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**Prior Appropriation
1848-1991**

by

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IN MEMORIAM

PRIOR APPROPRIATION 1848-1991

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As has been so widely reported, Prior Appropriation passed away last month at the age of 152. Prior was a grand man and led a grand life—by any standard he was one of the most influential people in the history of the American West. It is a tall order but, with these few thoughts, I will try to recount his life, to assess some of his accomplishments and some of his shortcomings.

The story of Prior's birth has been told so often that it has become part of the bedrock of western history—how, on January 26, 1848, James Marshall, literally shaking with exhilaration just moments after his epic discovery of gold, came upon a babe on his mad rush back to Sutters Mill to spread the news. The child was so young that he must have been left by the side of the American River that very day. And although all the leading botanists deny that the species ever existed in the Sierra Nevada foothills, the legend persists that Marshall found the infant Prior wrapped in a blanket nestled in the bullrushes.

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For the past several years, perhaps because he has remained so faithful to his childhood pledge to "outlive the bastards," Tom Simmons of Water Watch of Oregon has been keeping a close eye on the failing health of Prior Appropriation. A good year ago, Tom asked me to think about putting together a fitting eulogy for Prior. When the recent event occurred, Tom suggested that the banquet on February 22, 1990 held in connection with the Water Watch-Northwestern School of Law Water Symposium might be the appropriate occasion on which to deliver a eulogy. I thank him for that invitation and would like to dedicate this piece to Audrey and Tom Simmons with the hope that their sweet love might last as long as the one that is part of this eulogy.

The young boy was raised in as remarkable a time as ever existed, passed from miner to miner in the diggings in California and Nevada. Smart, exuberant, and savvy, Prior was a favorite of this nearly all-male society from the beginning. There was that moment of moments in September, 1851, at Rich Bar, on the Feather River. We know of it with accuracy because Dame Shirley, the author of the acclaimed *Shirley Letters*, was in Rich Bar that autumn. Let us remember, once again, Dame Shirley's account, in one of her letters back home to her sister:

A precious curly-haired three-year-old boy was playing jubilantly by the creek one afternoon. He had laboriously built a sand and gravel castle, with a moat. An elderly miner came down with a bucket to fetch his (must I say it?) weekly bath. He never saw the boy, his castle, or his moat, the flow to which the old man had disturbed by plunking his bucket in the stream. My heavens! All at once the September air was filled with the din of commotion. The boy shrieked with a purple rage and threw his favorite toys—his 2-pound Colt 45 revolver, his Green River knife with the 6-inch blade, his molded iron mining pan—in every direction. And then, as the old miner departed with an empty bucket, the boy thrust his index finger in the air and bawled out that word that bespoke to perfection the spirit of these mines: “first, *first*, *FIRST!!!*” I thought to myself, “patience, young fellow, sweet patience.” But a gaggle of veteran miners stood off by the side and one said, “I think the boy's on to something. I tell you, that idea of his about water fits this country just right.” The others all nodded in bright agreement.

“Still”, Dame Shirley added, “I wonder, I wonder.”

Prior rose again to glory in 1855. Matthew Irwin, one of Prior's volunteer foster parents, had diverted the water—all of the water—from the South Fork of Poor Man's Creek near the Sierra Nevada mining town of Eureka. Irwin took his crusade—nearly all the miners' crusade, really—to the California Supreme Court in a suit against Robert Phillips, a would-be water user who had come to Poor Man's Creek after Irwin.

The case was argued in the small courtroom in Sacramento amid a judicial scene rarely, if ever, duplicated, even in those boisterous days. For, in the back of the courtroom sat Matthew Irwin and the many miners and storekeepers who had bought water from Irwin and depended on him. And when the five judges

entered the chambers the crowd stood, initially respectful and silent, but then Prior climbed one of the benches, turned to the Irwin contingent, and, just like a conductor, the boy caused them to begin the chant that still resounds in so many venues today: "We're number one! We're number one! We're number one!" Chief Justice Murray first looked startled, then grinned, then gently raised his hand for silence, then just stopped and drank in the simplicity and justice of the chant.

The court ruled for Matthew Irwin and those he supplied—and for Prior. And, even today, nearly a century and a half later, is there one of us who could say we would have done differently back then?

Prior spent much of his youth in the Gold Country but he also made many travels with miners or merchants who wanted the company. Those early journeys presaged a life spent exploring every nook and cranny of the West. Prior's very first trip was to the Mormon settlements in Utah. He went in 1852, when he was just four. How the Mormons doted on him: tossing him in the air, teasing him with tickles and jests, taking him out to the irrigation fields where the languid early summer evenings were heavy with the breath of the new green crops.

He even met Brigham Young, who, when he saw Prior, did a double-take, grabbed the boy, hoisted him up in the air, looked up at him, and, beaming beatifically, exulted: "When I came to this Valley five years ago, I had a vision of a boy and an idea, and you are the boy whom I saw at that gilded moment." From that day on there always was a religious dimension to Prior's ideas.

He loved the generous and hardworking Mormons so. Years later, when Prior, who had no formal schooling, began a life of self-taught reading, he learned of the agrarian ideal and he often and rightly said of the Mormons: "That's what Jefferson had in mind." And he raged and fumed at the inequity when the easterners kept Utah—Deseret—from statehood until the late date of 1896. "These are the right and decent people, the Utah farming communities," he would say all his life.

But most of Prior's growing up days were spent in the Gold Country. His best and tightest pal would later earn fame as a military man, General Mining Law. I personally always thought it wrong for Professor John Leshy to term the General, who came

from a large and distinguished family, as "the Law with no brain," but the description has stuck.

Prior and the General grew up fast and grew up about the best any boys could. Both of them went everywhere in the gold camps—California, Oregon, Idaho, Colorado, Arizona, even Mexico and Alaska in later years. They saw shootings and hangings. Once they even saw the ultimate Gold Country act—one burly miner carved another's heart out "Maltese style," with a single motion from a curved-blade knife imported from the Mediterranean. Prior and the General clinked their shot glasses and the General hooted: "He probably deserved it; if he didn't steal water, he must have jumped a claim." To which Prior grinned and replied: "First in time, first in right," and the General, tossing his head toward the Maltese-style victim lying inert on the floor, added, "And if you're not first, you're out of here."

Prior and the General knew every bar from Columbia to the Klondike and from Virginia City to Cripple Creek and they caroused and cursed and drank and whored and fought in them all. They were men's men—broad-shouldered, barrel-chested, and square-jawed. Prior, who not only read Mark Twain but knew him, was fond of summing it all up by quoting Twain's comment upon his first visit to Nevada in the 1860's: "This is no place for a God-fearing Methodist and I did not long remain one."

But Prior did marry and while he married late—at the age of forty—he married well. Ramona was a black-eyed beauty, half Indian and half Mexican. They settled down near the heart of the West, in the farm-ranch country out near Vale, Oregon. And if I tell of some private talks between Prior and Ramona, it's because they told them to me and it seems in the spirit of building history, which Prior believed in, to pass along some of their conversations.

As I say, Prior went everywhere in the West and, after their marriage, he took Ramona with him whenever he could. He gave most of his adult life to public service, to furthering the cause he believed in. In the beginning, it was easy. Colorado bought in 1882. His beloved Utah followed suit soon thereafter. With some town-square oratory, Fourth-of-July backslapping, and Sunday-meeting preaching, nearly all of the others came into line. Prior was messianic and he developed a cult following that helped spread the word.

Everywhere, his message was the same, logical and true. "The water is our heritage. Take it—take it all, if you can. This is the American century. Progress will result." He would usually add, because he always wanted to be direct and candid: "And take it now. I'm travelling upriver to other towns and other states; if you don't take it, they will. Be first. Achieve progress first."

To be sure, Washington, Oregon, and California bought partway into Riparian Law, the General's outcast cousin who had moved back east to Newark. But no real matter: Washington and Oregon did away with Riparian early on and in California, in order to survive, Riparian had to buy off the state supreme court, something Prior never would have done—at least not directly. The real point was—and everybody knew it—that by the 1890s Prior had won out basically everywhere west of the Hundredth Meridian. He did it by knowing the land and the people, and by giving the people what they wanted and needed. And Ramona would say, "Prior, oh Prior, we've gone everywhere and seen so much and I admire you so. You're the man of the miners, yes, but you're also the man of the *farmers*. You're always so *right*."

It was about then, about 1890 when the frontier closed, that things began to change and Prior's work began to take on a much harder edge.

Prior had learned of the expert engineer, Elwood Mead, who had brought innovations to Colorado water policy (a century later, Coloradans still wait in vain for another innovation) and who had then moved to Wyoming just as statehood was drawing near. Mead was a major figure at the Wyoming constitutional convention in 1890, but Prior was concerned, for he had heard that Mead was proposing that the new Constitution should provide that water would be the property of the state and that appropriations would be allowed only if in the public interest.

The meeting between the two men was a study in contrasts—the ebullient, charismatic Prior, a big man, and Mead, the quiet, scholarly engineer with the round wire-rimmed glasses. "Well, what is this, Elwood? I thought water was for the people, not for big government."

"It is, Mr. Appropriation, but who would *you* say owns it before our farmers put it to use? The *federal* government, which will own most of the land, and all of the watersheds, in Wyoming

after statehood? The Arapahoe and Shoshone are the second biggest land owners in Wyoming. Do you want *them* to claim ownership before diversion?"

"I see your point, Elwood. But the state is only a front, right? The people can just take the water, right? State ownership is just a fiction, a way of explaining how the settlers can just take the water, right?"

"That's generally correct, Mr. Appropriation."

Prior pressed the matter. "State law is really *no* law. Each individual settler decides. Is that right?"

"I'd say so, yes."

"Now what about this so-called 'public interest,' Elwood? Everybody knows you're going to be the first Wyoming State Engineer. You're not going to go running around as the highest state water official deciding what's right and what's wrong, are you?"

"No, that's for the settlers to decide."

"Well, all right. It sounds like you're just prettying up the people's rule, 'first in time, first in right.' I'll need your assurance, Elwood, because you know damn well if I go to those farmers and tell them that this here new state is going to deny or regulate *their water*, then you know damn well there isn't going to be any Constitution and there isn't going to be any new State Engineer. We understand each other?"

"I've given you my interpretation, Mr. Appropriation."

In the years to come Mead kept to his interpretation. He distributed water to the people according to their priorities and he hardly ever used the "public interest" provision. Everybody knew that Prior was right, and that whatever the Constitution might say, the water users really owned the water. They had vested rights.

Prior's next confrontation was his biggest, and it probably changed the course of history more than anything he ever did.

If there was another great man of the West in the late 19th century, it was John Wesley Powell, the visionary who ran the Colorado River in 1869 and wrote his famous *Arid Lands Report* in 1878. Powell's report, which Prior hated, was nevertheless widely read and admired—to which Prior would always add, his

voice rising, "admired by a bunch of goddammed blind, thick-headed *easterners*." In the *Arid Lands* report, Powell urged a variety of measures to induce a more ordered settlement and a better fit between society and the limits imposed by the scarcity of water in the arid West. Prior was, of course, utterly contemptuous of the idea of limits—in fact, he never spoke the word even once during his long life. "Human beings," he would say, "can accomplish anything. There's no point in being negative."

Without Prior's knowledge, Powell was appointed head of both the U.S. Geological Survey and the Bureau of Ethnology. In 1888, Powell convinced Congress to commission him to conduct a comprehensive survey of potentially irrigable lands and possible reservoir sites in the West.

It seemed innocuous. But then Powell persuaded the Interior Department to close all lands west of the 101st Meridian to settlement, pending Powell's study as to which lands could be settled in an orderly way. It was the most sweeping public lands withdrawal in history. To boot, the 1889 withdrawal was made retroactive back to 1888, the date of Congress' original resolution requesting Powell's survey.

Prior became catatonically angry, the most furious he'd been since that day four decades earlier at Rich Bar on the Feather River. He was everywhere. He even travelled to Washington, which he detested most of every place in the East, which in turn he detested more than any place on earth. He met with Senator William Stewart of Nevada—"Big Bill"—Prior's old bar-hopping friend from the early Gold Country days. He talked with everyone he knew. On the way back home, he stopped off in Omaha to meet with William Smythe, the untiring booster for big irrigation, big dams, and more development.

With everyone he was direct, as always, but with Stewart and Smythe he was most direct of all. "This Powell sumbitch [Prior was always careful to use the preferred pronunciation, "sumbitch"] is a madman," he exhorted, the veins standing out on his neck. "Get him. *Get* the sumbitch."

And they did. In August, 1890, Congress, at Stewart's relentless urging, overturned the 1889 withdrawal. Then Smythe took over. He organized the Irrigation Congress in 1891. The most notorious Irrigation Congress meeting was in 1893 in Los Angeles

when Smythe, Prior, and nearly the whole crowd—a gang, really—shouted Powell down. He was a pariah, he was against progress. They finally drove Powell from office in 1894, when he was forced to resign. Wallace Stegner, who saw it differently than Prior, described Powell's downfall this way in *Beyond the Hundredth Meridian: John Wesley Powell and the Second Opening of the West*:

But they hadn't given him time. They had beaten him when he was within a year of introducing an utterly revolutionary—or evolutionary—set of institutions into the arid West, and when he was within a few months of saving that West from another half century of exploitation and waste. It was the West itself that beat him, the Big Bill Stewarts and the Gideon Moodys, the land and cattle and water barons, the plain homesteaders, the locally patriotic, the ambitious, the acquisitive, the myth-bound West which insisted on running into the future like a streetcar on a dirt road.

Ramona, who knew of the Powell confrontation, remained silent.

Prior stayed very busy. He lobbied through the great Reclamation Act of 1902. Prior knew it would never pay its way, although he kept that fact to himself during the debate over the Act. He knew reclamation was good because it meant more farms, more farming towns. Besides, water users should be subsidized. That's how you made progress in the West.

Prior had grown to respect Southern California—not as much as Utah, for sure—but he saw the beginnings of a great city there. He wanted to help. In 1903, after making some inquiries, he travelled to Los Angeles by rail, riding in the plush coach car specially designed for Leland Stanford. Prior had arranged for a private meeting with William Mulholland, the tall, dapper, mustachioed head of the Los Angeles Department of Water and Power. It was a match made in heaven.

“Owens Valley,” Mulholland mused, after hearing Prior's careful, detailed two-hour presentation in the wood-panelled, high-ceilinged office. “That's a long way from Los Angeles, nearly 250 miles.”

“That's exactly the point, Mr. Mulholland. If this city is going to be what you want it to be, you're going to have to think big. Imagine all the jobs you'll create in order to build the canal

and the facilities. Think of the economic benefit just from that. Besides, and I've got to be direct with you, I can either head back home or go on to Las Vegas and Reno. They want to grow, too, you know."

"Prior, may I call you Prior —?"

"You sure can—Bill."

"Prior, you've got a deal. Let's keep this to ourselves."

"We sure will, Bill."

Then Mulholland got up from his mahogany desk and walked to the window. "Do you think there's any problem with those folks up in the Owens who are planning their own reclamation project? We'll have to take the water out of their watershed and my impression is that water law pretty much favors irrigation."

"Bill, don't worry about a thing. This Riparian Law you sometimes use here in California is no problem—you just quietly, through a third party, buy up all the landowners along the stream. The only water law that really matters is first in time, first in right. Frankly, it's all up for grabs for the first taker. If that happens to be farming—fine. I'm all for farming. But if our cities need it and they get there first, they've got it. The law is completely neutral. Don't worry about a thing."

"As I say, Prior, we've got a deal. Thank you for this. A lot of people will thank you."

The two men shook hands and Prior moved toward the door. He stopped, turned, and said, "And, Bill, by the way, make your plans broad enough to include Mono Lake up to the north. Your city is going to need it some day."

"Prior, you took the words out of my mouth."

And the two men laughed heartily.

Prior was wakened one morning in 1908 by a friend's loud and rapid knock on the door. He brought news that seemed to come from Mars. "What?" Prior said in disbelief. "Indians? Water rights? Even if they haven't diverted water? The United States Supreme Court, you say?"

The *Winters* decision gnawed at Prior on a daily basis. Finally, in 1911, he got on the Northern Pacific and went out to the

Reclamation office in Billings. He knew the people there and he had an idea. At first they were taken aback. "Take on the *Winters* decision? Rub out the words of the Supreme Court by real action on the ground?" But they quickly understood, and they carried out Prior's carefully drawn plan.

As the first symbolic act of a campaign that would continue for nearly the whole century, in 1911 Bureau of Reclamation officials entered the Gros Ventre-Assiniboine Reservation at Fort Belknap, the very reservation at issue in *Winters*. They dammed up Peoples Creek, which drained most of the reservation. They diverted the flow and by canals sent the water to the non-Indian irrigators in the Malta District 150 miles away.

When Prior returned and told Ramona, she said, "Oh Prior, those are my people."

"Damn it, this is about law, Ramona. Law protects people who use water, not those who waste it."

Two years later Prior came up against John Muir. Three years later, Hetch Hetchy, the sister valley of Yosemite, was a reservoir. He railed to Ramona, "That long-haired wild man, with his talk about wilderness and beauty and animals—and *flowers*—he needed to be put in his place."

"But Prior, oh, Prior, you used to read Mr. Muir's books. And Prior, just last night we walked by the stream and you picked me a mariposa lily, the one in the vase over there, and you told me mariposa meant butterfly in Spanish and that I was your butterfly lily."

Prior just said, "Those were books and that flower was personal, Ramona. This is about water."

By 1916, Prior had succeeded in getting the Reclamation Service to build giant Elephant Butte Dam on the Rio Grande in southern New Mexico. Traditional, Hispanic farmers—1400 farms with 50,000 acres in crops supporting 6,000 Hispanic people in all—had worked the land long before the dam. In 1936, Hugh Calkins of the U.S. Soil Conservation Service wrote a report showing how the Hispanic subsistence farmers couldn't pay the charges for the big project and wouldn't or couldn't convert to the new, intensive cash crops of cotton favored by the Anglos for whom Elephant Butte was built. Before the dam, Calkins wrote,

“The Spanish-American population [was] largely self-sufficient and secure.” Afterward the Hispanics lost their farms and became farm laborers living “at a permanently low income level and a high insecurity level.”

When Prior learned of Calkins’ report, he cranked up his telephone and told Reclamation, “Bury it”—which Reclamation did.

“But Prior, these are my people. And weren’t they living the Jeffersonian ideal?”

“This is about policy, Ramona, and progress. And policy must be color-blind.”

By the 1930s, even though he was in his eighties, Prior was as energetic and effective as ever. He was ready for his last great crusade.

The great dam-building orgy of the 1930s through the 1960s remade the American West, and it was Prior’s central premise that drove it: the rivers and canyons, all of them, were zoned for intensive use, first come first served, no holds barred. Reservoir capacity expanded at the rate of eighty percent per decade during the nearly half-century boom. Ironically, Prior’s greatest ally in the early 1930s was Elwood Mead, by then Commissioner of Reclamation. Although they never talked and although each man carried a visceral dislike for the other from their 1890 meeting in Wyoming, the combination of their activities was overwhelming. Both men held a life-long love for irrigation and favored the farmers, they really did. But they believed in development more, and now it was the cities, the subdivisions, the hydro facilities, and the coal-fired power plants that wanted and needed the water. Prior and Mead made sure there were no obstacles.

Every single river system was built up. The Columbia, the River of the West, slackwater pools from Bonneville to Canada. The Missouri, with 85 million acre feet (MAF) impounded. The Rio Grande, with 7.8 MAF, twice the annual flow of the river, behind dams. The Colorado, with 72 MAF in storage—nearly six times the annual runoff of the river. And nearly all the smaller watersheds, too.

It seemed not to matter that so many hundreds of places were sacrificed. Glen Canyon. The rich bottom lands of the Fort

Berthold Reservation. The Hispanic settlements at Los Martinez, Rio de los Pinos, and Rosa under Navajo Reservoir on the San Juan River. The old falls and Indian fishing scaffolds at Celilo. At the other extreme, hundreds of rivers were drained dry by the diversions.

It was an ordeal. Prior had grown tired. He felt his age for the first time. Beginning in about 1975, he grew increasingly less active. His last public appearance was the closing address to an emotional, standing-room-only crowd of his truest believers at the 1987 annual meeting of the Colorado Water Congress. It was a prosperous audience: farmers; reasonably well-heeled public water officials; well-heeled executives from special water districts; very well-heeled engineers; very, very well-heeled real estate developers; and very, very, very well-heeled lawyers. The conclusion of Prior's famous swan song went like this:

Think back, gentlemen, over what we and our forebears have accomplished. We have conquered, tamed and settled the harshest land. We have made it green. We have built great cities. We have served all the people. We did it with water.

The Bureau of Reclamation alone has built 355 storage reservoirs and 15,000 miles of canals, 1,333 miles of pipelines, and 275 miles of tunnels. More than 100,000 miles of canals divert the flows of western rivers and deliver water to irrigators and other water users. More than a million artificial reservoirs, lakes, and ponds store 294 million acre feet. This is the equivalent of 22 whole Colorado Rivers backed up behind dams and over former canyons. It is enough to put Montana, Wyoming, Colorado, and New Mexico—an entire tier of states from Canada to Mexico—under a foot of water. All of that creativity and energy was unleashed by the simple, time-proven idea that the ingenuity and diligence of the individual American should not be shackled.

Progress, gentlemen, progress. That is what we have given to our children and grandchildren.

Prior has now passed on. He died this January 19th when his heart seized up after receiving a fax informing him that, on that very day, the new Director of the Denver Water Board had recommended that the water developers not file a lawsuit challenging EPA's rejection of the dam at Two Forks. In truth, however, he died of multiple causes. The publication of *Milagro Beanfield War* ("It's lies, lies top to bottom," Prior would fume. Ramona,

who seldom teased Prior, would say, "It's just fiction, love," and, she would add with a gleam in her bright eyes, "Oh, but it's a funny book, Prior."). Carter's Hit List in 1977 ("We need a good conservative Republican from the West, preferably California," Prior ranted.). President Reagan's moratorium on federal funding of water projects. The *Mono Lake* opinion and the public trust doctrine (Prior raged, "What kind of a court is this? Talking about brine shrimp, gulls, Wilson's Phalarope, tufa—whatever the hell that is. This was supposed to be a case about *water*."). The serious illness of the General and the ridicule he is suffering just now, in his last days. Indian water settlements ("They don't deserve a single drop."). Environmentalists—just the mere existence of them. Academics who relentlessly criticized Prior's ideas ("The bastards wouldn't know the real world from a beachball."). Federal reserved water rights. State water planning ("We've got a plan. It's called 'first in time, first in right.'"). An especially cruel blow was when they adopted an instream flow program—in Utah.

But perhaps we should leave the last word to Ramona. After all, she knew more about Prior than anybody. She had heard I was writing this piece, and this week she called to talk. I took notes and this is part of what Ramona told me in her measured way:

Everybody knows I've never been one to criticize Prior. Lord, I always loved the man so. But, you know, he *was* wrong sometimes. And, for me personally, the worst of it was that his wrong-headedness increased over the years. It seems he just couldn't change—he was so set in his ways, because he believed so deeply in his convictions.

But what people need to remember is that there were times when he was right, too. Otherwise, how could he have lived for so long? How many ideas, after all, last for a century and a half?

What I hope is that the reformers remember some of the good things about Prior now that he's gone. I hope that they appreciate that Prior's real roots were in the communities he helped build in his big-hearted way: in the Bitterroot, Gallatin, and Yellowstone valleys; the Powder River country; the Gunnison and Yampa watersheds; the Upper Rio Grande; the Verde Valley; the Virgin River country; some of the small farm communities in California's Central Valley; the Humboldt; our country out near Vale; places on the Snake River Plain; the Methow Valley. And places, too, where my people have managed to thrive: the Culebra watershed near San

Luis, Colorado; the Chama Valley; the Wind River Valley; the Deschutes watershed. There are many others. These are some of the finest places in the world. Whatever wrong directions his hard-headedness might have taken him off in, that sense of community was what he most passionately cared about. That was his most luminous idea.

I wonder whether the reformers will be able to keep the light of that idea alive and whether, now that they will have to replace Prior, they can offer up still other ideas as bright. I hope they can and if they can, I wish all the reformers godspeed. I wish them 152 years also.