Section 2 of the state constitution that simply says that priority in time should give the better right. There are only a few words there. The important part is that it is in the state constitution. That has a lot of meaning in terms of its impact.

But, even limited to the question of priority, within the doctrine part of appropriation, it's hard to think of a title like that without the nod to Mark Twain, who has been with us since before this morning. When Mark Twain was asked how he liked the fact that his death had been reported, Twain said, "Well, reports of my death have been greatly exaggerated." Also exaggerated has been the guarantee in Article 16 Section 2 that priority in time should give the better right in times of shortage. The priority doctrine flickers around in the history of water in the state, mostly in the deep background of water politics, and almost never in the actual allocation of varying and short supplies. You need to recognize that what looks like a simple command in the constitution has much deeper and harder to see meaning with respect to what is going down. So despite the fact that people are saying that we had better pick up that priority appropriation is dead, priority is back, and no fear that it ever was dead.

In my short time here this morning, I want to focus on two very recent New Mexico Supreme Court decisions, the 2012 *Tri-State* case and *Bounds* in 2013, and suggest to you how they may not have eliminated priority so much as shifted the doctrine's angle of repose in western water law, and in New Mexico law. In that posture, I think that the question that needs to be asked is not whether the two decisions have killed priority, but in what form have they resurrected a doctrine that has been moribund for a long time in this state.

When Steve Reynolds, who was my mentor and friend, used to give speeches like this, he would begin by saying, "I think it is good to start off with a little bit of history." I'd like to give you six points of priority history in New Mexico to show you how convoluted and obscure the priority doctrine has been in this state. All of them demonstrate the fact that priority isn't what it seems, and then we'll try to talk about what it will become.

Point one: pre-1848 Spanish-New Mexican water rights. Here is the thing—there was no such thing as strict priority enforcement in Spanish-New Mexican water law prior to 1848. Under pre-United States law, the priority was only one of many factors that was used in order to determine by public entities how best to distribute supplies. It wasn't the single factor that it is in the state constitution. It was one of many factors. I start here

because it is historically interesting, and to try to clear up some historical misconceptions, because, of course, New Mexico said that New Mexicans have followed the doctrine of prior appropriation before Queen Isabella's will in 1493. That is not true. There have been important changes, and one of them is the doctrine of priority.

Point two: a bad Californian idea. Better legal right that priority conferred under post-1848 American law emerged only after 1848. A ferocious rule that seniors that had priority to all the water to which they were entitled before "no sharing shortages" came from the Sierra Nevada gold fields in California and was picked up here in the 1870s and 1880s, and confirmed by a series of U.S. Supreme Court cases including *Keeney vs. Carrillo* in the late 19th century. It came from California, and took hold here, but never was implemented.

Point three: priority in Article 16 Section 2 of the state constitution protecting Hispanics. Yep, here is the priority provision, but it got in late when the 1912 Constitution was being drafted, and only got in there because Dan Cassidy of Mora County (the Mora county delegate to the constitutional convention that drafted the constitution) insisted that provision be added. Before that, it was just beneficial use shall be the basis, the measure, and the limit of the right to the use of the water. Cassidy insisted on the priority provision in the constitution in order to guarantee water rights for existing, largely Hispanic, largely acequia water rights from what people knew were the rapacious plans of the United States to add to and change the water institutions of the Southwest.

Point four: priority in the 1947 Pecos River Compact. We are jumping now a long way, but it is a subject that will come up again today. Tracy, and other Carlsbad participants in the drafting of the 1947 Pecos River Compact were allocating the water between Texas and New Mexico, insisting on the insertion in the compact of a provision that said New Mexico would follow New Mexico law, including priorities, in order to make up Compact shortfalls at the state line. The reason Tracy did that was that he was terrified that existing federal law said a state can get Compact water wherever it wants. If that rule had to be applied, the easiest place to get Compact water in case of shortage, was from downstream senior Carlsbad. Carlsbad people said, we're not in favor of that Compact unless you put in a provision that says that you will enforce priorities (presumably against the junior upstream Roswell wells).

Point five: groundwater-surface priority nightmares on the lower Pecos. In 1976—and I don't know if there has ever been a priority call of this magnitude before—Jay Forbes, who was the Carlsbad Irrigation District (CID) lawyer, and who became a district judge in Carlsbad, called the priorities on the Pecos River against junior upstream Roswell wells. Forbes demanded that Roswell wells be shut down in order to guarantee the full supply of water—strict priority—to the CID and its members. Initially, and this hasn't been much noted, State Engineer Steve Reynolds said, alright, this is what I am going to do. I am going to build a well field in the northern Roswell extension where the Corn family has extensive groundwater rights in that system. If the CID, or the Pecos River Compact is short, I am going to pump those wells after the fall irrigation season, and the next spring. I'm going to shut down the Roswell wells in the amount that I had to pump the state wells in order to get the water to CID and to the Compact. This was true enforcement of surface to ground priority, and Reynolds, as smart as he was, figured out immediately one way to solve the dilemma of how you pull surface to ground priorities. It's a dilemma, but Reynolds figured it out. Reynolds, having cooked up the solution, then decided he couldn't do it. His lawyers said there was no completed adjudication, and you can't enforce priorities until your adjudication is finished, which postponed the enforcement of priority on the Pecos, well, forever I think. Later this afternoon we are going to hear what led to the settlement with Roswell and Carlsbad that produced this situation. We will hear from Greg Lewis who is New Mexico's Pecos River Basin Manager and who is in charge. The point about the well fields is in the south—in the Three Rivers area of the Roswell Basin—is that that is not priority enforcement. Reynolds' initial decision was priority enforcement. The very expensive buyout and implementation of the state well field south of the Roswell Basin was not priority enforcement. You'll notice that in the examples that I have given, there has been no actual time that priority has significantly affected distribution of water. All we have been doing is fighting about the idea of priority and how it might be implemented rather than priority enforcement.

In the last 20 to 30 years, there have been efforts to actually enforce priorities in such a way as to affect the actual allocation and distribution of water. Let me give you a couple examples of those including some situations to which State Engineer Scott Verhines referred. One that seems to have worked is on the Rio Chama as State Engineer Verhines described. It was a complicated series of adjustments that resulted in full supply to the senior rights holders without any drastic detriment to junior rights holders. It was done by local enforcement that honored priority, but developed a flexible scheme toward implementation. Much more typical in the world of priority has been a recent suit by Los Lunas farmer Janet Jarrett, who owns the prior right on the Rio Grande. Jarrett sued the Middle Rio Grande Conservancy District (MRGCD) because the district refused to distribute district water by priority and to her detriment she said. What you had was a conflict between the state constitution, priority in time, priority should give the better right, and the state statute that authorized the MRGCD to distribute water in any way it wanted. For those of us who have been to law school, it looked like the state constitution might win over a state statute. That lawsuit disappeared in smoke this year of a very difficult civil procedure. It may come back, but it is one of the few instances where you see an individual trying to enforce priority against anybody, including the MRGCD.

As I said before, the history of priority enforcement in New Mexico has shown, despite the constitutional provision, that it has never been implemented in the state and never used. The question now is what the 2012 *Tri-State* and the 2013 *Bounds* decisions, both of which seem to honor priority without doing much about it, will do to the priority doctrine in New Mexico. I think the safest thing to say is that both those decisions damn priority with "faint praise and assent with civil leer"—which is Alexander Pope's description from 18th century poetry—and leave priority in worse shape than it has ever been, but in a different place.

You'll recall that the 2003 Active Water Rights Management (AWRM) statute got the *Tri-State* ball rolling, and the grounds on which it was attacked on its face was that it conferred on the state engineer powers that were broader than he could implement. Previous cases said there could be no priority enforcement, even interim priority enforcement, unless it was based upon a court decree with respect to relative priorities, and a judicial proceeding that allowed people to protest. That was clearly not going to be true with respect to the AWRM regulations that encourage the state engineer to administer priority on the basis of best available information to him. One district court judge disagreed but the state Supreme Court reversed and said these regulations are fine. Now we will find out what the AWRM regulations mean in terms of a constitutional guarantee that priority in time should give the better right.

The takeaway from what I am telling you today is that you are going to need to pay very careful attention to how. . . given AWRM regulations, the state engineer balances the management of natural resources with the promise that priority will be protected within those regulations. I think you will see a much richer array of priority enforcement techniques in AWRM regulations than you ever did before. There will be rotation. There will be augmentation agreements. People will agree not to irrigate in order to protect the prior rights of people who will be affected by that irrigation. In other words, I think priority is going to go underground, as it should, because it is only one of many factors in the distribution of water. And no mechanical rule, which is the old priority, is going to serve either prior owners or junior owners who depend on that water as well. That is my prediction and I think that it ought to happen.

Let me just say that *Bounds*, in 2013, took a slightly different tact, because it said that the state engineer didn't have to consider priorities when it issues a domestic well permit. There is a variety of legal reasons for that, but it absolved the state engineer of the priority business. *Tri-State* put it deep into the priority business and invited a flexible honoring of that decree in those AWRM decisions. *Bounds* said, at least with respect to domestic well permits, the state engineer didn't have to consider it at all. But, *Bounds* said private people could sue to enforce priority and encouraged *Bounds* to sue the upstream domestic well owners. What you may see is what we have never seen in New Mexico—private suits to enforce priority against junior appropriators. You demand not from the state engineer but from the guy up the stream. Just like in California, you tell him to shut off his ditch or you are going to make him pay for the damages that result from you not getting your full supply. That is ultimate private enforcement of priorities.

You may see some of that, and you see it a little bit in the Janet Jarrett case in the MRGCD. There might be more private efforts to enforce priorities, and that is really what the state constitution seems to mandate.

The state engineer decentralized many controls, a flexible response to priority considerations that is from the old pre-1848 Spanish, and individual lawsuits against junior appropriators for water, which you'll never get, but maybe damages for having a short supply. This matter is pretty vague, it will be very different than it is now, and the world of priority will switch.

Thank you very much.