

# **The Argument for the Prior Appropriation Doctrine to Allocate Water in the Western U.S.**

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a report prepared by the family farm alliance  
September 2015



Protecting and enhancing  
Western irrigated agriculture

# The Case for the Doctrine of Prior Appropriation to Allocate Water in the Western U.S.

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*“Water... symbolizes such values as opportunity, security, and self-determination... Strong communities are able to hold on to their water and put it to work. Communities that lose control over water probably will fail in trying to control much else of importance.”*

*Helen Ingram: Water Policies: Continuity and Change, quoted in Bates, Getches, MacDonnell, Wilkinson, Searching Out the Headwaters, p. 182 (Island Press 1993) (copyrighted 1993 Natural Resources Law Center, University of Colorado, School of Law).*

## EXECUTIVE SUMMARY

Lately, critics of California's water rights system have been using the drought crisis as a forum to advance their claims that Western water rights laws are outdated and hampering efforts to address the state's historic drought. The Family Farm Alliance position is that the Western system of prior appropriation still fundamentally works. The intent of this paper is to explain the prior appropriations doctrine and identify related general misconceptions about it. The paper identifies the key criticisms of the prior appropriations doctrine and provides responses from the perspective of Western agricultural water users.

In general, critics claim that California's water rights system is outdated and hampering efforts to address the state's historic drought. This paper demonstrates this is not the case. For example, a key criticism of the prior appropriation doctrine is that it allegedly fosters inefficient and wasteful uses of water. Actually, individual Western states in recent years have provided water right holders with economically sound conservation strategies that serve to protect against the loss of their water rights. Claims have also been made that the rigid nature of the prior appropriation doctrine complicates water transfer opportunities and hurts the environment. In fact, water transfers are actually routine in many areas of the West, including California. There are specific examples that show how the water rights system protects public trust resources, which further emphasizes that resolving environmental issues

requires balance. Finally, critics of the existing water rights system claim that holders of junior water rights suffer unnecessary hardship during times of drought. This criticism ignores the advance notice and risk-benefit analysis, which is inherent in the pure prior appropriation system.

Amidst the allegations that the prior appropriation doctrine is flawed and should be reconsidered have come calls that the existing water rights systems should be reformed. The Australian model that has been offered as a possible template to replace the water rights system employed in California and the Western U.S. has serious flaws that are not often discussed in the public dialogue surrounding this matter. We believe that dismantling the doctrine of prior appropriation in the West would destroy the benefits associated with generational ownership of water rights and undermine the considerable investments made based solely on those water rights. Further, the certainty desired by all users of water would be eroded. Plus, any public "taking" of water rights would violate the Fifth Amendment of the U.S. Constitution, where the government would have to compensate the owner of the right if it is going to be taken away or restricted. The paper concludes that the doctrine of prior appropriation and the need for certainty in Western states' allocation systems make it the cornerstone of Western water resource allocation policy.

## BACKGROUND

California is suffering the worst drought in recorded history. After four years of hot and dry weather, nearly 47% of California is now experiencing “exceptional” drought conditions, which are characterized by widespread crop and pasture losses, and shortages of water in reservoirs, streams and wells.<sup>1</sup> The record dry conditions of the past few years, coupled with water supply reductions related to regulatory (Endangered Species Act/Clean Water Act) actions, resulted in water supply reductions or constraints for most sectors even before California Governor Jerry Brown issued an executive order in April that imposed a 25% reduction on the state’s 400 local water supply agencies over the coming year.

Currently, 44% of California’s 9.6 million acres of irrigated farmland are receiving zero surface water allocations from state, federal and local irrigation projects, according to the California Farm Water Coalition Agricultural Water Supplies Survey. Almost 75% of the state’s irrigated farm land, nearly seven million acres, will receive 20% or less of its normal surface water supply. And, according to the California Department of Water Resources (DWR), 692,000 acres of farmland were fallowed in 2014 because of water shortages.

Individual farmers and irrigation districts with the oldest water rights in the State are experiencing severe reductions this year. For the second year in a row, many agricultural water users are receiving no allocations at all from the federal Central Valley Project (CVP), one of the largest water projects in the world. Settlement contractors, primarily agricultural water users, have water rights that predate the federal project, making them priority rights on the system, yet they elected to enter into settlement contracts years ago to facilitate the development of the CVP. Even allocations to those senior water rights and contract holders are being reduced. Almost as large as the federal CVP settlement contractors, California’s State Water Project (SWP) will cut contract quantities by 50

percent to prior right holders and settlement contractors on the Feather River system in 2015.

In most areas where surface water supplies have been severely reduced or eliminated, farmers have turned to groundwater to maintain their permanent crops – grape vineyards, tree fruits, nuts, citrus – that represent a lifetime of investments. But groundwater supplies are not infinite and were severely depleted in 2014 in areas that received no surface water. Often, farmers tear out mature, productive trees and vines and replace them with saplings that won’t produce a crop for years, but require far less water to keep alive now. And in some places, mainly the citrus belt in the Friant Division of the CVP, there is no groundwater at all. The many small farms there, which produce a large percentage of the nation’s oranges, had their surface water cut off for the first time in 60 years last year. Most of those farms will receive no surface supplies again this year, and as a result decades-old orchards are being bulldozed out of existence.

Certain critics of California’s water rights system are using the drought crisis as a forum to advance their claims that Western water rights laws are outdated and are hampering efforts to address the state’s historic drought. Most of these ideas are being floated by individuals from academic institutions and environmental organizations. Other criticisms, understandably, come from water right holders with junior priority dates who have been curtailed. Some of these proponents have even suggested that legal or legislative actions will be pursued if state lawmakers do not act to reform the system. Gov. Jerry Brown has publicly suggested that the system of water rights might need to be re-evaluated if the drought continues.

The Family Farm Alliance position on this matter has long been one that the Western system of prior appropriation still fundamentally works. This issue is a significant one for our Western

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<sup>1</sup> U.S. *Drought Monitor*, June 30, 2015. <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA>



family farmers and ranchers. The intent of this paper is to objectively investigate and respond to criticisms aimed at the doctrine of prior

appropriations, and to reaffirm our long-held and solid policy positions on this matter.

## **WORKING WITH PRIOR APPROPRIATION**

For more than a century, the prior appropriation doctrine has been the underlying principle for water law in western states. It uses the principle of “first in time, first in right,” which means the first person to put water to a beneficial use is granted a right to continue that use without interference from those using it later.

When the prior appropriation doctrine was first implemented, most states did not have a system for recording and documenting water rights. Without formal documentation, right holders needed to find ways to verify priority dates, the amount of water put to beneficial use and without waste, the point of diversion, and the place of use – key components of a valid water

right. The best evidence of first use was the date the water was physically diverted from the stream. Diversions became an essential requirement for a water right claim; thus, the prior appropriation doctrine rewarded those who were quickest to divert water from a river, lake or reservoir.

A key traditional role of Western state governments has been to administer water rights under prior appropriation by:

1. Not allowing people to exceed their water rights;
2. Not allowing new water rights when a stream is fully appropriated;

3. Curtailing junior water rights when senior water rights owners are not getting enough water; and
4. Not allowing people to change their water rights in a way that is detrimental to other water rights

In recent years, states have been forced to

## **GENERAL MISCONCEPTIONS ABOUT PRIOR APPROPRIATION DOCTRINE**

Prior appropriation doctrine is a shocking concept to people who consider water to be a common good. This is understandable because when viewed in the abstract, prior appropriation doctrine seems to suggest that senior water users will get more than they need of a resource that is essential to life while junior users will go thirsty. The reality is that the prior appropriation framework allows for water markets to develop and creates incentives for parties to come up with solutions to water allocation challenges so that water can move to where it is most needed or highly valued. In contrast, if water were administered as a common good, it would become another Tragedy of the Commons – where individuals acting independently and rationally according to each person’s self-interest behave contrary to the best interests of the whole group by depleting the resource. This has been shown to be the case with the “race to

develop policies regarding water transfers as new demands stretched the limits of existing developed water supplies, including water provided by federal Reclamation projects and other storage reservoirs. Thus, in the West, we have seen a move from an era of allocation to an era of reallocation.

the bottom” unregulated groundwater policies. Extensive regulation is needed to manage common good resources, which often does not accomplish what it intends to and creates excessive bureaucracy.

Enforcement of prior appropriation is also not as straightforward as the doctrine suggests. We all must keep in mind that most water rights are not defined to a level of detail that facilitates a refined implementation or enforcement activity. This together with the variability of supply and demand during the spring (when curtailments are most likely to occur) does not facilitate an hourly, daily, or weekly implementation procedure.

Prior appropriation is designed to curtail hoarding and speculation in water. It also allows us to put a price on water so that markets can develop to move water in times of drought.

## **CRITICISMS OF THE DOCTRINE OF PRIOR APPROPRIATION AND RESPONSES FROM THE PERSPECTIVE OF WESTERN AGRICULTURAL WATER USERS**

Although the doctrine of prior appropriation is the most frequently employed method to allocate water in states west of the Mississippi River, the doctrine has often been the subject of substantial scholarly criticism. Many of these arguments have been resurrected during the ongoing California drought crisis. The following identifies the more prominent arguments made by critics of the prior appropriation doctrine, followed by responses that reflect supporters of prior appropriation.

**CRITICISM #1: California’s water rights system is outdated and hampering efforts to address the state’s historic drought.** Critics claim the current system is simply a

hodgepodge of historic efforts to allocate scarce water supplies. In California, critics will often point out that the current system was concocted during the Gold Rush, and rehash the colorful story of San Francisco’s mayor nailing a notice to a tree in 1902, which helped secure the city’s rights to Tuolumne River water. Skeptics of prior appropriation also question the applicability of a system created 150 years ago to the modern era. One concern they voice is that Western states sometimes lack data on older users, and, as in California, also lack enforcement authority or are hampered by limited resources and staff to monitor whether users are complying with curtailment orders. Critics claim that, in some cases, the water rights allocated for river

systems are much higher than what the rivers can actually yield

“We do a worse job of administering water rights than any other Western state,” said Michael Hanemann, an economist at the University of California, Berkeley, in a call with reporters. “We need to reform water rights and get ourselves in shape to deal with future water scarcity resulting from climate change.”

**RESPONSE: The existing system works. Four years into the California drought, the current system – while not perfect – has worked amazingly well during a very challenging dry period.** David Guy, President of the Northern California Water Association, which represents senior water rights holders in the Sacramento Valley explains that, while there have been significant reductions in water supplies throughout both rural and urban areas in California, this is to be expected in dry years and is the way the water rights system is designed to work. The California State Water Resources Control Board (SWRCB) has curtailed water rights in 2014 and 2015 to a priority date similar to that curtailed in the 1976/77 drought and has made progress both in the methods employed and the level of analysis performed compared to that time.

The complexities in California are largely due to water right holders in the Sacramento-San Joaquin River Delta, where it is not clear what water source(s) the water rights within the Delta have a claim to. Some critics of the existing system are confusing water rights with system operation and contractual entitlements to previously stored water. As a result, the SWRCB has had to step in, and this is causing confusion and greater complexities. Over the next several months, the SWRCB will continue to implement the water rights system by issuing curtailments, based on water rights priorities and an increasingly sophisticated water availability analysis that triggers the curtailments for certain priorities. This means that water right holders must cease using surface water, unless they have either a valid water right or contract to

water that is already in storage for this year, or they buy water from another water right holder with valid rights to water this year. In many places, water users have access to groundwater and they will pump groundwater to make up for unavailable surface supplies.

Although many people with junior water rights suffer from not being able to use surface water, they should not be surprised to receive a curtailment notice in dry years like 2015, as the process generally works in an orderly manner. Importantly, there is also a process for the SWRCB to enforce against illegal users of water, which can be assisted by a complaint process where water right holders can bring illegal uses of water to the attention of the SWRCB.

The water right system in California is being tested in this time of extreme drought as it should be. Based on the level of deep curtailments, it would appear that it is passing the test. It is easy for the critics to identify the flaws of an imperfect system. However, it is important to recognize the significant improvements made by the SWRCB in the past two years, especially in obtaining data relative to pre-1914 water rights. Many water users in the San Joaquin Valley are challenging the SWRCB’s authority, but their concerns center primarily on the manner in which river flows intended to protect ESA-listed fish are managed relative to other water rights obligations. Many attorneys in the Sacramento Valley believe the SWRCB has the enforcement authority.

Regardless, as discussed later in this paper, it is generally not wise to construct public policy during times of extreme water-short conditions.

**CRITICISM # 2: Prior appropriation has been faulted for allegedly fostering inefficient and wasteful uses of water.** Because an appropriator is required to use the water claimed under his or her appropriative right or forfeit his or her priority, detractors of the prior appropriative right doctrine often cite over-irrigation as a problem attributable to the appropriative right. Critics contend that the

requirement of continuous use will lead existing users to always choose overuse when faced with a loss of entitlement as a result of temporary or permanent reduction in use.

**RESPONSE: In recent years, states have provided appropriators with economically sound alternatives to overuse that serve to protect against the loss of water rights.** In California, the judiciary and SWRCB have demonstrated that serious scrutiny will be paid to the efficiency of the appropriator. Inefficient water use is unlikely to increase the legal rights of the appropriator.

**CRITICISM #3: The rigid nature of the prior appropriation doctrine complicates water transfer opportunities and hurts the environment.** The benefits bestowed by certainty and appropriative rights are often the subject of criticism where there is an interest that lacks access to the water held under the most senior appropriative rights. Thus, some environmental interests have criticized the rigidity of a system that promotes certainty to the continued detriment of the environment.

“The water rights system is broken and is failing to protect our environment,” a water policy adviser for Defenders of Wildlife recently said. “The system is permitting certain interests to take so much water out of our rivers during drought that we are driving species like winter-run Chinook salmon and the delta smelt to the brink of extinction.”

So, dire environmental circumstances such as the current drought are often used as forums to criticize and at least partially blame the doctrine of prior appropriation.

**RESPONSE: In agriculture, a water right is tied to a specific piece of property. Therefore, a water transfer – including moving the place of use, point of diversion or type of use associated with a water right – is not an easy proposition and must satisfy a very extensive process in law.**

Using Arizona as a typical example, a change in the place of use of a surface water right is referred to as a “severance and transfer” of the right. As with most other Western states, a person must obtain the approval from the state engineer or water resources department director in order to sever and transfer a surface water right. In addition, the person must usually also obtain the approval of irrigation district, agricultural improvement district, or water users’ association if water is used on land within their boundaries or is in the same watershed or drainage area. Applicants wishing to sever and transfer a water right must file an application with the state, which is usually required to give public notice of the application and provide opportunities for others to file objections to the proposed severance and transfer. Sometimes, especially for cases in which an objection has been filed, the state may conduct a hearing. The final water rights transaction is further complicated if the transfer would interfere with vested or existing rights to the use of water; if the water right sought to be transferred was not lawfully perfected; or if the water right sought to be transferred has been forfeited or abandoned.<sup>2</sup>

**Still, water transfers are routine in many areas of the West, including California.** Water transfers are an issue where Family Farm Alliance members have been intimately involved. Agricultural water users in the Imperial Valley, Klamath Basin and Central Valley routinely participate in water transfer programs that temporarily move water from agriculture to urban and environmental uses. Findings in a 2014 report released by WestWater Research revealed that environmental water market activity has shown significant growth over the last 10 years. The WestWater Research report shows total expenses from water acquired to protect stream-flows across the Western U.S. have exceeded more than \$560 million. The release reported that these expenditures have been crucial for improving water quality and restoring stream-flows for endangered species

<sup>2</sup> See Arizona Department of Water Resources, *Surface Water Rights*, March 27, 2014: [http://www.azwater.gov/azdwr/SurfaceWater/SurfaceWaterRights/SurfaceWater\\_FAQ.htm](http://www.azwater.gov/azdwr/SurfaceWater/SurfaceWaterRights/SurfaceWater_FAQ.htm)



## Water Transfers

*Rice growers in California's Sacramento Valley (above) have long participated in voluntary water transfer transactions with urban, agricultural and conservation interests in other parts of the valley and in central and southern California. Photo Source: California Department of Water Resources.*

of fish. Throughout the last decade state and federal agencies, as well as an increasing number of private organizations, have become a large part of the overall trading activity.<sup>3</sup> Transfers are made possible because of the certainty provided by the water rights system, not in spite of it.

**However, water transfers should not be viewed as the “silver bullet” to meet Western water resources challenges.** We often see bold general statements by water transfer proponents about the potential for agricultural water use efficiency to free up water that can be transferred for use in urban areas or to enhance in-stream flows for the environment. However, those statements are usually followed by a list of the factors that make it a difficult proposition. Those include re-use deficiencies when water is removed upstream in the system, state water rights laws that protect water users from water being taken away, or forfeited, if they conserve water, and transactions that move water between presumably willing buyers and willing sellers, but have the effect of taking farmland out of production.

All of those issues are dealt with directly in a major California report released by the Center for Irrigation Technology (CIT) at Fresno State. The report, *Agricultural Water Use in California: A 2011 Update*,<sup>4</sup> refutes some long-standing beliefs about agricultural water usage and confirms others. The CIT report and others have reached a similar conclusion: the only large potential for moving water from agriculture to other uses will come from fallowing large swaths of farmland.

While there may be some financial savings gained using this “buy and dry” approach, there is another price that will be paid. Decision-makers must better understand the importance of maintaining America's low-cost access to safe, high-quality food and fiber, made available in large part by Western irrigated agriculture.

Transfers always have to meet the test of not damaging other water rights, and such analysis should include any ancillary economic and social damages caused to agricultural communities dependent on crop production. Agricultural land provides many environmental benefits, regardless of how the water is used or what crops are grown. Western rivers and associated riparian habitats are maintained and enhanced with flows from upstream dams. Conveyance facilities built to deliver water to farms and ranches also create artificial wetlands and support riparian habitat, while flood-irrigated fields have tremendous waterfowl benefits and provide supplemental return flows that support fish populations and recreation. All of these environmental attributes should also be measured and managed to reflect such benefits. Competing environmental demands for water must be a part of the discussion just as competing agricultural demands are today.

The water rights system protects public trust resources. The development of water rights in the West typically did not include rights for in-stream uses such as habitat for fish and wildlife, outdoor recreation, and the protection of scenic and aesthetic values and water quality. Over the years, we have come to recognize that

<sup>3</sup> Presentation by WestWater Research principle Clay Landry to Council on State Governments WEST River Governance Committee, August 24, 2015, Kalispell, Montana.

<sup>4</sup> The full report is available at <http://www.californiawater.org>.

in addition to the value provided by diverting water to grow crops, there are social, economic, and environmental values in increasing in-stream flows that may be captured in voluntary transactions.

As pressures increased to consider in-stream flow values during the 1960s and 1970s, some states responded with regulatory approaches, such as minimum stream-flow requirements, and imposed conditions on new appropriations. Some states tried issuing new water rights for in-stream flows. But these measures were implemented after much of the available water had already been appropriated by out-of-stream uses. As a result, some states began to look at changing the law to allow for leasing and buying of senior water rights to keep more water in-stream.

**In the West, water can be managed within the prior appropriations system to benefit public trust resources.** Consider California's Sacramento Valley, where water has been re-managed in very creative ways over the past several decades for the benefit of salmon and birds using the Pacific Flyway. The major rivers and streams of the Sacramento Valley provide essential pathways for spawning salmon and steelhead. Flow agreements to benefit these fish are on every major watercourse in the Sacramento Valley:

- *Trinity and Shasta Lakes* - are important sources of cold water storage. Timing the release of this cold water into the rivers is vital if spawning fish are to thrive.
- *Sacramento River below Keswick Dam* – In 1960, flow objectives were established for the protection of fish and wildlife. In 1990 and 1991 this policy was modified requiring more cold water when warmer temperatures would be harmful to fish.
- *Sacramento River Tributaries* - Various flow agreements benefit spring run salmon.
- *Clear Creek* - In May and June, water is pulsed into Clear Creek to attract Spring-run salmon from the Sacramento River. From June through October, water released from



*Wilkins Slough pumping plant on the Sacramento River. Courtesy The Sacramento River - a Blog.*

Whiskeytown Reservoir keeps water temperatures cool.

- *Feather River* - A water quality certification adopted in 2010 provides for specific flow and temperature requirements to accommodate spawning salmon and steelhead
- *Yuba River* - In 2008, the Yuba River Accord increased the stream-flow requirements over previous levels, which benefits fish while insuring sufficient water supplies for irrigation and municipal uses
- *Sacramento River at Wilkins Slough* - The Rivers and Harbors Act of 1935 mandated a specific flow rate at Wilkins Slough be maintained. The primary goals at that time were navigation and flood control. In 1992, Congress made protection of fish and wildlife a secondary goal and this requirement was updated in 2009. Agricultural water users along the Sacramento River developed and constructed their diversion facilities based on the established flow requirements. As the regulations are requiring significantly less flow for fishery protections, water users are adapting to maintain planted crops based on a significantly lower water surface elevation.
- *American River below Nimbus Dam* - In 2000, the Flow Management Standard was developed, which established minimum flow standards to improve the conditions for fall-run Chinook salmon and steelhead. Additionally, releases are adjusted to



maintain sufficiently low water temperatures for steelhead rearing in summer and Chinook spawning in the fall.

There are many examples that show how win-win solutions can be developed for farmers and the environment, crafted within existing water rights systems:

*The Nez Perce Water Rights Agreement of 2004*, entered into by the State of Idaho, the Nez Perce Tribe, the federal government and various irrigation districts and canal companies in Idaho, settled in-stream flow claims made by the United States in the Snake River Basin Adjudication on behalf of the Tribe, while at the same time providing flow augmentation for fish species listed under the Endangered Species Act and certainty for storage space holders – all within the confines of Idaho’s prior appropriation doctrine. Under the agreement, State law minimum stream flows were set in various tributaries. In addition, storage water was made available from willing sellers for downstream flow augmentation, pursuant to State law. Under the 30-year agreement (with an option to renew for an additional 30 years), which was approved by Congress, the Idaho State Legislature and the Nez Perce Tribe, senior water right priorities are protected, while accommodating environmental uses, thereby providing much needed stability and certainty for Idaho water users and downstream fisheries managers.

*The Wyoming Water Development Program* was established in 1975 to promote the optimal development of the state’s human, industrial,

mineral, agricultural, water and recreational resources. The program provides, through a commission, procedures and policies for the planning, selection, financing, construction, acquisition, and operation of projects. This can include projects for the conservation, storage, distribution and use of water, necessary in the public interest to develop and preserve Wyoming’s water and related land resources. The Program receives funding from severance tax distributions to fund new development projects, rehabilitation of water projects that have been in existence for 15 years or longer, and dam and reservoir planning and construction projects. Multipurpose projects – those which serve two or more of the following functions: agriculture, municipal, industrial, rural domestic, recreation, environmental, flood control, erosion control, and hydro-power – are given highest priority by the state of Wyoming. Projects that serve more than one entity or purpose and whose service area encompasses a larger, more regional area are also given priority. The program’s criteria are based on the general philosophy that responsible development and the efficient consumptive beneficial use of water will protect Wyoming’s compact and court decreed entitlements.

Since the 1960s, *local irrigation districts, cities, counties, and others in Oregon’s Deschutes River Basin* have undertaken an unprecedented array of voluntary measures to conserve water, return water in-stream for fish and wildlife purposes, and use irrigation water supplies to generate renewable carbon-free energy. District-led conservation projects have reduced diversions by more than 200,000 acre-feet annually, leading to higher in-stream flows in the Deschutes River and its tributaries. Recent projects by four districts alone have resulted in the piping or lining of 58 miles of canals, resulting in a return of 91.5 cubic feet per second of water in-stream. All of these measures are designed to sustain agricultural productivity, reduce diversions and increase in-stream flows in the Deschutes River and its tributaries. Raising wool and beef, and growing alfalfa, grass hay, carrot seed, wheat, and other



*Newspaper photo of 2004 signing of Nez Perce agreement. Photo Source: Idaho Statesman.*

products requires a sustainable supply of water. Improving in-stream flows for salmon, steelhead and other fish and wildlife species also requires sustainable supplies of clean water. The efforts underway in Central Oregon are a terrific example of how to preserve our important agricultural economy in places like Deschutes County, while improving habitat in Oregon's iconic Deschutes River.

*The Yakima River Basin Integrated Plan* has been developed by a broad group of stakeholders in the Yakima River Basin in Central Washington State. The Yakima River Basin is one of the most productive agricultural areas in the Nation, and a reliable supply of water for irrigation is a critical requirement for the local economy. The Yakima River Basin is also home to significant fish and wildlife resources, including an anadromous fish population of steelhead, currently protected under the Endangered Species Act (ESA), and salmon runs. These fish runs are part of the important recreational and tribal resources in

the Basin. These ancient fish runs declined precipitously during the mid-Twentieth Century, and were a source of contention over water supplies and water management in the basin for many years. Irrigation interests have worked with other water stakeholders and the Yakima Nation in developing the Yakima Basin Integrated Plan, a well thought out, long-term comprehensive set of solutions to restore ecosystem functions and fish habitat and improve long-term reliability of water supplies for in-stream flows, agricultural irrigation and municipal supply. The Integrated Plan was developed in a public, collaborative process involving local, state, federal and tribal governments plus stakeholders representing environmental, irrigation and business interests. The consensus achieved by this diverse group represents a major and unprecedented accomplishment for the Yakima Basin and for water management in the western United States.

These examples clearly show that the current



*Three Sisters Irrigation District (TSID) manager Mark Thalacker, who serves on the Family Farm Alliance board of directors, explaining how the double pipes now carrying water through the TSID main canal will conserve enough water to restore 3.8 million gallons per day to Whychush Creek, in Oregon's Deschutes River basin. Courtesy Deschutes River Conservancy.*

system provides flexibility that protects public trust resources in a variety of circumstances.

**Resolving environmental issues requires balance.** Environmental enhancement and mitigation programs are competing for existing sources of water. Across the West, the Bureau of Reclamation and the Department of Interior, have attempted to redirect water to environmental uses without adequate public process or regard for prior commitments. These actions have caused major conflicts, costly lawsuits and delayed benefits for endangered species and the environment.

There is a better way. Solutions to these complex issues can be found by reasoned, well intentioned people. We must recognize that while it is important to include all viewpoints in the discussion, the holders of water rights have far more at risk than most other parties at the table. They also have far more to offer when it comes to actually resolving issues. Resolutions to water conflicts should proceed from an understanding that existing water rights are not “part of the problem,” but are instead, a starting point for future solutions. Rather than threaten existing water users with dire consequences or federal mandates if issues are not resolved, the

federal government should use its considerable resources to offer legitimate incentives to right holders to develop solutions to allocation issues. Moreover, other “stakeholders” must recognize that when a water user takes the steps necessary to create or procure a valid appropriative right, he or she is awarded a valuable property right that cannot be taken or diminished without just compensation.

Agricultural water users care about the environment. Creative, successful solutions can be found by motivated, unthreatened parties. Incentives that create reasons to succeed will do more good for the environment in a shorter period of time than actions that rely on threats of government intervention.

**CRITICISM #4: Holders of junior water rights suffer unnecessary hardship during times of drought.** Critics underscore the perceived hardship that the doctrine of prior appropriation places on junior uses in times of shortage. Under drought conditions and a strict application of prior appropriation principles, a junior appropriator might find themselves with no water.

**RESPONSE: This criticism ignores the advance notice and risk-benefit analysis,**

which is inherent in the pure prior appropriation system. It also ignores that junior users are often able to purchase or lease water from more senior water right holders. Furthermore, when no other sources of supply are available, it makes more sense for fewer users to receive sufficient water for their operations than for everyone to get some water but not enough to sustain any of their operations.

**CRITICISM #5: The water rights system employed in California and the Western U.S. should be replaced with a system similar to that recently developed in Australia.**

One idea that is being discussed by some is to move towards the system that is currently used in Australia. Across the Pacific, water rights are based on annual volumetric allocations to those who hold 'water access entitlements'. These entitlement holders have a perpetual (property) right to a 'share of the available water resource in a particular water source'. However, this system is based on a strict hierarchy whereby water is first allocated to critical human needs, then to the environment and lastly to productive water users – including irrigators.

Water management in Australia has also undergone substantial changes since the 1990s and even more so since the introduction of the Federal Water Act in 2007 which transferred water management from the states to the Commonwealth Government. The Water Act of 2007 (which is often cited as a model for water management around the world) was introduced in the midst of Australia's 'millennium drought' which brought extremely low precipitation, high temperatures and water shortages across Australia's inland areas. The millennium drought also coincided with a Federal election, which provided a perfect opportunity for the then Prime Minister of Australia John Howard to build a pre-election policy platform around water and a \$8.2 billion (U.S.) national water management plan.

The media and environmental groups jumped at this opportunity and emphasized the need for change by highlighting degrading environmental



*Protest sign objecting to the Murray Darling Basin plan.*

health, poor water quality and a dying Murray-Darling River Basin, demanding that something be done before the trend became 'irreversible'. What came next was a long list of Federal and state legislation that re-wrote water management in inland Australia. However, the Water Act 2007 is a purely political product infused with a strong environmental bias; social and economic issues are essentially treated as an afterthought.

Even before the introduction of the Federal Water Act in 2007 (which will ultimately remove over 5.5 million acre feet from productive water use), irrigators and rural communities have had to endure progressive reduction in water access through the 'CAP' (a legislated upper limit on water extraction in each valley based on 1993/94 level of development) and the state's water resource management plans, which have been introduced over the course of the past decade.

Significant quantities of water have been recovered for the environment under these state water resource management plans independent of the Federal Water Act 2007 and the often hailed Basin Plan. This environmental water recovery is often not mentioned in the context of the Water Act and the Basin Plan and it remains a sore spot for irrigators that these two buckets of environmental water are not managed holistically.

Still, this concept is supported by some in the

U.S. as well.

“To protect the environment, in my view, one thing we should do is to acquire or develop water rights for the fish,” Buzz Thompson, a law professor from Stanford University, recently told E&E Daily. “The fish should have their own water rights. We should be creating an environmental reserve that has clear legal recognition and can only be tampered with under extreme circumstances.”

**RESPONSE: The “Australian Solution” is not a template for success.**

Stefanie Schulte<sup>5</sup> of the New South Wales Irrigator’s Council explains how Australia’s Water Act 2007 effectively created new ‘rules of the game’ - rules that certainly favored the environment. To adequately understand how the Act became what it is – an environmentally focused process with social and economic considerations as an afterthought – it is necessary to understand the political scenario and the time at which it was being developed. The then-Prime Minister John Howard needed an environmental issue to address as part of his political platform. For a variety of reasons, he chose water and focused on the Murray-Darling Basin.

In order to get the Water Act through, the Commonwealth needed the cooperation of the States. However, the period during which this occurred was becoming increasingly unstable for political reasons and eventually the relationship between the Federal Government and the States broke down to the extent that one state, Victoria, withdrew from the discussions completely. By this stage, the Water Act had undergone multiple changes (it was at version No. 63).

Without the political will of the states, the Act’s constitutional validity was in question and, a consideration of what capacity the Commonwealth had was necessary.

The end result is that the balance of the Act – for the simple reason of legislative capacity –

focuses wholly and solely on environmental considerations. Irrigators believe the Act and the Basin Plan (subordinate legislation to the Water Act which sets out the finer details associated with environmental water recovery target, sustainable diversion limits and environmental priorities) will bring about untenable social and economic implications

As such, Australia’s most recent water reform is not based on efficient water management between competing water demands but rather is a product of its time and political context.

What started out as a 10-point plan and \$8.2 billion dollar (U.S.) investment has transformed into a complex and confusing framework that often does not achieve its ‘environmental’ objectives but leaves Australian rural agricultural producers and communities with significantly less productive water to grow food and fiber.

If California is to learn from Australia’s experience, then it is that good water management planning must recognize prior water management arrangements and be complimentary to state based water management practices. In addition, reform must come from the ‘bottom up’ with a clear goal, a solid business plan (and sufficient funding to enable the implementation and ongoing management of such a system) and also must incorporate comprehensive stakeholder engagement. This has not happened in Australia and has therefore generated serious impacts in regional communities. Rural communities in NSW have recently spoken up and expressed their loss of confidence in the independent authority managing the Basin Plan and have called for amendments to the Water Act to indisputably give effect to a triple bottom line outcome (social, economic and environmental).

California’s drought isn’t going to last forever. We should avoid making the same mistake Australia did by rushing through a “solution” to

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<sup>5</sup> Stefanie Schulte is the Policy Manager at the New South Wales Irrigators’ Council. The Council represents 12,000 water license holders in NSW. Its members include valley water user associations, food and fiber producers, irrigation infrastructure operators and commodity groups. Visit: <http://www.nswic.org.au/>

the drought that has longer term impacts on that country's ability to grow food. Australia's newly elected Prime Minister Tony Abbott recognized the potential problems for business and their domestic food supply when he introduced legislation to cap the amount of water purchased for the environment. He did this because he recognized that the previously adopted plan would overburden their economy.

Aside from this recent bill (still to be passed), funding of up to \$200 million will be provided for Basin communities under the 'Murray-Darling Basin Regional Economic Diversification program' to "increase economic diversification and adjust to a water constraint environment". The provision of this funding is essentially an admission that the reduction in water has damaged the economies of Basin communities. Another \$263 million has been made available for the latest round of on-farm infrastructure adjustment funding. This program – introduced in 2012 - has assisted in maintaining agricultural productivity with less water.

Clearly, substantial funding is being spent just to mitigate the impact of the Basin Plan - and the full impact of the water "reforms" have yet to be felt because much of the recent hardship relates to the millennium drought.

If critics of the prior appropriation doctrine are dead set on pointing to the Australia model as a template for the Western U.S. to follow, they also need to acknowledge how Australia has recently reigned in the water policies that were a road to disaster for farmers and ranchers and the nation's economy. The Australian Water Plan "experiment" has resulted in disenfranchised farmers and ranchers, overburdened the Australian economy with an unsustainable plan, and caused serious damage to the country's food producing region. In fact, some in Australia are now looking at reigning in their overbearing, top-down water policies in an attempt to undo this damage.

### **CRITICISM #6: The prior appropriation doctrine is flawed and should be scratched or the existing water rights system should be reformed.**

Another solution proposed is to "reform" water rights and work within the existing system of laws and regulations. Adjudication of water rights is pointed to as a solution for basins that are over-allocated and where users cannot agree on how to divide up the water.

**RESPONSE: Dismantling the doctrine of prior appropriation would destroy the benefits associated with generational ownership of water rights and undermine the considerable investments made based on those water rights.** Historical development based upon prior appropriation ties in with the good of society; it encourages the highest and best use of the water. Society benefits from the application of the prior appropriation doctrine because people are creating real wealth, growing food, creating jobs and investing in new places to live. The quality of life in many Western rural communities is better now than it was before prior appropriation was instituted. There are numerous examples of Family Farm Alliance members whose ancestors settled 160 acres of raw land in remote, arid Western locations. With the development of water development projects, these areas that were once nothing but sagebrush were soon feeding and clothing the region and the country.

In short, prior appropriation encouraged the development of the communities our members live and work in. For example, the challenges facing the rural communities of northern New Mexico are complex and often inter-related with their urban neighbors. Loss of agricultural lands and access to forest resources impact the ability of communities to support their social ties and cultural identities. Poverty rates are unacceptably high, and a great many residents rely on traditional agricultural resource based

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<sup>6</sup> The Santa Fe Economic Development Plan. *A Report to the Community: The First Year Accomplishments*. City of Santa Fe Economic Development Division of the Community Services Department. October 26, 2005. Page 3.

activities to support their families. The Community Economic Development Plan, adopted by the Santa Fe City Council in 1996, promotes a regional approach to community based development, specifically citing agricultural products as a target industry. At that time, Santa Fe recognized that “preservation of water rights, acequia systems, small scale sustainable farming and forest based activities are crucial to the health of rural communities.... The health of Santa Fe is intrinsically tied to the health of its’ rural relatives.”

The City’s current plan builds upon the foundation of the 1996 Community Economic Development Plan.<sup>6</sup>

One of our organization’s farmers in Oregon recounts the story of an early settler who was compensated by the federal government when the Klamath Project incorporated an existing water delivery canal and related existing water rights. She created wealth with that investment and generations later, her granddaughter used some of that investment to start a successful helicopter business. There are many other unique examples of the how numerous variations of prior appropriations law contributed to the development of the rural West.

The water rights system exists as it is today, and people have made investment decisions based on the way it is today. The canals, diversion systems and land represent a huge investment based on those water rights. If wholesale changes are made to the water rights system, the implications would be very far reaching.

“It’s better to try to figure out how to make the system you have work than it is to just throw away the system”, said California SWRCB executive director Tom Howard. “In this country, we try to provide certainty for things like property rights and things of that nature rather than just by fiat decide to change them.”

**The certainty desired by all users of Western water would be eroded.** State and federal law regarding the allocation and administration of water were developed to provide long term,

certain, predictable and affordable supplies of water to all users. Without some degree of certainty, no investment will be made in the future. When certainty is threatened, water users become entrenched. Solutions to critical issues cannot be developed in an environment where the parties feel exposed and vulnerable. This is true of all water users whether they are urban, industrial, tribal or agricultural. Uses for environmental purposes are also dependent on long term, stable commitments. If the certainty that is intended to be provided under existing laws is eroded, the unavoidable consequences will be:

- An increase in conflict between stakeholders
- Water would flow away from agriculture without compensation and irrigated agriculture, along with wildlife habitat, will be “dried up” to obtain water for urban growth
- Agriculture lands that surround urban areas will be lost, which often means that the most effective mechanism for preserving open space is eliminated
- Destabilization of the market in water rights, which inhibits voluntary transfers to the highest and best use of the resource
- Impairment of local economies that are largely dependent on irrigated agriculture and secondary adverse impacts to businesses, local governments and schools.

Without water rights, water becomes public property and would be allocated to society’s best-connected users, injecting a level of anarchy and chaos into water allocation matters. Water law does and will change. However that change must respect the promises of the past, while addressing the realities of the future.

**Any public taking of water rights would violate the Fifth Amendment of the U.S. Constitution. The right to use water is a “property right” and the government would have to compensate the owner of the right if it is going to be taken away or restricted.** Significant constitutional issues would arise from eliminating the prior appropriation doctrine and reordering the priority of use of water. The



U.S. Supreme Court in June 2015 issued an opinion which found that raisin growers required to turn over part of their crop each year to the U.S. was an unconstitutional taking of that fruit, which would require compensation to the grower by the U.S. Any state considering retroactive amendment of its water law faces the same argument.

The Fifth Amendment of the U.S. Constitution proscribes the taking of private property “for public use, without just compensation.” In cases where the federal government, by means of any of its various agencies, takes property in violation of the Fifth Amendment – an action known as “inverse condemnation” or “taking” – property owners have a right to seek just compensation via a takings claim filed in the U.S. Court of Federal Claims. And in the West, the state-based right to the use of water for beneficial uses is considered property. Even though the water itself is public property and is owned by the state, the right to the use of the water is a private property right.

The long-running case, *Klamath Irrigation District v. United States*, stems from a 2001 decision by the Bureau of Reclamation to curtail water to Klamath Project farmers and irrigators that year. Reclamation claimed it was doing so because it was obligated under the federal Endangered Species Act (ESA) to protect endangered species. The case against the government was filed in the U.S. Court of

Federal Claims by several agricultural landowners as well as a number of water, drainage, and irrigation districts on their behalf who alleged, in part, that the government violated the Fifth Amendment by taking their vested rights to water without just compensation. (Marzulla, 2011). The court actions surrounding this case have been drawn out for over 14 years. If the Klamath farmers are successful, the federal government will be on the hook for “takings” compensations associated with the 2001 curtailment that may approach \$50 million. A “total” or permanent taking of the water from 200,000 acres would likely be in the billion dollar range.

Over 40 million acres of irrigated farms and ranches cover the West. The potential compensation associated with the “taking” or restricting of existing water rights associated with a new water allocation system employed in California and other parts of the West would be staggering and likely something the federal government could not afford.

**Adjudication is a very lengthy and time-intensive endeavor, and is often only used as a last resort in some states.** The State of Oregon recently issued its Final Order of Determination for the Klamath River adjudication, a process that took 38 years and many millions of dollars to complete. Similarly, Idaho’s Snake River Basin Adjudication, finalized 158,000 water right claims over 27 years and cost the state almost \$100 million to complete. California has been trying to avoid an adjudication of the Sacramento and San Joaquin Rivers since the 1920’s. On June 15, 2015, in *NRDC v. Kempthorne*, the Court reaffirmed that “non-renewal of the Settlement Contracts could result in potentially catastrophic consequences for California’s entire water delivery system.”<sup>7</sup> This is because the Settlement Contractors hold water rights that pre-existed the creation of the CVP.<sup>8</sup> While the exact priority of these right vis-a-vis the Bureau

<sup>7</sup> See *NRDC v. Kempthorne*, 2008 WL 505115, at pp. 27-29.

<sup>8</sup> *Ibid.* at p 25.

of Reclamation's rights to divert water for the CVP has never been conclusively determined, Congress has expressed intent that the Bureau avoid the "monstrous lawsuit...that would embroil the CVP in litigation for decades," should the matter ever be adjudicated.<sup>9</sup>

The overriding reason adjudication is

unwieldy, lengthy and expensive legal and administrative process associated with the adjudication.<sup>10</sup> Critics of the prior appropriations doctrine and the adjudication process are correct in their observations that the administrative processes associated with water rights adjudication are very lengthy and expensive. In some states, there is likely a need



considered the remedy of last resort is the

## CONCLUSIONS

The Family Farm Alliance maintains that the doctrine of prior appropriation and the need for certainty in Western states' water rights allocation systems remain the cornerstone of Western water resource allocation policies. A simple commitment by governing agencies to work within the framework of existing appropriative systems instead of attempting to fashion solutions which circumvent current water rights allocation and administration

to streamline these administrative proceedings.

schemes can form the foundation for eliminating the gridlock that now paralyzes federal water management decisions. This type of commitment can encourage states and water right holders to proactively address water allocation issues by eliminating the now omnipresent fear that a subsequent federal mandate will either undermine local efforts to address a water allocation issue or suddenly require unexpected reallocations of water away

<sup>9</sup> *Ibid.* at pp 26, 28.

<sup>10</sup> See Governor's Commission to Review California's Water Rights Law, *Final Report* (1978) at p. 136.

from existing water rights holders without due process or compensation.

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P.O. Box 216  
Klamath Falls, OR 97601