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Currents in Water Resources Law and Policy: How is “Prior” Coping with New Stresses? [outline]

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Currents in Water Resources Law and Policy: How is “Prior” Coping with New Stresses?

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I. An Urbanizing and Greener West Faces New Challenges
   A. Stresses on Water Allocation and Management
      1. End of Reclamation Era
      2. Climate Change
      3. Demand for Instream Flows
      4. Urbanization
   B. Stresses Have Become Greater Recently
      1. Water Agencies No Longer Step in to Solve Problems with Subsidized Development
      2. Cities Compete with Irrigated Agriculture
      3. Environmental Interests Compete with All Consumptive Users and with Hydropower

II. Responses to Stresses
   A. Outside-the-Box Approaches
      1. Peeking Out of the Box from Within
         a. Out of Priority Use: Sharing Replaces Strict Priority
            i. Exchanges, Substitute Supply, Rotation, etc.
            ii. Augmentation
         b. Statutory Softening of Priority System
            i. Public Interest Requirements: Efficiency, Environment, Future Uses
            ii. Instream Flow Regimes: Doctrine Gives Way to Fish and Fun
      2. Multi-Issue Watershed-Based Solutions: The Belated Legacy of Powell
         a. River Basin Scale
            i. California: Bay-Delta
            iii. Platte River Endangered Species. See J. David Aiken, Balancing Endangered Species Protection and Irrigation Rights: The Platte River Cooperative


c. General Stream Adjudications
   i. Early efforts mended patchworks of appropriations
   ii. Modern examples provide solutions to multiple problems
      a. Idaho: Snake River Basin Adjudication
      b. Arizona: Gila River Adjudication


B. Cities as Water Planners
1. First Round of Planning: Federal Development-Driven
2. Second Round: Statewide; Also Focused on Development
3. Missing: Adaptation
   a. Drought
   b. Climate Change
   c. Unrealistic Expectations in Water Project Delivery Contracts
4. Cities as Providers Assume Responsibility
   a. Requirements for “Adequate Water Supply”
      i. CAP
      ii. Arizona Groundwater Act
      iii. East Bay MUD
   c. Coordination of Land Use Planning and Water Planning.
III. Prior Appropriation Remains Alive, If Not Well

A. A Doctrine Never Complete; Early Skeptics. E.g., Moses Lasky, From Prior Appropriation to Economic Distribution of Water by the State, 1 Rocky Mtn. L. Rev. 161 (1929), 2 Rocky Mtn. L. Rev. 35 (1929); Samuel Weil, Water Rights in the United States (3rd ed. 1911); Elwood Mead, Irrigation Institutions (1910).


D. Priority Notions Survive
   1. Organizing Principle for Administering Old Rights and Granting New Rights
   2. Default Rule in Permit Systems
   3. Embedded Economic Value
   4. Market Transfers Maintain the Doctrine’s Vitality

E. Outside-the-Box Solutions Have Bucked Against Pure Priority. E.g.,
   2. Groundwater Conflicts: Venerable Waste vs. Modern Efficiency

F. Conclusion: Priority Defines Basic Rights but Cannot Solve Modern Problems.