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Creates Tension with the Takings Clause and the Prior  
Appropriation Doctrine**

Ashley N. Minton

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# TENSION IN THE WATERS: HOW *TRI-STATE GENERATION* v. *D'ANTONIO* CREATES TENSION WITH THE TAKINGS CLAUSE AND THE PRIOR APPROPRIATION DOCTRINE

Ashley N. Minton\*

## I. INTRODUCTION

The New Mexico Supreme Court recently invoked the Public Trust doctrine as a means to reallocate water rights in a manner inconsistent with the traditional reallocation of water in New Mexico.<sup>1</sup> In *Tri-State Generation and Transmission Association, Inc., v. D'Antonio*, the supreme court upheld NMSA Section 72-2-9.1,<sup>2</sup> which provides the Office of the State Engineer (“State Engineer”) a conduit to administratively regulate water rights that fall outside of the adjudication process prior to an *inter se* process.<sup>3</sup> The *inter se* process allows any water rights owner in a water adjudication to challenge any other defendant to establish the seniority of an individual’s water right.<sup>4</sup> Additionally, the supreme court held that the deprivation of an *inter se* process before a water right was curtailed was not a violation of the Section XVI of the New Mexico Constitution, which mandates that water be allocated according to priority

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\* University New Mexico School of Law.

1. See *Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039, ¶ 41, 289 P.3d 1232 (explaining “[y]et this court has repeatedly recognized, a water right is a limited, usufructuary right providing only ‘a right to use a certain amount of water to which one has claim via beneficial use.’ Water is ‘merely usufructuary; as belonging to the public; as subject to public servitudes; as incapable of full ownership; as subject to constraints that it be used nonwastefully, reasonably, beneficially.’” (quoting *Walker v. United States*, 2007-NMSC-039, ¶ 21, 142 N.M. 45)).

2. See *Tri-State Generation & Transmission Ass’n*, 2012-NMSC-039, ¶ 32. See also NMSA 1978, § 72-2-9.1 (2003).

3. See *Tri-State Generation & Transmission Ass’n*, 2012-NMSC-039, ¶ 33 (explaining that “[w]hile the statutory adjudication process serves an essential function in the final determination of water rights, Tri-State offers no applicable support for its proposition that water priorities can be managed by the State Engineer only after an *inter se* adjudication.”).

4. Brigitte Buynak, *Adjudications*, WATER MATTERS! 4-1, 4-5 (2010-2011) [hereinafter *Adjudications*] <http://utntoncenter.unm.edu/pdfs/Water-Matters-2013/Adjudications.pdf>.

administration.<sup>5</sup> By finding that the State Engineer has authority to administer water rights without an *inter se* process, the supreme court creates tension with the Fifth Amendment's Takings Clause and New Mexico's constitutional guarantee of the priority administration of water.<sup>6</sup>

The background section of this note highlights the conditions leading up to the *Tri-State* decision and then takes a deeper look into the procedural history prior to the case reaching the supreme court. Part III analyzes the four sections of the supreme court's decision in *Tri-State*. Part IV analyzes the tensions *Tri-State* creates with the Takings Clause as well as the prior appropriation doctrine when the decision departs from earlier precedent.<sup>7</sup> Finally, Part V recommends that the New Mexico Legislature or the supreme court take measures to alleviate the tensions created by the *Tri-State* decision by providing an *inter se* process to individuals who possess water rights before those rights are curtailed.

## II. BACKGROUND

Article XVI, Section II of the New Mexico Constitution provides that "priority appropriation [of water] shall give to the better right".<sup>8</sup> The better right is determined by which water user has the earliest appropriation date as compared to other water users when placed in a chronological hierarchy.<sup>9</sup> In New Mexico, the hierarchy of water rights is determined by a formal adjudication process with the goal of identifying and recognizing all of the valid water rights held within the state and placing them in chronological order for regulation purposes.<sup>10</sup> The water user found to have the earliest appropriation date has a senior right while all later appropriations are junior against the senior appropriation.<sup>11</sup> The adjudication process in New Mexico often takes a decade or more to complete and consists of seven phases, not all of which are relevant to this case

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5. See *Tri-State*, 2012-NMSC-039, ¶ 33 (explaining that "nothing in the New Mexico Constitution establishes a right to an *inter se* adjudication of priority").

6. U.S. CONST. amend. V (forbidding "private property [to] be taken for public use, without just compensation").

7. See generally *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699 (providing that there can be no administration of water rights until parties have been provided opportunity to contest priorities through and *inter se* process).

8. N.M. CONST. art. XVI, § 2.

9. Susan Kelly & Carol Romero-Wirth, *Water Rights Management in NM and Along the MRG: Is AWRM Sufficient?*, WATER MATTERS! 1, 2 (2013) [hereinafter *Water Rights Management*] [http://uttcncenter.unm.edu/pdfs/water\\_rights\\_mgmt.pdf](http://uttcncenter.unm.edu/pdfs/water_rights_mgmt.pdf).

10. See *Snow v. Abalos*, 1914-NMSC-022, ¶ 22, 18 N.M. 681.

11. *Water Rights Management*, *supra* note 9, at 2.

note.<sup>12</sup> In the formal adjudication process, the State Engineer and the adjudication court work together to locate and join all parties with a claim to the water source being adjudicated.<sup>13</sup> Currently, New Mexico has 12 pending adjudications involving approximately 72,300 non-Indian claimants and 18 tribes/pueblos.<sup>14</sup> These numbers only account for water actually in the adjudication process. New Mexico contains a large amount of water that is awaiting the initiation of adjudication.<sup>15</sup>

The sixth phase of the adjudication process is the *inter se* phase, which provides any party that the State has involved in the adjudication an opportunity to challenge the seniority of any other involved party's water rights.<sup>16</sup> A successful challenge places the water right chronologically higher than (prior to) the losing right in the challenge and definitively determines which right is senior and which is junior.<sup>17</sup> Seniority is important because in the event that water rights ever need to be regulated, as in periods of drought, they will be curtailed from the bottom up.<sup>18</sup> "By resolving the challenge of any member of a community, the water rights are made final as against every other right, including the State's claim to the right."<sup>19</sup> Traditionally in New Mexico, the *inter se* phase has been required before an individual's water right could be curtailed.<sup>20</sup>

Review of the water issues New Mexico experienced leading up to the enactment of NMSA § 72-2-9.1 (the statute at issue in this case), helps provide an understanding of what is at stake and the parties' legal argu-

12. *Adjudications*, *supra* note 4, at 4-3 (outlining the seven phases of adjudication as: "(1) the complaint; (2) the hydrographic survey; (3) the sub-file phase; (4) the global issues phase; (5) the errors and omissions phase; (6) the *inter se* phase; and (7) the final decree").

13. *Water Rights Management*, *supra* note 9, at 4.

14. *Water Rights Management*, *supra* note 9, at 2.

15. *See Water Rights Management*, *supra* note 9, at 13 (establishing the potential implications of AWRM on the pending adjudication of the Middle Rio Grande which is expected to "involve thoughts of claimants, cost millions of dollars, and last for decades").

16. *Water Rights Management*, *supra* note 9, at 4-5.

17. *Adjudications*, *supra* note 4, at 4-5.

18. "Priority of appropriation shall give the better right." N.M. CONST. art. XVI, § 2.

19. N.M. CONST. art. XVI, § 2.

20. *See State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699 (asserting "[the court] agree[s] that there can be no administration of junior rights as against senior rights until the parties have had an opportunity to contest priorities *inter se*").

ments in *Tri-State v. D'Antonio*.<sup>21</sup> In 1983, the United States Supreme Court required New Mexico to pay Texas \$14,000,000 for the state's failure to comply with the Pecos River Compact.<sup>22</sup> Additionally, New Mexico was required to meet all future Pecos Compact obligations to Texas without fail.<sup>23</sup> Between the years 2000 and 2003, New Mexico experienced a steady and rapid increase in the percentage of the state facing some degree of drought,<sup>24</sup> which created worry of potential shortfalls in the water deliveries to Texas that are now expressly required by the United States Supreme Court.<sup>25</sup> Between New Mexico's water commitments through compacts, the severe nature of the state's drought, the amount of unadjudicated water, and the prolonged nature of adjudicating and administering water rights, the State could no longer ignore the tension between the demands on scarce water resources and the sheer amount of unadjudicated water.<sup>26</sup>

In recognizing that the State was facing a severe drought with undecided water rights and competing needs for water, the New Mexico Legislature ("legislature") took action by enacting NMSA 1978, Section 72-2-9.1(A) (2003).<sup>27</sup> In an attempt to address these concerns, the legislature directed the State Engineer to "adopt rules for priority administration to

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21. NMSA 1978, § 72-2-9.1 (2003) (mandating that the New Mexico Office of the State Engineer adopt rules to efficiently administer water rights in priority).

22. See *Texas v. New Mexico*, 482 U.S. 124 (1987). See also Chris Gorbach, *New Mexico's Experience on the Pecos* (Dec. 17, 2004), <http://www.waterassembly.org/archives/8th%20Assembly/New%20Mexico's%20Eperience%20on%20the%20Pecos.pdf> (providing and general background of Pecos Compact compliance and that New Mexico's lesson from *Texas v. New Mexico* was that "compact compliance is not an option—either we are going to figure it out, or there are nine judges in a big building in Washington, D.C. that will do it for us."), <http://www.waterassembly.org/archives/8th%20Assembly/New%20Mexico's%20Eperience%20on%20the%20Pecos.pdf>.

23. *Texas v. New Mexico*, 482 U.S. 124, 135 (1987).

24. See Richard Heim, *U.S. Drought Monitor: West*, UNITED STATES DROUGHT MONITOR, (Nov. 19, 2013) (showing that at the end of 2000 about 20 percent of New Mexico was experiencing some degree of drought compared to about 85 percent at the end of 2003), <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?NM>.

25. Chris Gorbach, *New Mexico's Experience on the Pecos*, MIDDLE RIO GRAND WATER ASSEMBLY (2003), <http://www.waterassembly.org/archives/8th%20Assembly/New%20Mexico's%20Eperience%20on%20the%20Pecos.pdf>.

26. *Water Rights Management*, *supra* note 9, at 3 (recognizing that "[p]riority administration has the potential to pit cities and farmers against each other," as one of the potential tensions created when priority administration is used to regulate water rights).

27. See NMSA 1978, § 72-2-9.1(A) (2003) (stating "[t]he legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to

ensure that authority is exercised: (1) so as not to interfere with a future or pending adjudication; (2) so as to create no impairment of water rights, other than what is required to enforce priorities; and (3) so as to create no increased depletions.”<sup>28</sup> This mandate permitted the State Engineer to administer water rights within the state prior to a formal adjudication process, effectively allowing a water right to be curtailed without an *inter se* process.<sup>29</sup>

To accommodate the mandate, the State Engineer developed the Active Water Resource Management regulations (“AWRM”).<sup>30</sup> AWRM gives the State Engineer authority to appoint water masters to unadjudicated districts that are identified to be in need of water management.<sup>31</sup> Once a water district is identified and assigned a water master, the water master has the authority to evaluate and delegate the supply of water based on “administrable water rights.”<sup>32</sup> Administrable water rights are defined as “water right or right to impound, store or release water, the elements of which have been determined by a court of competent jurisdiction or determined on an interim basis by the state engineer under these rules and regulations.”<sup>33</sup>

The State Engineer established a hierarchy of evidence to be considered in determining each user’s water right and date that the water right was established.<sup>34</sup> This hierarchy is structured to establish water rights based on the best available evidence, ordered as follows: (A) a final decree from an adjudication,<sup>35</sup> (B) a sub file order from an adjudication,<sup>36</sup> (C) an offer of judgment from an adjudication, (D) a hydrographic sur-

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administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.”).

28. See NMSA 1978, § 72-2-9.1(B) (2003).

29. See *Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039, ¶ 44, 289 P.3d 1232 (establishing that Tri-State’s belief that water rights were prohibited from being curtailed until they have been adjudicated *inter se* was based on the New Mexico Supreme Court’s holding in *PVACD*). See also *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699 (providing that there can be no administration of water rights until parties have been provided opportunity to contest priorities through and *inter se* process).

30. See 19.25.13.1-50 NMAC.

31. See 19.25.13.11-12 NMAC (creating districts for water masters based on necessity). See also 19.25.13.16 NMAC (giving general authority to appointed water masters).

32. See 19.25.13.17(H) NMAC (implementing authority for administration of water deliveries according to priority). See also 19.25.12.16(B) NMAC.

33. 19.25.13.7(B) NMAC.

34. 19.25.13.27 NMAC.

35. See *Adjudications*, *supra* note 4, at 4-5.

36. See *Adjudications*, *supra* note 4, at 4-3.

vey,<sup>37</sup> (E) a license issued by the State Engineer, (F) a permit issued by the State Engineer, and (G) a determination by the State Engineer using “the best available evidence” of historic, beneficial use.<sup>38</sup> After the water master determines the administrable water rights, the dates are posted and can be appealed through the State Engineer’s administrative appeals process.<sup>39</sup>

AWRM’s hierarchy does not provide an *inter se* process and thus effectively allows a water right to be curtailed without the previously integral process of determining the priority of water rights. The *inter se* process was also thought to be protected by constitutional due process because of the Court’s ruling in *State, ex rel. Reynolds v. Pecos Valley Artesian Conservancy District* (“PVACD”).<sup>40</sup>

In response to the creation of AWRM, Tri-State Generation and Transmission Association, Inc. (“Tri-State”) promptly challenged the regulations on separation of powers, statutory interpretation, due process, and vagueness grounds.<sup>41</sup> Tri-State claimed that the absence of the *inter se* process before curtailing a water right provides the state engineer with an adjudication power that properly belongs to the judiciary and thus violates separation of powers.<sup>42</sup> Tri-State also claimed that by failing to provide an *inter se* process, AWRM strips water right holders of their procedural due process rights.<sup>43</sup>

The district court reversed the State Engineer’s adoption of AWRM regulations on separation of power grounds and held that AWRM violated Article III, Section I of the New Mexico Constitution because the State Engineer did not have the appropriate power to enforce the priority administration in AWRM.<sup>44</sup> The district court found sections (D), (F), and

37. *Adjudications*, *supra* note 4, at 4-5 (explaining that the Office of the State Engineer collects information about each water claim to a source to identify should be joined as claimant in a case as well as to collect necessary information to make offers of judgment to claimants).

38. See 19.25.13.27(A)-(G) NMAC. See also *Adjudications*, *supra* note 4, at 4-5.

39. See *Adjudications*, *supra* note 4, at 4-5.

40. *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699 (stating that “there can be no administration of junior rights as against senior rights until the parties have had an opportunity to contest priorities *inter se*.”).

41. *Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039, ¶ 7, 289 P.3d 1232.

42. *Id.* ¶ 33.

43. Brief for Plaintiff-Respondent at 25, *Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039 (No. 32,704).

44. N.M. CONST. art. III, § 1 (providing that “[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers

(G) (hydrographic survey, permit issue by the State Engineer, and determination by State Engineer respectively) of 19.25.13.27 NMAC unconstitutional because the State Engineer's authority to determine priority dates was limited to considering licenses and adjudications only.<sup>45</sup> The district court also determined that the appeals process for priority administration was too slow and violated state constitutional guarantees of due process as well as New Mexico's guarantee of an *inter se* process before water rights are curtailed.<sup>46</sup>

The New Mexico Court of Appeals affirmed the district court in part and reversed in part. The court of appeals held that even if the Legislature intended to provide the authority for the State Engineer to adopt the AWRM regulations being challenged, the necessary framework to provide that authority was not present in NMSA § 72-2-9.1.<sup>47</sup> The court of appeals further restricted the sources the State Engineer could use to determine priority dates by ruling that in addition to sections (D), (F), and (G), Sections (B) (sub-file orders), and (C) (offer of judgment) could not be considered.<sup>48</sup> The court of appeals reversed the district court's finding that the appeal procedures for priority determinations failed to satisfy New Mexico's due process requirements.<sup>49</sup> The State Engineer then petitioned the supreme court where four issues, which are discussed in the next section of this note, were considered on appeal.<sup>50</sup>

The New Mexico Supreme Court upheld NMSA § 72-2-9.1 and AWRM in their entirety. Affirming in part and reversing in part, the court held that the Legislature provided the necessary authority for the State Engineer to promulgate AWRM and that the regulations were constitutional for purposes of due process, separation of powers, and vagueness.<sup>51</sup>

### III. RATIONALE

Part III discusses the New Mexico Supreme Court's *Tri-State Generation v. D'Antonio* decision in four sections. Each section reflects an issue

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properly belonging to one of these departments, shall exercise any powers properly belonging to either of the other .").

45. *Tri-State Generation & Transmission Ass'n.*, 2012-NMSC-039, ¶ 7.

46. *Id.*

47. *Id.* ¶¶ 29-30.

48. *See* 19.25.13.27(B)-(C) NMAC.

49. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-015, ¶36, 149 N.M. 394.

50. *See generally Tri-State Generation and Transmission Ass'n.*, 2012-NMSC-039.

51. *Id.* ¶ 17.

appealed to the court including: (1) statutory analysis, (2) separation of powers, (3) due process, and (4) vagueness.

### A. *Statutory Interpretation*

To determine whether § 72-2-9.1 provides appropriate authority to the State Engineer the supreme court applied two canons of statutory construction. First, the court analyzed the plain meaning of the language of the statute.<sup>52</sup> In doing so, the court considered the title of the enacting legislation as an indication of legislative intent.<sup>53</sup> Senate Bill 551, the enacting legislation for Section 72-2-9.1, was titled “An Act Relating to Water; Providing Authority for State Engineer Priority Administration and Expedited Water Marketing and Leasing.”<sup>54</sup> The supreme court reasoned that the title was clear about the intent of the Legislature and proceeded to analyze the plain meaning of the word “provide” in the title and determined that the Legislature intended to grant the State Engineer new authority to carry out the new priority administration responsibilities.<sup>55</sup>

Secondly, the supreme court addressed the absence of legislative statutory direction as to placement in New Mexico’s statutory code. The supreme court determined that the assigned placement of the legislation by the New Mexico Compilation Commission after it was enacted does not restrict the power granted to the State Engineer to the subject matter in Section 72-2-9 simply because the statutory number assigned was 72-2-9.1.<sup>56</sup> The court explained that there are times that placement can be taken into consideration but that in the case at hand, the Legislature only gave general instructions to enact a new section of Chapter 72 NMSA 1978.<sup>57</sup> The court reasoned that the instruction of the Legislature to create a new section also supports the plain meaning of the enacting legislation’s title.<sup>58</sup> Ultimately, and contrary to the court of appeals, the supreme court provided a great deal of deference to the Legislature when conducting a statutory analysis of § 72-2-9.1.

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52. *Id.* ¶ 18.

53. *Id.*

54. 2003 N.M. Laws, ch. 63 § 1. See *Tri-State Generation & Transmission Ass’n.*, 2012-NMSC-039, ¶ 19.

55. *Tri-State Generation & Transmission Ass’n.*, 2012-NMSC-039, ¶ 20.

56. *Id.* ¶¶ 21-26.

57. *Id.* ¶¶ 21-23.

58. *Id.* ¶ 25.

### B. Separation of Powers

Next, the supreme court rejected Tri-State's claim that AWRM is unconstitutional on the grounds that the New Mexico Constitution provides that water priorities must be determined only after an *inter se* adjudication *in a court*.<sup>59</sup> Upholding the court of appeals, the supreme court determined that the New Mexico Constitution does not indicate that all elements of determining water rights are the exclusive responsibility of the judicial branch.<sup>60</sup> Tri-State's argument relied on language from the supreme court's decision in *PVACD*, which required an *inter se* process before any administration of junior rights against senior rights.<sup>61</sup> The supreme court distinguished the rule in *PVACD* and made clear that the *PVACD* holding deals exclusively with an adjudication statute and is therefore inapplicable in *Tri-State* because §72-2-9.1 addresses priority administration *before* the adjudication process begins.<sup>62</sup> Put another way, *PVACD* articulates that an *inter-se* process is required before the priority administration of water rights can occur within the adjudication process, but § 72-2-9.1 and AWRM fall outside of the *PVACD* scope because AWRM's primary purpose is to address the priority administration of water outside of the formal adjudication process. The distinction the Supreme Court made between *PVACD* and § 72-2-9.1 resolved the claim that the State Engineer was given adjudicative authority that rightfully belongs to the court because the authority the statute provides is authority to administer rights completely outside of and before the formal adjudication process.<sup>63</sup> The court then went one step further in supporting its rejection of Tri-State's argument that AWRM violates separation of powers by illustrating the New Mexico Supreme Court's long standing support for allowing the Legislature to vest agencies with rule-making and quasi-judicial authority.<sup>64</sup>

### C. Due Process

Third, the supreme court used a two-step analysis to address Tri-State's claim that they were deprived of a water right without due pro-

59. *Id.* ¶ 27.

60. *Id.*

61. *Id.* ¶ 28 (providing “[t]here can be no administration of junior rights as against senior rights until the parties have had an opportunity to contest priorities *inter se*” (quoting *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699)).

62. *Tri-State Generation & Transmission Ass'n.*, 2012-NMSC-039, ¶ 31.

63. *Id.* ¶ 32.

64. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-015, ¶ 35, 149 N.M. 394.

cess.<sup>65</sup> The court rejected Tri-State's claim by invoking the Public Trust doctrine, which allows water rights to be reallocated at the government's discretion without being considered a taking.<sup>66</sup> Under the Public Trust doctrine, a water right is incapable of being entirely owned by an individual but rather is owned by the public, and individuals are only afforded a right to use a certain amount of water as long as there is no greater public interest in the water.<sup>67</sup> The supreme court explained that water rights are regulated by the state, and in New Mexico the water is governed by the prior appropriation doctrine, which states "priority of appropriation will give to the better right[.]"<sup>68</sup> This language within the N.M. Constitution indicates that the ultimate owner of all of the water within the state is actually the state, which then authorizes the *right* to use to water beneficially.<sup>69</sup> After explaining that New Mexico water rights are usufructuary<sup>70</sup> in nature, the supreme court explained that when a water right is deprived due to limited resources, the regulation does not constitute a confiscation of the right, only an administration based on priority that is supported and mandated by the N.M. Constitution.<sup>71</sup> The supreme court recognized the sobering realities of operating under the prior appropriation doctrine but established that when junior rights are curtailed to accommodate the rights of senior users or the public, a junior user does not have a guarantee of adjudication prior to the deprivation.<sup>72</sup> The court further explained that a water right was nothing more than permission from the State to use the water as long as there was not a more pressing and beneficial use for that water that better serves the interest of the public.<sup>73</sup>

Additionally, the supreme court held that Tri-State's claim that the appeals process set forth by AWRM was unconstitutional, was not ripe.

65. *Id.* ¶ 38.

66. Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423, 424 (1995) [hereinafter *Western Water Rights*] (explaining that the Public Trust Doctrine has developed into a tool to reallocate water from existing appropriations to trust uses without payment of just compensation to the appropriators).

67. *See Tri-State Generation & Transmission Ass'n.*, 2012-NMSC-039, ¶ 41.

68. N.M. CONST. art. XVI, § 2.

69. *Id.*

70. *See BLACKS LAW DICTIONARY* 1684 (9th ed. 2009) (providing the definition as "[a] right for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it, but allowing for any natural deterioration in the property over time.>").

71. *Tri-State Generation & Transmission Ass'n.*, 2012-NMSC-039, ¶ 45. *See Water Rights Management*, *supra* note 9, at 2 (explaining that beneficial use has never had a static definition in New Mexico but is clear in that the term does not include waste).

72. *Tri-State Generation & Transmission Ass'n.*, 2012-NMSC-039, ¶ 45.

73. *Id.* ¶ 45.

The court rejected Tri-State's argument that the appeals process would cause damage because Tri-State had not yet been subjected to a ruling under AWRM or appealed an administration of water rights pursuant to the State Engineer's administrative appeals process set forth in AWRM.<sup>74</sup> The Supreme Court ultimately found the appeals process constitutional.<sup>75</sup>

#### *D. Vagueness*

Finally, Tri-State argued that since a person of normal intelligence would not be able to understand the hierarchy of evidence that the AWRM takes into consideration in determining the priority of water rights, the application of the hierarchy is so vague that it violates due process.<sup>76</sup> The supreme court rejected this claim and reasoned that where no direct penalties are tied to the statute, the standards for vagueness are more relaxed.<sup>77</sup> The court further determined that the hierarchy (which includes examples) adequately informs those who wish to be informed what kind of evidence the State Engineer will take into consideration when determining priority of water rights.<sup>78</sup>

In summary, the New Mexico Supreme Court upheld the AWRM regulations by deferring to its interpretation of the legislature's intent when creating 72-2-9.1. After establishing the validity of the legislature's statutory mandate to the State Engineer, the supreme court held that the AWRM regulations do not violate due process, as water ultimately belongs to the public and the state is under a duty to regulate water in a manner consistent with the public interest at large. The court also found that AWRM does not usurp the power of the judiciary, as the regulation of water consistent with public interest is not an exclusive power of the judiciary. Finally the *Tri-State* court ruled that the AWRM regulations created by the State Engineer are not impermissibly vague, and that the language of the regulations is sufficient to apprise an average individual of the types of evidence the State Engineer will consider when administering water rights.

## IV. IMPLICATIONS

Three main issues were created when the *Tri-State* court invoked the Public Trust doctrine as a means to grant the State Engineer authority to curtail pre-adjudicated water rights and departed from the *PVACD*

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74. *Id.* ¶ 49.

75. *Id.* ¶ 50.

76. *Id.* ¶ 51.

77. *Id.* ¶ 57.

78. *Id.* ¶ 59-60.

rule.<sup>79</sup> First is the tension between the use of the Public Trust doctrine in the *Tri-State* decision and the Takings Clause of the Fifth Amendment.<sup>80</sup> Secondly, when the supreme court departed from *PVACD* and ruled that an *inter se* process was not required before a pre-adjudication water right could be curtailed, the court created the potential for out-of-priority administration of water rights. Even though the public interest that buttresses the *Tri-State* decision is compelling and may find shelter under the Public Trust doctrine, the guarantees of the Fifth Amendment Takings Clause are ultimately eroded. An erosion of takings protections leaves New Mexico's water right holders with few options to be compensated for losses suffered due to a curtailment of their water right, even if the curtailment suffered is wrongful and resulted in complete economic devastation. Lastly, a departure from the *PVACD* rule mandating that individuals be afforded an *inter se* process may discourage the State Engineer from undertaking formal adjudications in a timely manner or at all. These concerns arise from the increased potential for the State Engineer to wrongfully curtail a water right under the alarmingly simple AWRM regulations.

While the State of New Mexico may find protection under the Public Trust doctrine for the reallocation of water rights to serve the public interest, significant constitutional concerns are raised when the State Engineer curtails a water right without an *inter se* process.<sup>81</sup> A deprivation of a water right without an *inter se* process almost certainly violates New Mexico's constitutional mandate that water be regulated by priority administration.<sup>82</sup> Additionally, while the Public Trust doctrine generally provides protection to a state from the Takings Clause when a water right is reallocated in the public interest, a reasonable argument exists that an individual whose water right is wrongfully curtailed has the right to be compensated. Ultimately this author concludes that the Public Trust doctrine provides the state with a way to serve the public interests by arming the State Engineer with the necessary tools to comprehensively manage the State's water. However, by denying affected individuals an *inter se* process, there will ultimately be violations of Section XVI of the N.M.

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79. *Id.* ¶ 31.

80. Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context*, 29 NAT. RESOURCES J. 585, 590 (1989) [hereinafter *Public Trust Doctrine and Water*] (highlighting the tension between the Public Trust Doctrine and the Takings Clause concerning water rights and how differing state laws may also create more or alleviate that tension).

81. "Priority of appropriation shall give the better right." N.M. CONST. art. XVI, § 2.

82. *Id.*

Constitution that run counter to the protections afforded by the Takings Clause of the United States Constitution. The New Mexico Supreme Court should consider returning to the rule set forth in *PVACD*, which requires an *inter se* process to be provided to a water right holder before curtailment of that right can occur.

*A. How Tri-State Creates Tension between the Public Trust Doctrine, and the Takings Clause of the Fifth Amendment to the United States Constitution*

The Public Trust doctrine promotes the public interest, while the Takings Clause serves to protect individual interests. These competing interests are weighed by the court in the *Tri-State* decision, and the implications of pitting public and private interests against each other in matters of water regulation become clear.

i. Brief History of the Public Trust Doctrine

The complete history of the Public Trust doctrine is beyond the scope of this paper but has been discussed in great detail in other works.<sup>83</sup> The American judicial system has traditionally held that the Public Trust doctrine limits a state's administrative and legislative power to transfer state owned lands under navigable waterways, the lands that are beneath waterways, to individuals as wholly vested water rights.<sup>84</sup> The Public Trust doctrine has historically protected public interests such as fishing, water navigation, and commerce.<sup>85</sup> In the historical use of the Public Trust doctrine, states own the land under navigable water and when states transfer such lands into private ownership, they violate the trust in navigable waters that the state holds in interest of the public.<sup>86</sup> Consequently, it is established that any transfer of land to a private party that violates the public trust is inherently revocable.<sup>87</sup>

While largely ignored until the 1960's, the Public Trust doctrine has seen a recent revival that has shifted its historical interpretation.<sup>88</sup> In nat-

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83. William D. Araiza, *Democracy, Distrust, and the Public Trust: Process Based Constitutional Theory, The Public Trust Doctrine, and the Search for A Substantive Environmental Value*, 45 UCLA L. REV. 385, 395-401; James Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reversed Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 189-96 (1987) [hereinafter *Avoiding the Takings Clause*].

84. *Western Water Rights*, *supra* note 66, at 423.

85. *Avoiding the Takings Clause*, *supra* note 83, at 192.

86. *Id.*

87. *Id.*

88. *Id.* at 189-190. See generally, Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalist And Policy Makes*, 10 FORDHAM ENVTL. L.

ural resource litigation throughout the 1960s and 1970s, courts discovered that the guessing game of whether a state must compensate private parties, such as water rights holders, could often be completely avoided by invoking the Public Trust doctrine.<sup>89</sup> Litigators suing on behalf of the public used various legal theories to protect the environment and natural resources, but the Public Trust doctrine proved the most viable legal tool for aiding comprehensive natural resource management.<sup>90</sup> What was unclear from the doctrine's traditional interpretation was whether the right of the public to perpetually use such resources has any legal foundation capable of preventing infringements on those rights.<sup>91</sup> The modern trend is shifting as courts have recently used the Public Trust doctrine to limit the legislative and administrative power of states to authorize proprietary rights to water.<sup>92</sup>

The Public Trust doctrine has generally been applied to cases involving disputes over tide lands or lands beneath navigable waters, but not to state water rights claims.<sup>93</sup> State water rights are usually governed by either the riparian doctrine or the prior appropriation doctrine.<sup>94</sup> New Mexico is governed by the prior appropriation doctrine, which requires that a water diversion be for a beneficial use of the diverted water.<sup>95</sup> The Public Trust doctrine was not held to affect riparian and appropriative water rights until 1986 in the California case of *National Audubon Society v. Superior Court*.<sup>96</sup> In *National Audubon Society*, the California Superior Court held that the Public Trust doctrine may compel the state to curtail existing water appropriations that compromise the public interests in navigable water by balancing economic and environmental needs.<sup>97</sup> However, the court noted that the state could grant and regulate water in a manner

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REV. 1 (1998-1999); Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter *The Public Trust Doctrine in Natural Resource Law*].

89. *The Public Trust Doctrine in Natural Resource Law*, *supra* note 88.

90. *Id.* at 474 (suggesting that if "that doctrine is to provide a satisfactory tool, it must meet three criteria; it must contain some concept of a legal right in the general public, it must be enforceable against the government, and it must be capable of an interpretation consistent with contemporary concerns for environmental quality").

91. *Id.*

92. *Western Water Rights*, *supra* note 66, at 424.

93. *Public Trust Doctrine and Water*, *supra* note 80, at 586.

94. *Id.* (providing that "private landowners have property rights in water contiguous to their lands" under the riparian doctrine).

95. N.M. CONST. art XVI, § 3.

96. See Nat'l Audubon Soc'y v. Superior Court, 658 P. 2d 709, 728 (1983). See also Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context*, 29 NAT. RESOURCES J. 585, 586 (1989).

97. *Nat'l Audubon Soc'y*, 658 P. 2d at 728.

contrary to the public interest if the economic need is so great as to outweigh the public's environmental interest at stake.<sup>98</sup> *National Audubon Society* echoes the revocability principle regarding submerged lands and perpetuates the notion that existing water appropriations do not prevent water from later reallocation in the public interest.<sup>99</sup>

## ii. Brief History of the Takings Clause

The Fifth Amendment of the U.S. Constitution protects private property from being taken for public use without just compensation.<sup>100</sup> The Fifth Amendment was adopted in the Bill of Rights to protect against fears of a tyrannical federal government.<sup>101</sup> Initially, the Fifth Amendment limited only the federal government and not state governments.<sup>102</sup> It was not until after the Civil War when the Fourteenth Amendment was adopted that the Fifth Amendment was applied to state governments.<sup>103</sup>

In 1978 the United State Supreme Court, due to the legal difficulty in determining when a taking actually occurred, analyzed the Takings Clause in *Penn Central Transportation Corporation v. City of New York*.<sup>104</sup> The Court in *Penn Central* developed a balancing test that must be undertaken in each case to deal with distinct facts.<sup>105</sup> The Court identified three factors to balance to determine whether a taking has occurred: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with distinct investment-backed expectation; and (3) the character of the governmental action.<sup>106</sup> The *Penn Central* Court alluded to the fact that protecting public interest can be a significant weight in the balancing test when it considers the physical invasion of property as more problematic than merely adjusting the economic benefits derived from property.<sup>107</sup>

Since *Penn Central* laid out the balancing test for a taking, the Court has carved out two types of regulatory takings that are not subject to that balancing test. These exceptions are important because compensation de-

98. *Id.* at 727-28.

99. *See generally id.* at 728.

100. U.S. CONST. amend. V (stating "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

101. Edward J. Sullivan, *A Brief History of the Takings Clause*, LAND USE LAW (Nov. 19, 2013), [http://landuselaw.wustl.edu/Articles/Brief\\_Hx\\_Taking.htm](http://landuselaw.wustl.edu/Articles/Brief_Hx_Taking.htm).

102. *Id.*

103. *Id.*

104. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

105. *Id.* at 124. *See generally Western Water Rights*, *supra* note 66.

106. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

107. *Id.*

terminations are *not* subject to an examination into whether the takings advance an important public interest.<sup>108</sup> The first exception to the balancing inquiry was set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, where the Court determined that permanent physical occupation of the property by the government constitutes a taking.<sup>109</sup> The *Loretto* rule is significant because despite a compelling public interest and regardless of how minimal the economic impact suffered actually is, a permanent physical taking by the government “entertains a historically rooted expectation of compensation[.]”<sup>110</sup>

The second exception is found in *Lucas v. South Carolina Coastal Council*, which held that when governmental action deprives a property owner of all economic benefit of their property, the governmental action is a taking whether or not a particular public interest is served.<sup>111</sup> However, a pre-existing limitation on the property title may actually permit the governmental action of altering the physical or economic benefit from the property.<sup>112</sup> If there are pre-existing limitations on the title to a property, then the owner is not entitled to compensation irrespective of how crippling an intrusion by the government may be, unless the action taken by the government goes beyond what the pre-existing limitation would allow.<sup>113</sup>

### iii. Tri-States Invocation of the Public Trust Doctrine Creates Protection From Tradition Fifth Amendment Takings Protections.

The Public Trust doctrine has become a refuge from the Takings Clause of the Fifth Amendment through the assertion that governments are the guardians of finite public resources.<sup>114</sup> As guardians, governments have a duty to protect these finite resources to ensure they are used in accordance with public interests.<sup>115</sup> Thus, private ownership is not considered to be deteriorated when the government asserts control over the title to a resource or land under the Public Trust doctrine. The refuge concept enshrined in the Public Trust doctrine creates an obvious tension

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108. *Western Water Rights*, *supra* note 66, at 426.

109. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

110. *Id.* at 441.

111. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

112. *Id.* at 1028.

113. *Id.* at 1030.

114. See Bernard S. Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388, 388-89 n.5 (1970) (“The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.”) (quoting *State v. Cleveland P.R.R.*, 113 N.E. 677, 682 (1916)).

115. *Id.*

with the protections of the Fifth Amendment, which provides that just compensation will be rendered when the Government forces individuals to bear a public burden.<sup>116</sup> The goal of takings jurisprudence is to avoid placing too large of a burden on a disproportionate few to serve the greater interest of the public.<sup>117</sup> A look back at *Lucas* will shed more light on the strain between the guarantee of just compensation and the refuge from compensation that the Public Trust doctrine provides. In *Lucas* it was suggested that the state had the right to limit the value of land with exemption from takings principles.<sup>118</sup> The *Lucas* Court, however, explained state impunity for limiting an individual's economic benefit was inconsistent with the assurance of just compensation to citizens in the Takings Clause of the Fifth Amendment.<sup>119</sup>

*The Tri-State* court, however, embraces the rule of *National Audubon Society* and perpetuates dicta that encourage the use of the Public Trust doctrine as a means of reallocating water rights in the interest of the public.<sup>120</sup> *Tri-State* established that the State Engineer has power to curtail a water right without an *inter se* process pursuant to the Public Trust doctrine by holding "Tri-State offers no applicable support for its proposition

116. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (obligating the Government to comply with its constitutional obligation of paying petitioners just compensation for a loss suffered when the Government was the direct beneficiary). See also *Avoiding the Takings Clause*, *supra* note 83, at 173 (suggesting that the trick behind the Public Trust Doctrine in circumventing the constitutional mandate of just compensation is simple: "[r]ather than admitting that public action has affected a private property right and then seeking to justify that effect as a legitimate exercise of the police power, t[his] doctrine[ ] lead[s] to the conclusion that a private property right never existed in the first place and thus nothing has been taken as a result of the government action.").

117. See *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (establishing a balancing test to determine to weigh the private loss against the public interest); *Lucas*, 505 U.S. at 1015 (establishing that when a governmental taking results in a complete economic loss, just compensation is required); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (establishing that when a property owner suffers a permanent loss of the property due to a physical governmental intrusion, then the intrusion is a taking).

118. *Lucas*, 505 U.S. at 1028-29 (stating "[w]here permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved. We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation).").

119. *Lucas*, 505 U.S. 1003, 1031 (1992).

120. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶¶ 41-43, 289 P.3d 1232 (insinuating that merely regulating water in accordance with seniority is not a confiscation of water).

that water priorities can be managed by the State Engineer only after an *inter se* adjudication[.]”<sup>121</sup> By invoking the Public Trust doctrine, *Tri-State* provides an avenue for the state to reallocate appropriated rights without just compensation. Not only does this raise the question as to whether a constitutional taking would occur under *Loretto*, *Lucas*, or *Penn Central*, but whether it would transcend the protection of the Takings Clause if a water right is wrongfully curtailed, by accident or on purpose. If a water right were to be wrongfully curtailed, the *Tri-State* ruling provides the state protection from the duty to compensate the owner. There is no doubt that if these takings protections were to be invoked, a disproportionate burden of servitude to the public would be placed on the few individuals who have water rights curtailed without an *inter se* process.<sup>122</sup> The *Tri-State* court ultimately determines that an appropriative water right must give way to the public interest even though the right was initially granted for private use.<sup>123</sup> The imbalance of the burden raises questions as to whether this is the proper balance between public and private interests.<sup>124</sup>

### *B. Tri-State's Departure from PVACD Erodes Prior Appropriation Protections*

New Mexico delegates water in accordance with the prior appropriation doctrine, which historically emphasizes investment security.<sup>125</sup> The prior appropriation doctrine grants water rights to users chronologically in the order the water was claimed.<sup>126</sup> This doctrine provides security to users by protecting investments to land, infrastructure, or other water dependent activities made in reliance on the water right. The doctrine also provides incentive to develop and increase the economic benefits of

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121. *Id.* ¶ 33.

122. *Id.* ¶ 49 (recognizing that consequences of the prior appropriation system includes the potential of crops failing and industries suffering).

123. *Id.* ¶ 41.

124. *See English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 107 S. Ct. 2378 (1987) (departing from *Penn Central* ruling and marking a possible shift in the interpretation of the takings when it ruled that even temporary takings require compensation). *See also Avoiding the Takings Clause, supra* note 83, at 172-73 (explaining that uncertainty regarding how the U.S. Supreme Court will ultimately decide to balance the burden between public and private interests in resources when the cost of resource regulation is borne by an individual).

125. *See Western Water Rights, supra* note 66, at 426 (explaining that the emphasis on the security of water rights within the prior appropriation doctrine provides assurance that water will not be deprived for the needs of those that come later and thus encourages investment in water development projects).

126. *Water Rights Management, supra* note 9, at 2.

land.<sup>127</sup> In 1983, the United State Supreme Court highlighted the importance of the security provided by the prior appropriation doctrine in declining to unsettle existing appropriations.<sup>128</sup> More interesting is New Mexico's recognition of the importance of security in water rights appropriation (also as recently as 1983) in the *PVACD* ruling.<sup>129</sup>

#### i. How Tri-State Weakens the Prior Appropriation Doctrine

The prior appropriation doctrine is the legal doctrine under which water has been regulated in New Mexico for many years, and it promotes "first in time" claims to water over those claimed later.<sup>130</sup> Under the prior appropriations doctrine, an individual possessing a water right is entitled to continual use of that right so long as the use is beneficial.<sup>131</sup> This guarantee encourages investment in economic development opportunities by offering security against the loss of water rights.<sup>132</sup> The prior appropriations doctrine's encouragement to use water succeeded in allocating much of the state's water early on.<sup>133</sup> However, limited water resources, population growth, environmental concerns, and claims to water by tribes, the federal government, and other states are now colliding with the central purpose of the prior appropriations doctrine and chipping away at the security it once provided.<sup>134</sup> While the reasons behind this erosion are compelling, the governing doctrine that contributed much to western economic development should not be cast aside.

A traditional element of the prior appropriations doctrine is the hierarchy for determining water rights it sets forth.<sup>135</sup> The doctrine established that seniority of water rights was directly related to the earliest identified beneficial use of that water. The primary benefit of senior

127. See *Western Water Rights*, *supra* note 66, at 461. See also *Moyer v. Preston*, 44 P. 845, 847 (1896) (providing that when land is unproductive due to arid and dry climate, water can make land productive and that in order to promote land productivity, appropriated water rights should have "a security accorded to that right").

128. *Arizona v. California*, 460 U.S. 605, 620 (1983) ("The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.").

129. *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699.

130. Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 676-77 (2012).

131. *Id.* at 676.

132. *Id.* at 677.

133. *Id.* (explaining that many western rivers were fully appropriated by the early twentieth century due to the principles behind the prior appropriation system).

134. *Id.* at 679.

135. *Id.* at 682.

water rights is that during times of shortage, those with junior water rights will suffer reductions or even a complete curtailment of their use before the holder of a more senior water right.<sup>136</sup> New Mexico operates under the prior appropriations doctrine not only to establish water rights, but also to regulate water rights.<sup>137</sup> A problem occurs when an unadjudicated source of water is experiencing a shortage, as the state is left without a regulatory mechanism for the water rights during the shortage.<sup>138</sup> This problem is addressed under the controversial AWRM regulations, which authorized the State Engineer to temporarily regulate water by assigning a chronological order to water rights on a unadjudicated source of water.<sup>139</sup>

Senior water rights traditionally offered a great deal of security to their owners. Under AWRM, the State Engineer possesses the authority to assign a chronological order to water rights without allowing negatively affected individuals to present evidence of their right's seniority or beneficial use before curtailment. The inability to present evidence of priority increases the potential for a wrongful curtailment and undermines the ownership security traditionally provided by the prior appropriations doctrine.<sup>140</sup> *Tri-State* effectively opened the door to an erosion of New Mexico's constitutional mandate that waters of the state be subject to appropriation in accordance with priority appropriation.<sup>141</sup>

The weakening effect of the *Tri-State* decision on the prior appropriations doctrine and can be seen in *Bounds v. State of New Mexico*.<sup>142</sup> In *Bounds* the supreme court held constitutional a statute in conflict with the prior appropriations doctrine.<sup>143</sup> In doing so, the court relied on *Tri-State* as authority to buttress the concept that water rights are not absolute and depend on the availability of water.<sup>144</sup> *Bounds* further relied on *Tri-State* to solidify the assertion that individuals whose senior water rights are curtailed in the public interest cannot complain because the ultimate right to

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136. *Id.* at 682-84.

137. NM CONST. art. XVI, § 2.

138. Benson, *supra* note 130, at 677.

139. 19.25.13.17(H) NMAC.

140. Benson, *supra* note 130, at 684 (providing that problems could arise when the state tries to regulate water rights that pre date the state water code consistent with the prior appropriations doctrine because “[w]here a person has actually and continuously applied water to a beneficial use, there is almost certainly a valid right, but its priority date [is] undetermined.”).

141. N.M. CONST. art. XVI, § 2.

142. 2013-NMSC-037, ¶ 31, 306 P. 3d 457.

143. *Id.* ¶ 1.

144. *Id.* ¶ 31.

water is vested in the public.<sup>145</sup> It is clear that the governing legal principles within the public appropriations doctrine are being diminished as times, values, or public needs change and become more diverse. What is not clear is whether ignoring New Mexico's foundational principles will discourage economic investments that rely on the availability and enforceability of water rights. More importantly, our courts still must decide whether curtailments made under AWRM will be upheld under the Public Trust doctrine or nullified by the Takings Clause of the Fifth Amendment.

ii. Potential Impact of Tri-State's Departure From PVACD

In *PVACD*, the supreme court expressly held, "there can be no administration of junior water rights as against senior right until the parties have had an opportunity to contest priorities *inter se*."<sup>146</sup> The *inter se* process allows individuals to challenge each other's rights with all documentation relevant to the date a water right was established.<sup>147</sup> This is important because there are water rights that pre-date records available to the State Engineer.<sup>148</sup> An individual that has a right that was vested prior to 1907 is under no requirement to record the water right with the State Engineer leaving the State Engineer without access to that information unless the individual chooses to place it on file with the State Engineer.<sup>149</sup> This means that by determining the priority of rights before an *inter se* process occurs, the State Engineer could potentially make a priority determination without considering all the relevant information. The importance of a water right holder having an opportunity to present documentation that establishes the seniority of the right before curtailment cannot be denied when a curtailment could equate to complete economic devastation.<sup>150</sup> Simply stated, a priority determination by the State Engineer made without all relevant and necessary documentation could violate the constitutional mandate of priority administration.<sup>151</sup> AWRM and

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145. *Id.*

146. *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 6, 99 N.M. 699.

147. *Water Rights Management*, *supra* note 9, at 8.

148. *Water Rights Management*, *supra* note 9, at 2 (providing that New Mexico's water code was not enacted until 1907, and it was only after the enactment of the water code that a permit became the only way to obtain a new water appropriation).

149. NMSA 1978, § 72-2-9.1 (2003).

150. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶49, 289 P.3d 1232 (recognizing that consequences of the prior appropriation system includes the potential of crops failing and industries suffering).

151. N.M. CONST. art. XVI, § 2.

the supreme court's holding in *Tri-State* appears to provide the State Engineer with authority to do just that.

Under the AWRM regulations being challenged in *Tri-State*, the State Engineer is not under any obligation to seek documentation outside that of which is present in the office when compiling a chronological list of priority determinations.<sup>152</sup> Once the State Engineer compiles a chronological ordering of water rights, he publishes the list in the relevant newspaper for two consecutive weeks as notice to the affected water right holders.<sup>153</sup> In contrast, under the historic adjudication process, where the *inter se* process is guaranteed, the Attorney General files a notice of adjudication.<sup>154</sup> Upon that filing, all water rights claimants that can be discovered with reasonable diligence, are brought into the suit as parties to the adjudication.<sup>155</sup> Once a party has been brought in as a party, each claim to a water right is litigated or otherwise resolved against all others *inter se*.<sup>156</sup> The AWRM regulations offer no such protections a reality that raises serious concerns for water right holders.

*C. How Tri-State's Departure from the Public Trust Doctrine and PVACD Creates Tension with The Fifth Amendment's Takings Clause*

The historic security for water users provided by the prior appropriation system is eroded by the potential curtailment of water rights before an *inter se* process under AWRM and creates a clear tension between the Public Trust doctrine and the Takings Clause.<sup>157</sup> The AWRM regulations upheld in *Tri-State* (when combined with the protection from the Takings Clause under the Public Trust doctrine) effectuate a legal tool that provides the State Engineer protection in the event water is regulated, either purposefully or accidentally, in violation of the New Mexico Constitution's mandate for priority administration.<sup>158</sup> Further, by providing the State Engineer with a frighteningly simple process by which to prioritize water until a proper adjudication process is completed, AWRM discour-

152. 19.25.13.27 NMAC.

153. 19.25.13.28 NMAC (providing “[t]he state engineer shall publish the adoption or revision of administration date once a week for two consecutive weeks in two newspapers of general circulation within the water master district affected by such adoption or revision.”).

154. NMSA 1978, § 72-4-17 (1965).

155. *Id.*

156. *Id.*

157. *Western Water Rights*, *supra* note 66, at 432 (supporting the notion that states that govern water rights by the priority rule and then deviate from that practice “likely raise takings issue[s] involving matters of reasonable owner expectations”).

158. N.M. CONST. art. XVI, § 3.

ages the undertaking of the much more time and labor intensive adjudication process.

Once the State Engineer determines and implements priority dates, there will be little incentive to go follow through with the formalities of a judicial adjudication that would create a great deal more work. In a formal adjudication process, the State Engineer must locate all water uses on a water source and provide the information to the Attorney General. The Attorney General then sues on behalf of the state for the purpose of determining all rights to use the water.<sup>159</sup> Once claimants are brought into the adjudication by the state, the State Engineer is ordered to provide a complete hydrographic survey that contains all of the necessary data for the determination of the rights involved in the suit.<sup>160</sup> AWRM lacks such obligations for the State Engineer and permits making priority determinations based on the information “on hand.”<sup>161</sup> Also contrary to the formal adjudication process, AWRM places no requirement on the State Engineer to locate water users causing increased chances of an erroneous priority determination.<sup>162</sup>

Establishing an appropriate hierarchy of priority could become significantly less precise under AWRM. A misstatement of a water right due to an oversight, incomplete data, or errors in data could all result in a wrongful curtailment by the State Engineer.<sup>163</sup> The AWRM regulations provide the State Engineer with authority to regulate water without the burdens of a judicial adjudication process, and arguably encourage a departure from undertaking new formal adjudications. After all, the State Engineer need only “publish a list of his determinations of . . . water rights” and decide on the date of administration (which effectively cuts off junior users) to curtail a water right under AWRM.<sup>164</sup> When the simplicity of the AWRM process is viewed next the complexities and burdens of the judicial adjudication process, there is little incentive for the State Engineer to initiate the adjudication process on a basin that has already been subjected to AWRM determinations. AWRM changes the State Engineer’s role in the adjudication of water rights from being a party in a lawsuit to being the ultimate decision maker as to the priority of water

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159. NMSA 1978, § 72-4-15 (1907).

160. NMSA 1978, § 72-4-17 (1965).

161. *See* 19.25.13.27 NMAC. *But see* 19.25.13.27(G) NMAC (implying that there may be field evidence of beneficial use, but fails to provide an obligation or mandate to collect further information than what is already on hand).

162. NMSA 1978, § 72-4-17 (1965).

163. NM CONST. art. XVI, § 2.

164. 19.25.13.27-28 NMAC.

rights.<sup>165</sup> The question becomes, what incentive does the State Engineer then have to pursue a formal adjudication once he has already made a determination as to priority? The lack of an *inter se* process combined with the absence of takings consequences serves as a disincentive to the State Engineer to initiate formal judicial adjudications and may ultimately slow the adjudication process in New Mexico.

## V. Conclusion

The *Tri-State* court holding that deference will be given to the Public Trust doctrine ultimately serves as a detriment to private water rights. Unlike traditional property, water rights are ordered chronologically, and a junior right must be curtailed before a senior right. Ensuring that curtailments are performed in a manner that is consistent with the prior appropriations doctrine, as required by the New Mexico Constitution, protects individuals from the grave implications of a wrongful curtailment. While there is a strong argument that reallocations of water rights in the interest of the public should be afforded deference, the question remains of whether that protection should be extended when the government was not obligated to obtain all relevant information before reallocations were performed. The effect of these misallocations would be a violation of the New Mexico Constitution. Ultimately, *Tri-State* creates confusion for water right holders in their investments that rely on water. For this reason, substantial consideration should be given to the issue of whether a wrongful reallocation of a senior water right violates the protections of the Fifth Amendment Takings clause.

Water reallocations within the state of New Mexico are periodically necessary, and our Legislature appropriately delegated authority to the State Engineer to oversee water regulations. However, this author encourages taking a deeper look at the private interest also at stake in the world of water rights and advocates for the return to the *PVACD* rule. At minimum, the State must create a process that allows for the accurate and appropriate determination of water rights and remains consistent with the prior appropriation tradition New Mexico has thrived under. "To the extent that we believe that private decisions will optimize the social benefits we can derive from our scarce resources, we should be concerned about judicial doctrines which alter private rights with impunity."<sup>166</sup> As demon-

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165. 19.25.13.6 NMAC.

166. *Avoiding the Takings Clause*, *supra* note 83, at 210.

strated here, the Public Trust doctrine has become a tool of circumvention that allows states to reallocate private property and water rights without regard to the Fifth Amendment.<sup>167</sup>

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167. *Id.*

