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Recent Developments in the Recognition of Instream Uses in Western Water Law

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I. INTRODUCTION

Prior appropriation, the principle that running water can be captured for private benefit, has historically been a law of private water rights.[1] This principle originated in the practice of the mining camps of California, and was later rationalized by lawyers, such as Samuel Wiel and Roscoe Pound, who were influenced by the Roman stoic idea of *naturalis ratio* which posited that most things were destined by nature to be controlled by man.[2] Jurisprudential theories which idealized the economic status quo were attractive because private exploitation of natural resources was the norm during most of the nineteenth century—the formative period of United States water law. It was true that the federal government owned the public domain and its attendant natural resources, but this ownership was thought to be only temporary.[3] Again Roman law reenforced the doctrine of prior appropriation, since it ex-

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1. See Trelease, *Policies for Water Law: Property Rights, and Public Regulation*, 5 NATURAL RESOURCES J. 1 (1965), for a good discussion of the proposition that the principal function of the law should be to encourage a system of private property rights and that as a consequence, regulation and public allocation of water should be confined to curing recognized cases of market imperfection. For an economic analysis of the rise of exclusive property rights in western water resources see Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. LAW & ECON. 163, 176-78 (1975).

2. S. WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 1-63 (3d ed. 1911). A classic discussion of the influence of these ideas on modern property theories can be found in R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 195-99 (1922).

3. The history of public domain law and policy prior to the Federal Reserve Act of 1891, ch. 561, 26 Stat. 1095 (codified in scattered sections of 16, 25, 30, 43 U.S.C.) (Forest Preservation Act), focuses on the issue of how and to whom the public domain should be disposed of, not whether disposal was proper. In practice, much of the public domain passed into the hands of large holders; in theory, it was to be transferred to small farmers who made substantial improvements to earn a federal patent. As Paul Gates reports in his masterful study of public land law policy,

> [a]fter most of the arable, grazing, and forest resources of significant value had gone into private hands, frequently in large tracts, it was now possible [in 1890] for the Commissioner of the General Land Office to say, "The great object of the Government is to dispose of the public lands to actual settlers only — to bona fide tillers of the soil . . . ."

P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 462 (1968).

In California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 157 (1935), Mr. Justice Sutherland even asserted that Congress had a duty to dispose of the public domain. This position, however, is incorrect. Congress has a policy of disposal but, as a matter of constitutional law, it also has the authority to dispose of or retain the public domain. Goldberg, *Interposition — Wild West Water Style*, 17 STAN. L. REV. 1, 19 (1964).

cluded only three limited categories of resources from individual ownership: *res communes*, which were resources that from their nature could not be owned or were adapted for public use; *res publicae*, which included resources adapted for public purposes by public functionaires; and *res sanctae*, which consisted of things devoted to religious uses. All other resources were classified as *res nullius* and were considered part of a negative community awaiting capture.[4] The concept of the negative community thus justified title to natural resources on the basis of discovery and reduction to possession, and formed an ideal theory for a system of law developed from mining customs. The only limitation imposed by this doctrine of private water rights was that a right to use running water was usufructory rather than corporeal, and could only be asserted by capturing a portion of a stream's flow.[5]

Early in the development of western water law it was recognized that a completely unregulated system of property rights was unsatisfactory.[6] To implement conservation policies, Roman law justifications for a sytem based on capture were therefore recast as bases for the assertion of the state's police power to control the mode of acquisition and use of private water rights. As Dean Pound noted, the idea of capture was limited

> by making *res nullius (e.g.*, wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (*e.g.*, of the use of running water for irrigation or for power) by declaring that they are the property of the state or are owned by the state in trust for the people.[7]

This theoretical shift from an unregulated system of property rights was used initially to justify restrictions on the mode of acquisition of water rights to protect the correlative rights of other users by increasing the adequacy of title records.[8] In similar fashion, the trust theory was used to justify restrictions designed to prevent waste and speculation.[9] Only occasionally was the justification of natural resources conservation used to deny the right to appropriate if unappropriated water was available, thereby falling short of the creation of public water rights.

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4. R. POUND, *supra* note 2, at 197-98, 207.

5. W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 442-45 (1971).

6. *See* Trelease, *supra* note 1. *See also* E. MEAD, IRRIGATION INSTITUTIONS (1903). For a contemporary defense of prior appropriation see Trelease, *The Model Water Code, The Wise Administrator and the Goddam Bureaucrat*, 14 NATURAL RESOURCES J. 207 (1974).

7. R. POUND, *supra* note 2, at 198-99.

8. This led to the creation of the requirement of permits to record the use of water and application for water rights so that an applicant could more easily ascertain the amount of water available for appropriation. Nielson v. Parker, 19 Idaho 727, 115 P. 488 (1911), *discussed in* 2 IDAHO L. REV. 42, 48-49 (1965).

9. *See, e.g.*, Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935), *interpreting* CAL. CONST. art. XIV, § 3, which imposes a reasonable use restriction on appropriative as well as riparian rights.

Although the above restrictions on the right to capture and use water form the basis of state power to recognize and protect public water rights, it is important to appreciate the limited extent to which administrative and common law restrictions on water use have modified the historic assumptions of water law. Now, as in the nineteenth century, the prevailing natural resources policy followed by the courts is that scarce resources should be utilized.[10] Permanent withdrawals from exploitation are rare and represent minor exceptions to this policy.[11] However, in order to promote a policy of equality of access to a fair share of

10. S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920 (1959). There is limited judicial reevaluation of this policy, however. In the leading case of Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the court departed from this position and upheld a prohibition against filling wetlands above the high water mark of a navigable lake. The court spoke of the growing appreciation of the "vital role in Nature" of wetlands and noted:

> Is ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? . . . An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others.

201 N.W.2d at 768.

The rationale for the result reached in *Just* is suggested in Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), and a philosophical justification of sorts is outlined in Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1074-83.

11. See F. TRELEASE, WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION 61-62 (1974) for a discussion of early Idaho and Oregon statutory withdrawals of waterfalls and other scenic waters. *See also* J. ISE, OUR NATIONAL PARK POLICY (1961) (dealing with the congressional policy of leaving certain scenic resources unimpaired for the enjoyment of future generations). One such exception, public rights of navigations for example, has long been recognized, but has played a limited although increasingly significant role in constraining the capture of western waters for private benefit.

The law of public rights of navigation is derived from Roman doctrine which favored the natural use of navigable rivers for transportation. J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREFORE 2-3 (1847). In the West, the concept of public rights of navigation has been used primarily as a technical standard to allocate title to river and lake beds between federal and state governments and their patentees. Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NATURAL RESOURCES J. 1 (1967). Recently, it has been broadened in many western states to include recreational uses, such as pleasure boating and fishing. These uses, as well as irrigation, must be shared with the public by those who own the lake and river banks and beds under state law. *See* People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Southern Idaho Fish & Game Ass'n v. Picabo Livestock Co., 2 ENV. L. REP. 20,472 (Idaho 1972). The cases have not yet involved direct conflicts between consumptive and non-consumptive uses, but in the future, a state might well deny a permit to appropriate on the ground that public rights in navigable waters must be protected through the maintenance of a minimum flow. *Cf.* Omernik v. State, 64 Wis. 2d 6, 218 N.W.2d 734 (1974). *See also* Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896); Comment, *Recreational Use of Texas Rivers—Recommendations for Adoption of the Texas Public Rivers Act*, 7 ST. MARY'S L.J. 575 (1975).

a scarce resource, the law recognized correlative rights among competing users.[12]

The blanket preference for exploitation was slightly tempered by the adoption of the populist theory that speculation should be discouraged in order to prevent the monopolization of western waters. This policy against speculation, which justifies such doctrines as the actual diversion requirement in water law and the implied covenant of further exploration for oil and gas,[13] complements the preference for exploitation by helping to insure that resources are placed in the hands of present potential users. For these reasons, there has been little recognition in western water law of the principle that a portion of a stream's flow should be withdrawn from appropriation so that they can be reserved in place for the benefit of all the public. The common law or eastern law of riparian rights was rejected precisely to allow the flow to be removed for a beneficial use, rather than require it to remain in the stream to protect the correlative rights of all downstream users.

The political pressure for the recognition of environmental values in the use and development of water resources has caused a reevaluation of these assumptions which favor private water utilization. If environmental values are to be recognized with reference to water resources, large quantities of water must be reserved in place for fish and wildlife preservation and for the enhancement of the aesthetic enjoyment of streams and adjoining land areas. The purpose of this article is to trace the historic reasons for the conflict between the law of prior appropriation and the protection of flow maintenance and to examine current legislative and administrative methods for the recognition of instream uses. The article will also concentrate on a limited number of technical issues which may arise in connection with flow maintenance programs in the appropriation states, including: whether a public entity or private individual can perfect an appropriation without an actual diversion; whether a state water resources agency can deny a permit to appropriate when unappropriated water is available on the ground that reservation in place is a higher use of the water; and whether state environmental

12. Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900), for example, upheld an early state conservation law which required gas wells to be capped. In justifying the law on the ground that it protected the correlative rights of concerned parties, the Court wrote:

> Hence it is that the legislative power . . . can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste . . . . Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others.

Id. at 210.

13. 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 842.1 (1975).

policy acts require flow maintenance considerations to be taken into account in connection with water rights applications. The increasing tension between state flow maintenance programs and federally constructed or licensed projects will also be discussed.

II. JUSTIFICATION FOR STATE PROTECTION OF MINIMUM FLOWS

In general, instream uses must be protected by public rather than private rights to ensure broad distribution of both the direct and indirect benefits of reserving water in place. Private users would likely have little incentive to appropriate water for instream uses in the amounts the public is now demanding, as opposed to traditionally higher valued uses such as irrigation and power generation. Also, because the benefits of reserving the free flow of a stream may be "appropriated" by free riders, the person undertaking the reservation would often not be able to recapture, through prices or otherwise, the value of these benefits. Public rights, however, should be created by the same procedures as private rights wherever possible. Without these procedures, the imposition of public rights to minimum flows would threaten disruption of prior vested rights, as well as introduce uncertainty into the availability of water for newly emerging demands, such as energy production. In contrast to assertions frequently made by environmentalists, the values furthered by withdrawal of water for instream uses do not override these considerations.[14] The extent of public claims in support of conservation should also be clear, and perfection of these claims within the context of the appropriation system is the best method for accomplishing this objective.

The source of a state's power to recognize public rights to a portion of the flow of a stream is its sovereignty over natural resources within its borders.[15] As Justice Holmes stated in *Georgia v. Tennessee Copper Co.*,[16] each state

> has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it can utter the word, but with it remains the final power.[17]

Historically, western states have asserted claims over unappropriated waters in order to set the conditions under which private rights

14. Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 453 (1975); Tarlock, *A Comment on Myers' Introduction to Environmental Thought*, 50 IND. L.J. 454, 469 (1975).

15. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). The growth of the doctrine that the state can regulate the capture of natural resources, which were not subject to capture under Roman law, is traced in Geer v. Connecticut, 161 U.S. 519 (1896).

16. 206 U.S. 230 (1907).

17. *Id.* at 237.

may be acquired and exercised. Various theories in support of state controls to assert such claims, ranging from proprietary ownership to trusteeship, have been adopted in state constitutions and water codes. These constitutions and codes, however, are nothing more than assertions of state police power derived from state sovereignty, and all have the same operative consequences.[18] As indicated by the logic of Justice Holmes' statement in *Tennessee Copper*, this police power is not limited to withholding unappropriated waters from private appropriation in order to decide among rival claimants or curtail waste. A state can claim the water for its own use or allocate it through state financed projects. It can decide which individuals, discrete classes of users, or geographic area shall use the water. Similarly, it can decide whether the water should be reserved in place and in the name of the public generally.

As spelled out in *Light v. United States*,[19] notion of sovereignty also provides the constitutional justification for governmental regulation of resources. In *Light*, a rancher who had been enjoined from grazing his cattle on a newly created forest reserve challenged the injunction on the broad ground that federal ownership did not carry with it general rights of sovereignty over such lands. Although the Court's rejection of this argument is phrased in terms of federal power, the argument is also applicable to state control over its water resources:

> "All the public lands of the nation are held in trust for the people of the whole country." . . . And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, *to say nothing of the power of the United States as a sovereign over the property belonging to it.*[20]

Light would seem to settle the matter of the constitutional basis for government control of resources were it not for recent arguments that natural objects themselves have rights or that the Constitution requires preservation of certain, especially scenic, natural resources.[21] In response to these arguments, John Passmore has cogently noted:

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18. Professor Frank Trelease has demonstrated that the concept of state ownership has been used to support the assertion of various state regulatory powers and that all of the restrictions on use imposed on the basis of this theory "could be established without the concept of state ownership." Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638, 644 (1957).

19. 220 U.S. 523 (1911).

20. *Id.* at 537 (emphasis added).

21. Christopher Stone has made an ingenious anthropological and philosophical argument that natural objects should be given legal rights. C. STONE, SHOULD TREES HAVE STANDING? (1972); Stone, *Should Trees Have Standing? Toward Legal Rights for Natural*

> Animals cannot have rights since they "are not members of human society." We sometimes now meet with the suggestion, however, that animals do in fact form, with men, a single community, and so can properly be said to have rights. . . . Ecologically, no doubt, men form a community with plants, animals, soil, in the sense that a particular life-cycle will involve all four of them. But if it is essential to a community the members of it have common interests and recognise mutual obligations then men, plants, animals and soil do *not* form a community. Bacteria and men do not recognize mutual obligations nor do they have common interests. . . . The idea of "rights" is simply not applicable to what is non-human.[22]

The argument that we have a constitutional obligation "to protect natural environments" can also be dismissed, at least for the present. Adherents of this argument contend that

> preserving an environment may be compared to maintaining an institution, for symbols are to values as institutions are to our legal and political life.[23]

However, the values the Constitution protects are, by and large, rights to participate in processes which shape values, rather than to a fixed set of values.[24]

A more interesting but less significant question is the philosophical justification for reserving water in place. In the opinion of many conservationists, preservation of natural areas has become necessary to reaffirm and maintain cherished values such as freedom, innocence, virtue, courage, and strength. If the entire country cannot be the Garden of Eden, supporters of preservation argue that we can at least preserve the vision of what it could have been. To lawyers, however, the rich literary and philosophical tradition of wilderness preservation may seem interesting,[25] but is not directly relevant to the question of whether a state can reserve in place a portion of the free flow of a stream.

III. THE ACTUAL DIVERSION REQUIREMENT

The three traditional requirements of a valid appropriation are an intent to appropriate, an actual diversion, and an application to a beneficial use. It has always been assumed that the object of appropriation is not the flow of a stream, but the quantity of water—with a fairly wide margin of error—necessary to sustain the beneficial use. The diversion requirement imparted "notice to others that claims to use existed

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Objects, 45 S. CAL. L. REV. 450 (1972). *See also* Sierra Club v. Morton, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting).

22. J. PASSMORE, MAN'S RESPONSIBILITY FOR NATURE 116 (1974).

23. Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 265 (1974).

24. *See* Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545, 556 (1975).

25. *See, e.g.*, R. NASH, WILDERNESS AND THE AMERICAN MIND (1967).

against the stream,"[26] but unless construction costs had been incurred to make use of the water, these claims were not recognized.[27]

The significance of the "beneficial use" requirement and the common law hostility to flow appropriations are illustrated in *Schodde v. Twin Falls Land & Water Co.*[28] In *Schodde*, the appropriator, a landowner who intended to lift water from the Snake River by a current-driven waterwheel, claimed the current necessary to drive the wheel in addition to the water he intended to divert. The court held that while he was entitled to divert a fixed quantity, he was not entitled to the current necessary to obtain that quantity. In support of its holding, the court stated:

> There might be a great surplus of water in the stream at and above plaintiff's premises and an urgent demand for a portion of this surplus for beneficial uses. . . . It is clear that in such a case where a right to the current necessary to support the diversion is recognized the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated.[29]

Today, however, it would be difficult to argue that instream values are a grossly inefficient use. *Schodde* is a classic case of a wasteful and, hence, non-beneficial use and illustrates that the important question is whether a use is beneficial, not whether there has been an actual diversion.

Because of the powerful spectre of backdoor riparianism, however the actual diversion requirement has persisted in western water law long after such methods as the issuance of permits were developed to control excess claims. The requirement was invoked by a California state administrative agency in 1961,[30] for example, and by the Colorado Supreme Court in 1965, to prevent state agencies from appropriating water for public recreation and fish and wildlife maintenance.[31] The requirement was also reaffirned in the 1972 New Mexico decision of *State v. Miranda*.[32] A recent opinion of the Idaho Supreme Court, however, sug-

26. C. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION LAW 7 (Nat'l Water Comm'n 1971).

27. *Id.*

28. 224 U.S. 107 (1912).

29. *Id.* at 120.

30. California Water Rights Board Decision 1030 (1961).

31. Colorado River Water Conservation Dist. v. Rocky Mt. Power Co., 158 Colo. 331, 406 P.2d 798, 800 (1965). The case is critically discussed in Ellis, *Water Courses — Recreational Uses for Water Under Prior Appropriation Law*, 6 NATURAL RESOURCES J. 180 (1966). *See also* Lamont v. Riverside Irr. Dist., 179 Colo. 134, 498 P.2d 1150, 1153 (1972).

32. 83 N.M. 443, 493 P.2d 409, 411 (1972). In *Miranda*, the court invoked the actual diversion requirement to deny an application to drill two wells in a groundwater basin. The applicant argued that his predecessors in interest had grazed stock in a wash, thus giving him a perfected prior appropriation. *Miranda* is a sensible application of New Mexico's policy that water rights should originate with a permit from the state engineer's office whenever possible, and the court specifically limited its holding to claims of water

gests that this doctrine will no longer be applied to bar a reservation of water for instream uses where the reservation is authorized by procedures that take into account its impact on state water use patterns.[33] In addition, the Eighth Circuit long ago rejected the necessity for an actual diversion where the natural course of nature could accomplish the same beneficial purpose as the diversion.[34] State courts have also occasionally allowed appropriations to be perfected on the basis of cattle grazing or the cultivation of lands naturally overflown by a stream.[35] These appropriations are not technically instream uses, however, since the diversion was caused by nature, and they have not generally been extended to allow instream rights to be acquired.

The chief barrier to statutory abrogation of the actual diversion requirement seems to result from narrow interpretations of state constitutional provisions which provide that "the right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."[36] In *State Department of Parks v. Idaho Department of Water Administration*,[37] for example, it was argued that such a constitutional provision prohibited appropriations by public agencies and incorporated, as a matter of state constitutional law, the actual diversion

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rights for agricultural purposes. *But see* Comment, 13 NATURAL RESOURCES J. 170, 174-75 (1973). Comment, *Appropriation by the State of Minimum Flows in New Mexico Streams*, 15 NATURAL RESOURCES J. 809 (1975), argues that a diversion is not constitutionally required in New Mexico and suggests a legislative scheme for the preservation of instream uses.

33. State Dep't of Parks v. Idaho Dep't of Water Administration, 96 Idaho 440, 530 P.2d 924, 929 (1974), *construing* IDAHO CODE § 67-4307 (1971), which provides for the appropriation of certain waters to be held in trust for the people's scenic and recreational benefit.

34. Empire Water & Power Co. v. Cascade Town Co., 205 F. 123, 129 (8th Cir. 1913).

35. Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370, 378 (1960); Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 295 P. 772 (1931). Oregon originally had a broad rule that an appropriator was entitled to rely on nature's bounty, Masterson v. Pacific Live Stock Co., 144 Ore. 396, 24 P.2d 1046, 1050 (1933), but in 1959 the Oregon Supreme Court held that this was a wasteful method of appropriation, and that such a use was only a privilege which would have to yield to appropriations by others for a beneficial use. Warner Valley Live Stock Co. v. Lynch, 215 Ore. 523, 336 P.2d 884, 891 (1959). See Note *Adjudication Provisions Under the 1909 Water Code — Survey of Case Law and Proposals for Legislative Amendment*, 50 ORE. L. REV. 664, 678-87 (1971), for a discussion of the Oregon law of beneficial use, and Comment, 13 NATURAL RESOURCES J. 170 (1973), for a brief history of the actual diversion doctrine.

36. *E.g.*, COLO. CONST. art. 16, § 6; IDAHO CONST. art. 15, § 3. The constitutions of Nebraska and Wyoming qualify this declaration by the phrase "except when such denial is demanded by the public interests." NEB. CONST. art. 15 § 6; WYO. CONST. art. 8, § 3.

37. 96 Idaho 440, 530 P.2d 924 (1974). It has sometimes been suggested that in addition to the requirement of an actual diversion, there is a further requirement that the use be exclusive. The court in *State Department of Parks*, however, made no mention of the exclusive use doctrine. Most commentators have concluded that the doctrine serves no useful function. Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels*, 10 HOUSTON L.J. 598, 616-18 (1973).

requirement. The Idaho Supreme Court, however, upheld the constitutionality of an Idaho statute that authorized public appropriations, and found no precedents denying the right of state agencies to appropriate water. The court also specifically noted that "throughout the western states, state agencies frequently appropriate water" for fish and wildlife maintenance and that the statute was not part of an insidious scheme to "monopolize the state's unappropriated waters or to condemn already appropriated waters."[38]

A more thorough analysis of the constitutional issue was made in the concurring opinion in *State Department of Parks*. Justice Bakes argued that the phrase "the right to divert" was inserted in the state constitution to assert the supremacy of prior appropriation over riparian rights, not to freeze the actual diversion requirement into the constitution. To bolster his conclusion, he cited various precedents, including the famous case of *Empire Water & Power Co. v. Cascade Town Co.*[39] in support of the proposition that the law of prior appropriation has never required an actual diversion where no practical reason exists for such diversion.[40]

Two justices in *State Department of Parks* dissented, arguing that the actual diversion requirement was constitutionally required and that the state, therefore, could not protect instream uses through the appropriation system. Justice McFadden, in the most substantial dissenting opinion, contended that the state had unconstitutionally monopolized waters dedicated to other uses. His argument rested on the distinction between a state's proprietary and sovereign powers over its waters. Under Idaho law, the state holds its water in trust for its citizens in a sovereign rather than proprietary capacity.[41] To Justice McFadden, holding water in trust included the duty to preserve waters for scenic and recreational purposes, and the effect of a proposed use on scenic beauty was a proper factor to be considered in deciding whether a proposed use was beneficial. But, under his conception of the trust, the State of Idaho could not achieve these objectives by acting in a proprietary capacity.[42] He went on to argue that under the Idaho Constitution

38. 530 P.2d at 927. The court was impressed that Colorado had recently enacted similar legislation and that the Colorado Supreme Court had never relied on its similar constitutional provisions to establish an actual physical diversion requirement. See COLO. REV. STAT. ANN. § 37-92-102(3) (1973).

39. 205 F. 123 (8th Cir. 1913). See text accompanying note 34 *supra*.

40. 530 P.2d at 933-34.

41. Walbridge v. Robinson, 22 Idaho 236, 125 P. 812, 814 (1912).

42. 530 P.2d at 936. Justice McFadden noted:

> [I]f the state in its sovereign capacity has the right to use 'public water' for a certain beneficial use, it obviously cannot 'acquire' a right that it already has.

Id. The problem with this analysis is that prior to the statute in question, the state had not asserted the right to appropriate the water for the preservation of scenic beauty. Therefore, it is erroneous to speak of a right the state already has. In addition to a state's power to decide whether the water should be reserved or opened to appropriation, it

> water held by the state in its sovereign capacity—even though being beneficially used by the general public—is subject to being appropriated for specific private (or proprietary) beneficial uses. Thus, in-stream public use of unappropriated water for recreational purposes is subject to diminution by the exercise of the constitutional right to appropriate water for private (or proprietary) beneficial uses.[43]

In short, Justice McFadden believed that instream uses could only be protected by withdrawals, or denying subsequent permits, and not by appropriations. The fallacy of his argument, however, is not only seen in the erroneous assertion that a state cannot act in a proprietary capacity to recognize public rights, but in the illogical conclusion that simply because a state has the power to withdraw water from appropriation to protect recreation and scenic beauty, it cannot appropriate them for these purposes. Judicial adherence to a firm distinction between the proprietary and sovereign powers of the state stems from an era when the public interest was identified almost solely in terms of the widespread availability of natural resources for exploitation. Government property rights were viewed "as a prerogative for the advantage of the government as distinct from the people."[44] Today the recognition of public rights in natural resources is seen as a means of securing widespread benefits that will not be recognized through a private property

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appears to be well settled in western water law that a state can exercise this power by claiming proprietary rights as long as vested rights are not taken without due process of law.

43. *Id.* at 937. Justice McFadden cited Trelease, *The Concept of Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1 (1956), as authority. Dean Trelease noted that

> [i]n Idaho the governor is authorized to appropriate the water of certain lakes in trust for the people . . . although in reality this is not an appropriation, but . . . a reservation of water to prevent its being appropriated for more mundane purposes.

Id.

Although not cited by Justice McFadden, Paradise Rainbows v. Fish & Game Comm'n, 148 Mont. 412, 421 P.2d 717 (1966), provides modest support for his argument. In the course of a proceeding to establish the right to maintain a series of fish ponds, the Fish and Game Commission required the applicant to construct a fish ladder in a creek where the applicant had valid appropriative rights. The Commission argued that the public had used the stream and thus, had a prior right which required the release of some water from a fish ladder. The court rejected this argument, declaring that

> [s]uch a public right has never been declared in the case law of this state. Under Art. III, § 15 of the Montana Constitution, a private beneficial use is declared to be a public use. Individuals who have put water to a beneficial use should not have their rights arbitrarily diluted, under the claim of sovereign right or otherwise.

Id. at 721. The case does not, however, stand for a blanket rejection of public rights within an appropriation system. The court qualified its statement noting that the right should be recognized under proper circumstances, but not under the facts before the court, since the creek was not a migratory route for large numbers of fish. *Cf.* People v. Glenn-Colusa Irr. Dist., 127 Cal. App. 30, 15 P.2d 549 (1932). See Stone, *Legal Background on Recreational Use of Montana Water*, 32 MONT. L. REV. 1, 13-18 (1971).

44. Geer v. Connecticut, 161 U.S. 519, 529 (1896). Even with the bias in favor of private exploitation, the power of the state to withdraw resources from exploitation pursuant to its sovereignty was recognized. *Id.*

rights regime. Thus, the distinction between proprietary and sovereign functions has lost much of its force.

The Idaho Supreme Court has never clearly defined the constitutional limitations[45] on the state's power to determine how its water shall be allocated, nor is there any precedent for reading into the constitutional provision upholding the right to appropriate unappropriated waters, a preference for diversions over other forms of appropriations, as the two dissenting justices did in *State Department of Parks*. A more logical construction of article 15, section 3 of the Idaho Constitution is that its primary purpose was to reenforce Idaho's rejection of the doctrine of riparian rights by insuring that prior appropriations would not be displaced by recognition of riparian rights. As such, the constitutional provision does not speak to the question of whether Idaho can appropriate waters without any actual diversion to protect and enhance recreation and scenic beauty.

Both Colorado and Washington have eliminated the actual diversion requirement and now permit state appropriation of waters to preserve the natural environment. In 1973, Colorado enacted the following statute:

> Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree. Prior to the initiation of any such appropriation, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.[46]

As will be noted, the statute provides considerable protection to existing water users, since the state may only acquire that portion of the flow of a stream that has not already been put to a beneficial use. This qualification is necessary in Colorado where all major streams are over appropriated. Because of this, the major utility of the elimination of the actual diversion requirement in Colorado will be to give the state stand-

45. Article 15, section 3 of the Idaho Constitution provides that

> [T]he right to divert and appropriate the unappropriated waters of any natural stream shall never be denied to beneficial uses, except that the state may regulate and limit the use thereof for power purposes.

With respect to this constitutional provision, the cases seem to hold only that the legislature intended to allow constitutional appropriations as an alternative to statutory appropriations. *E.g.*, Nielson v. Parker, 19 Idaho 727, 115 P. 488 (1911).

46. COLO. REV. STAT. ANN. § 37-92-102(3) (1973).

ing to contest changes in the point of diversion of existing water rights holders.

The Washington statute directs the state to establish "base flows" necessary for the preservation of wildlife, fish, scenic, aesthetic, and other environmental values in perennial rivers and streams.[47] As part of a minimum flow maintenance program, base flows are an effective means of withdrawing water from appropriation, since the state may only allow further appropriations if at least fifty percent of the time the volume of water in the stream is sufficient to fulfill prior vested rights.

IV. THE BENEFICIAL USE REQUIREMENT

Elimination of the actual diversion requirement does not remove all barriers to the recognition of instream uses. A substantial question has always existed as to whether fish and wildlife maintenance and the enhancement of aesthetic enjoyment are beneficial uses. The requirement that a use be beneficial is a prohibition against practices which are excessively wasteful in comparison with competing uses. In short, all uses must be reasonable under all circumstances.[48] Instream uses are vulnerable to attack as non-beneficial because a considerable amount of water must be reserved in place and thus is not available for consumptive withdrawals.

The determination of whether a use is beneficial has traditionally been primarily a judicial function; legislatures have seldom defined the term. On occasion, however, statutes have listed uses which may be beneficial,[49] but these offer comparatively little guidance to the courts. Admittedly, the statutes foreclose arguments that a use is per se non-beneficial, but under modern thinking the determination of whether a use is reasonable can be made only on the basis of comparison with other potential uses for the water. Thus, courts have had to determine on a case by case basis whether a use is reasonable, and hence beneficial, by making an independent and crude benefit-cost calculation to determine if the opportunity-cost of the contested use is too high. Legislative attempts to protect instream values are therefore vulnerable to judicial invalidation on the ground that the use is wasteful.[50] Where there has

47. WASH. REV. CODE ANN. § 90.54.030(3) (Supp. 1974); *see* Comment, *Towards the Maximization of a Resource: The 1971 Washington Water Resources Act*, 9 GONZAGA L. REV. 759, 766-68 (1974). Base flows are calculated from the averages of seven consecutive low flow days of each ten year increment for the periods of available hydrologic data. *See also* MODEL WATER CODE 1.07(4)-(7), which provides a procedure for the establishment of minimum flows and lake levels. These sections have aptly been described as a form of environmental zoning. F. MALONEY, R. AUSNESS & J. MORRIS, A MODEL WATER CODE WITH COMMENTARY 107 (1972).

48. Tulare Irr. Dist. v. Lindsay-Stratmore Irr. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935) (use of water in the winter solely to kill rodents held not to be a beneficial use).

49. *E.g.*, ORE. REV. STAT. §§ 537.170(3), 543.225(3) (1974); TEXAS REV. CIV. STAT. ANN. art. 7471 (Supp. 1970).

50. Johnson, *supra* note 37, at 612-14.

been no prior legislative determination that a use may be beneficial, case by case determination of whether a use is beneficial is even more compelling.

Judicial review is also useful to police legislative recognition of instream values when the power to reserve water has been delegated to an administrative agency. The case for independent judicial review is weak, however, when the legislature or another politically accountable branch of government, such as the executive, has made a comparison study of the value of instream uses and other demands. When such a comparison has been made, the courts should accord a high level of respect for the legislative judgment unless measures to reserve water are implemented in a clearly arbitrary manner.

The leading case of *Empire Water & Power Co. v. Cascade Town Co.*[51] suggests that an instream use can be beneficial only if it is efficient. In *Empire Water*, the Cascade Town Company sought to enjoin a power company from interfering with the normal flow of a stream in a scenic canyon.[52] The company had developed a profitable resort and sought to protect its investment by perfecting an appropriation to the normal flow of the creek. Although the district court upheld the company's right to appropriate the normal flow, the Eighth Circuit reversed on the ground that

> the trial court . . . made no inquiry into the effectiveness of the use of the water in the way adopted as compared with customary methods of irrigation.[53]

The court concluded that while use of the water to enhance a profitable resort was a beneficial use, it was wasteful in view of competing demands.[54]

Despite the approach of the Eighth Circuit, the Colorado Supreme Court subsequently invalidated an appropriation for fish and wildlife preservation on the basis that there was no actual diversion, but failed to consider whether instream uses for fish and wildlife preservation could be beneficial.[55] Recently, however, Colorado,[56] like various other

51. 205 F.123 (8th Cir. 1913).

52. The canyon and waterfalls along the stream were described as "rare in beauty" because of "an exceptionally luxuriant growth of trees, shrubbery, and flowers." The court rejected as "too narrow" the position that views and standards of the early settlers were reflected in the Colorado Constitution, at least to the extent that the use of water for rest and recreation could never be considered beneficial. *Id.* at 128.

53. *Id.* at 129.

54. *Id.*

55. Colorado River Water Conservation Dist. v. Rocky Mt. Power Co., 158 Colo. 331, 406 P.2d 798 (1965). In dictum, however, the court suggested that fish and wildlife preservation was not beneficial and that cases holding to the contrary were distinguishable.

56. In 1969, the statutory definition of beneficial use was amended to include *impoundments* for "recreational purposes, including fish and wildlife." COLO. REV. STAT. ANN. § 39-92-103(4) (1973). *See* R. DEWSNUP, LEGAL PROTECTION OF INSTREAM VALUES (Nat'l

states,[57] has classified by statute the maintenance of minimum flows to preserve the natural characteristics of a stream as a beneficial use. Because of these trends in support of the preservation of natural resources, it is unlikely that courts would now decide that instream uses are per se non-beneficial, but the extent to which these uses can displace more traditional uses still remains unclear.

As noted, the recent decision of *State Department of Parks* upheld an Idaho statute allowing the state to withdraw by appropriation designated streams and declared that the preservation of water for scenic beauty and recreation was a beneficial use.[58] The real party in interest, the Idaho Water Users Association, argued that such uses could not be beneficial because the Idaho Constitution listed only five uses, none of which included recreation and fish and wildlife maintenance or the preservation of scenic beauty. The Idaho Supreme Court rejected the Water Users' argument, stating that the debates in the Idaho Constitutional Convention showed only an intent to establish a system of preferences, rather than to limit and define generically the term "beneficial use." Citing the Report of the National Water Commission[59] for the proposition that there is an emerging recognition of these values, the court concluded that there was "no basis upon which to disturb that declaration of the legislature that in this instance those values and benefits constitute 'beneficial uses.' "[60] In concurring, Justice Bakes accepted the plurality opinion's construction of the state constitution, but advanced additional justification for the theory that the list of beneficial uses should be continually expanding in order to accomodate new water use demands:

> I do not believe that by adopting Article 15, § 3, of the Idaho Constitution that it was intended that uses such as these could no longer be considered beneficial uses. On the contrary, the universal expectation must have been

Water Comm'n 1971) (commenting on the ability of selected states to adjust their laws to preserve instream uses).

57. *E.g.*, CAL. WATER CODE § 1243 (West Supp. 1975); MONT. REV. CODE ANN. § 89-867(2)(Supp. 1974) (fish and wildlife and recreational uses); ORE. REV. STAT. §§ 537.170(3)(a), 543.225(3)(a) (1974). New Mexico has classified water impounded for recreational purposes as a beneficial use. State *ex rel.* Fish & Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421, 428-29 (1945). Other state statutes are discussed in W. HUTCHINS, *supra* note 5, at 542-44.

58. See text accompanying notes 37-38 *supra*.

59. NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE 278-79 (1973) recommends that the doctrine of prior appropriation

> should authorize water rights to be acquired for all social uses, noneconomic as well as economic. In particular, recreation, scenic, esthetic, water quality, fisheries, and similar instream values are kinds of social uses, heretofore neglected, which require protection.

Id. The Commission further recommended that "their benefits should be clearly mandated for general public use, particularly when they are uniquely suited to such uses." *Id.*

60. 530 P.2d at 928.

> that such uses could continue and could be the subject of an appropriation. Many of those uses still continue today, and the changing needs of our society are generating new uses for water which are neither domestic, agricultural, mining nor manufacturing . . . . Natural hot water springs have been extensively developed into health resorts . . . upon the assumption that they have obtained a valid right to the use of the water in their facilities. Such uses could not be considered as domestic, mining, agricultural or manufacturing as used in Article 15, § 3, without unduly broadening the definitions of the terms, yet such uses are no doubt beneficial, from a societal point of view in that they contribute to the general welfare of the citizenry. . . .[61]

Justice Bakes' views differed from those of the majority in that he contended that courts should assert the power and willingness to review and revise legislative determinations of whether a use is beneficial. His analysis of this point is perhaps simply a restatement of the familiar qualification on water usage that a use must always be reasonable when compared with the uses of other claimants:

> I would restrict today's holding to the narrow proposition that the use before us is beneficial so long as, and only so long as, the circumstances of water use in the state have not changed to the extent that it is no longer reasonable to continue this use at the expense of more desirable uses for more urgent needs. . . . This supports the legislative determination that non-consumptive appropriations of water in natural waterways for scenic and recreational purposes, among others, can, under proper circumstances "be a beneficial use" . . . .[62]

However, this analysis also suggests that a court might declare a use non-beneficial not because an excessively large quantity of water is required to support the use or that the gain from the continued application of the contested use is marginal when compared to the gain from competing demands, but that the water should be made available for other uses that the court determines have now become more valuable, even though the benefits of the instream use remain substantial. When courts move away from establishing and protecting correlative rights of similarly situated users and attempt crude state-wide cost-benefit calculation in the face of legislative judgments, there is a high risk that

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61. *Id.* at 931.

62. *Id.* at 932. A 1969 Montana statute delegated the power to review legislative determinations of beneficial use to courts. MONT. REV. CODE ANN. § 9-801(2) (1969). This statute allowed the Fish and Game Commission to file on "such amounts only as may be necessary for the preservation of fish and wildlife habitat" in designated major trout streams. It further provided that

> [s]uch uses shall have priority of right over other uses until the district court in which lies the major portions of such stream or streams shall determine that such waters are needed for a use determined by the court to be more beneficial to the public.

This section was repealed in 1973 and replaced by a provision for a general procedure for the reservation of waters to support minimum flows. *Id.* § 89-890 (Supp. 1974).

their conclusions will rest on inadequate information. Because of more comprehensive data gathering processes and other factors, legislatures are in a better position than courts to decide which waters to reserve in place and which reservations to terminate.

Despite the above criticism of Justice Bakes' views, both the majority and concurring opinions in *State Department of Parks* are commendable, since they illustrate the capacity of the law of prior appropriation to permit new demands for water usage to be reocgnized and protected. As economic and social conditions change, it will be necessary to expand the categories of beneficial uses, and the Idaho opinion provides a constructive example of this expansion.

It is well established in western water law that a use must be reasonable in regard to other competing uses in order for the use to be protected. Historically this has meant that a challenged consumptive use must not be radically more wasteful than the uses of proximate users. A use was not required to be reasonable with regard to those claiming nonconsumptive rights in the stream. A most significant California intermediate appellate court opinion, *Environmental Defense Fund v. East Bay Municipal Utility District*,[63] held that a consumptive use can be challenged as wasteful by those asserting nonconsumptive rights in the stream. In *Environmental Defense Fund*, the plaintiff fund challenged East Bay's decision to augment existing supplies by obtaining water from a new dam on the American River. The plaintiffs argued that East Bay's use of its existing supplies was wasteful because existing supplies could be conserved by waste water reclamation (recycling) and withdrawal of water from behind the dam would impair downstream flows. Thus, the failure to recycle had adverse environmental impacts. At issue was the construction of article 14 section 3 of the California Constitution which provides that "the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof." This section was originally enacted to curtail riparian claims to spring floods, but the court held that on the basis that the language of the section specified "to the fullest extent of which they are capable," *all* of the waters of the state should be put to a beneficial use. The case was remanded for a trial on the merits. If the California Supreme Court affirms the decision,[64] California will impose a formidable barrier on the ability of existing large-scale users to augment existing supplies. *Environmental Defense Fund* potentially imposes conservation measures on existing uses far beyond those previously imposed under the doctrine of beneficial use,[65] and thus the case is a powerful precedent for the preservation of existing flows.

63. 8 ERC 1535 (Cal. Ct. App. 1975).

64. The California Supreme Court has granted a hearing.

65. *See* Clark, *Background and Trends in Water Salvage Law*, 15th ROCKY MT. MINERAL L. INST. 421 (1969).

V. Administrative Permit Denial or Imposition of Environmental Conditions

A. *Evolution of the Public Interest Standard*

Administrative denial of an appropriation application on the ground that reservation in place is a more beneficial use of water is an alternative method of recognizing instream values. Most western states authorize state water resources agencies to deny applications that they consider inconsistent with the "public interest," even though unappropriated water is available.[66] In addition, these agencies may, as an incident to this power, condition permits on minimum flow maintenance.[67]

"Public interest" has been defined historically in terms of crude economic efficiency and protection of vested rights, but values such as fish and wildlife preservation, ecosystem maintenance, and enhancement of aesthetics generally have not been included in the public interest calculus. The original Water Use Act in Utah,[68] for example, permitted the state engineer to reject applications on several broad grounds, including a determination that they would "prove detrimental to the public welfare." However, due to the narrow construction of the statute in the leading Utah case of *Tanner v. Bacon*,[69] it seemed unlikely that the statute would permit denial of an application for a withdrawal or impoundment to protect natural resources. To authorize denials for the protection of public environmental interests, the phrase "or will unreasonably affect public recreation or the natural stream environment" was added to the statute in 1971.[70] Today various states have enacted statutory amendments that expressly require recognition of instream uses,[71] and some state agencies have inferred such a requirement by implying an environmental protection policy from a variety of recent legislative enactments.

The use of these statutes, however, raises several broad issues. Assuming the existence of the constitutional power to withhold water from appropriations,[72] the appropriate standards to grant or deny a permit remain undefined. Also important is the question of whether a state agency may withdraw water for public instream uses on its own initiative, or whether it must act only with reference to prior executive or legislative guidance. Apart from the issue of standards, the advantages and disadvantages of the permit denial procedure must also be compared with other methods of recognizing public rights.

66. *See* Cal. Water Code § 1255 (West 1971). *See also* Wash. Rev. Code Ann. § 90.03.290 (1962).

67. Cal. Water Code § 1253 (West. 1971). A similar provision appears in the Model Water Code § 2.02. *See* F. Maloney, R. Ausness & J. Morris, *supra* note 47, at 179-80.

68. Law of March 12, 1903, ch. 100, § 39, [1903] Utah Laws (expired 1930).

69. 103 Utah 494, 136 P.2d 957 (1943).

70. Utah Code Ann. § 73-3-8 (Supp. 1975).

71. *See* note 95 *infra*.

72. See text accompanying notes 19-24 *supra*.

B. Definition of Public Interest in Utah

Originally, appropriations under western water law were denied on public interest grounds in order to further consumer protection objectives. Applications for appropriation in support of water projects that were economically marginal and had a strong likelihood of becoming bankrupt, thus disappointing those who purchased land with the expectation that a supply of water was assured, for example, were often denied.[73] As more and more water projects became financed through public water districts, utilities, and the federal government, however, the likelihood of a project's financial instability diminished. The important issue then became whether a small but financially feasible project might subsequently preempt a more desirable project.

This issue arose in *Tanner v. Bacon*,[74] a case in which the Utah Supreme Court reviewed a decision of the state engineer to reject an appropriation application for power purposes on the ground that the appropriation was detrimental to the public welfare. The court found that if the application were granted, the appropriator

> would be entitled to have the flood waters of the Provo River run through his plant, and thereby prevent the storage thereof in [the proposed] Deer Creek Reservoir, regardless of how great the demand for water might be, and regardless of the fact that if it were stored it might be used for power purposes during the dry seasons and at the same time be used for domestic and irrigation purposes.[75]

It should be noted that a Utah statute in *Tanner* permitted the state engineer to reject an application for an appropriation that would "interfere with a more beneficial use" or "prove detrimental to the public welfare."[76] The court construed the first section of this provision to authorize a case by case determination of whether the appropriation

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73. *E.g.*, Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045 (1910). In *Hinderlider*, the Supreme Court of New Mexico upheld the territorial engineer's rejection of a prior application for an irrigation project in favor of a subsequent application that planned to use the same water. In support of its position, the court noted that protection of the public interest was not limited to cases where a project would be a menace to public health or safety.

> It is, for instance, obviously for the public interest that investors should be protected against making worthless investments in New Mexico, and especially that they should not be led to make them through official approval of unsound enterprises.

Id. at 1050.

74. 103 Utah 494, 136 P.2d 957 (1943). Compare the preemption issue in *Tanner* with Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910). In *Sowards*, a prospective water user filed an application with the state engineer for water on Indian lands that were expected to be opened to the public. The court held that an application may be made for a beneficial use to commence in the future so long as it is not made for the purpose of mere speculation or monopoly.

75. 103 Utah at 500, 136 P.2d at 963.

76. UTAH CODE ANN. § 100-3-8 (1943).

would interfere with a more beneficial use in light of the statutory purposes, and held that under the circumstances, the state engineer's decision was reasonable. With respect to the second section of the provision, the court quoted with approval decisions from other states which held that "anything which is not in the best interest of the public would be 'detrimental to the public welfare.' "[77] The court therefore concluded that "under this construction the State Engineer was authorized to reject or limit the priority of plaintiff's application in the interest of the public welfare."[78] This statutory authorization, however, did "not vest the state with the proprietary ownership of the water but [placed] upon the state the duty to control the appropriation of the public waters in the manner that will be for the best interests of the public."[79]

The case for denial of an appropriation permit in *Tanner* was easily made. The administrative action was guided by a clear executive and legislative preference for a water use scheme (irrigation) that would have been impaired if the application had been granted. Thus, the board itself did not have to define "public interest"; it had already been expressly defined for them.

In 1971, the Utah Legislature considered two bills to protect public instream values on a systematic basis and bring them within the definition of "public interest." The first bill, expanding the jurisdiction of the state engineer to consider the possible adverse effects of a withdrawal on the natural stream environment, was enacted.[80] A companion bill that sought to provide a systematic procedure for the withdrawal of scenic resources, however, was not enacted. Under this bill, the state engineer would have been permitted to initiate a withdrawal proceeding and make a recommendation to the governor to withdraw

> sufficient quantities of surplus or unappropriated water, in order to preserve waterfalls, natural lakes, other outstanding scenic attractions and minimum stream flows for public recreational purposes.[81]

The governor would have then effectuated the withdrawal by a proclamation, and it would have remained in effect until the conclusion of the next regular legislative session, at which time it would have lapsed unless confirmed by a majority of the Senate.

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77. 103 Utah at 501, 136 P.2d at 964.

78. *Id.* The court's analysis of this section, which is dictum, starts with the sweeping statement that under the law of prior appropriation not "every person who applies to appropriate unappropriated waters of this state has an unqualified right to have such application approved." *Id.* at 499, 136 P.2d at 962.

Idaho is one of the few western states where the state lacks the power to deny an application that proposes to put unappropriated water to a beneficial use, unless the state decides the water is needed for power purposes. IDAHO CONST. art. 15, § 3. *See* Comment *Idaho — The Constitutionality of a Mandatory Permit System and Denial of a Water Use in the Public Interest*, 4 LAND & WATER L. REV. 487 (1969).

79. 103 Utah at 506, 136 P.2d at 962.

80. See note 70 *supra*.

81. *Id.*

C. *Expansion of Public Interest in California*

In addition to the guidelines under sections 1253 and 1255 of the California Water Code,[82] compliance with the policies and requirements of the California Water Plan constitutes a major determinant of the public interest.[83] Because the state has the power to file on water that it considers necessary to implement the California Water Plan, and thus preempt subsequent appropriations, conflicts between applicants and the state do not frequently arise. Environmental conflicts over the amount of water an applicant may store or withdraw, however, are increasing. These conflicts arise from a series of legislative enactments during the past twenty years that have expanded the jurisdiction of the State Water Rights Board to consider the impact of withdrawal on instream uses such as fish and wildlife,[84] as well as more abstract environmental considerations such as aesthetics. The Board is now actively implementing this mandate through flow maintenance programs. However, since few important Board decisions have been litigated, the extent of its power to compel minimum flow releases remains unanswered.

The leading California case involving the argument that an appropriation is not in the public interest is *Johnson Rancho County Water District v. State Water Rights Board.*[85] Before the case reached the appellate court, the Board had rejected the application of one water district in favor of another. The losing district argued that the winning district's plans were inconsistent with the state plan that contemplated development of a site which would be undeveloped under the winning application. The winning application relied on inundation of an upstream dam in the event that the site designated under the state water plan were approved. The issue before the court was analogous to the problem of whether a zoning ordinance should be invalidated because it is inconsistent with an adopted comprehensive building plan. In most states, courts have been unwilling to give binding force to such plans on the ground that they are only tentative. The court in *Johnson Rancho County* applied the same standard and concluded that section 1256 of the California Water Code "does no more than command the board to hold in mind and pay regard to the Plan and its projects in passing on water rights applications."[86] The court, however, did not elaborate on the meaning of the public interest standard, except to reject by implication the argument that a project must put the river to its fullest beneficial use. It looked only to whether the evidence was sufficient to support a finding that the winning application was in the public interest and

82. See notes 66-67 *supra.*

83. CAL. WATER CODE § 1256 (West 1971).

84. *E.g., id.* § 1243.5. See Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 710-21 (1972).

85. 235 Cal. App. 2d 863, 45 Cal. Rptr. 589 (1965).

86. *Id.* at 869, 45 Cal. Rptr. at 595.

held that the public interest, as defined in a series of board decisions conditioning the operations of major water projects, would be upheld by granting the application.

The major technique used by the California Water Rights Board to protect instream uses is the imposition of seasonal minimum flow schedules on applicants who have been given the right to store water.[87] Historically, the Board has required the bypassing of the natural flow or restricted the time during which water can be withdrawn. Initially, it required such action as a result of persuasion from agencies, such as the Department of Fish and Wildlife, which intervened in appropriation application proceedings.[88] Later, the power to deny an application on the ground that it was inconsistent with the public interest came to include the power to condition withdrawals on the maintenance of minimum flows for fish and wildlife maintenance.[89] Both the state and the Federal Power Commission have made increasing use of these techniques in recent years.

Since 1972, the California Department of Fish and Game has been required to make recommendations concerning the amount of water needed for preservation and enhancement of fish and wildlife resources.[90] An important question not yet resolved, however, is the weight to be given to these recommendations. Technically, a water resources agency is not bound by the recommendations of another state agency absent a statutory grant of veto power to the other agency. None of the western states, however, have enacted legislation giving the environmental protection agencies such a veto. But, the absence of a statutory veto power does not end the inquiry, since many states have passed environmental policy acts[91] modeled after the National Environmental Policy Act of 1969 (NEPA).[92] Under these acts, an agency's decision must be reasonable, and the extent to which a water resources agency ignores strong evidence that a withdrawal will have an adverse environmental impact which could be minimized, will give rise to the argument that the decision is arbitrary. In upholding the power of the California Water Rights Board to impose flow maintenance conditions, the court

87. Releases from storage were required for the first time in the *Delta Water Rights Decision*. California State Water Resources Control Board Decision No. 1379 (1971); see text accompanying notes 101-07 *infra*. Johnson, *supra* note 37, at 625 (quoting a letter from Ronald B. Robie, Member California State Resource Control Board, to Professor Johnson).

88. The Board's recent use of the power to impose conditions to protect fishery resources is discussed in Robie, *supra* note 84, at 718-21.

89. *See* Bank of America Nat'l Trust & Sav. Ass'n v. State Water Resources Control Bd., 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974).

90. CAL. WATER CODE § 1243 (West Supp. 1975). Prior to the 1972 amendment, the California Water Rights Board itself had primary responsibility for preserving and enhancing fish and wildlife resources through water allocation.

91. See text accompanying notes 96-104 *infra*.

92. 42 U.S.C. §§ 4321 *et seq.* (1970).

in *Bank of America v. State Water Resources Control Board*,[93] emphasized the significance of recommendations made by environmental agencies:

> Fish & Game's judgment in this matter is entitled to great weight. Charged with a statutory obligation, Fish & Game is the guardian and custodian of the public's deep and continuing interest in the fish and game resources of this state. It has the collective experience and expertise to make the essential determinations in the technical areas of water flows and fish maintenance.[94]

Since state environmental policy acts require water resource agencies to give careful consideration to the recommendations of environmental agencies, these acts may provide the basis for compelling resource agencies to impose flow maintenance conditions.[95]

D. The Impact of State Environmental Policy Legislation on Appropriation Applications

Recent judicial construction of state environmental policy acts has changed the ground rules for the perfection of an application by both private parties and public agencies. No longer is it sufficient for a private applicant to show that there is unappropriated water available and that vested consumptive rights will be unimpaired. Furthermore, even if the state water resources agency does not contest the permit on the ground that the water should be reserved for instream uses, an applicant cannot be assured that the permit will be issued. State environmental policy acts impose an affirmative obligation on the state permit granting agency to consider reservation as an alternative in all applications subject to the act, and as construed by the courts, this obligation extends to the review of most applications.

Stempel v. Department of Water Resources,[96] a recent Washington state decision, illustrates the impact of a state environmental policy act.

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93. 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974).

94. *Id.* at 212-13, 116 Cal. Rptr. at 778-79.

95. See Robie, *supra* note 84, at 701-10. Robie bases his argument that the existence of a state environmental policy act is a sufficient basis for an agency to conclude that denial of a permit is warranted on public interest grounds, on Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), and Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049 (1972). The court in *Zabel* held that the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661-66 (1970), was a sufficient basis for denying the Corps of Engineers a dredge and fill permit. Judge Brown suggested in dictum that any doubts about the Corps' authority would be resolved in their favor in the future, due to NEPA. In *Friends of Mammoth*, the court applied the California Environmental Policy Act to an application for zoning permits, and noted:

> Obviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved.

8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8.

96. 82 Wash. 2d 109, 508 P.2d 166 (1973).

In *Stempel*, an application to appropriate water from a small lake north of Spokane was challenged by cabin owners on a lake who argued that numerous pollution problems were imminent if the lake level were further lowered. The Department of Ecology, successor agency to the Department of Water Resources, concluded that the statutory language which required a determination of whether the proposed appropriation would be a "detriment to the public welfare" referred only to the rights of those who might be injured by withdrawal of the water (a traditional definition of the term) and that pollution controls were irrelevant. The Washington Supreme Court, however, disagreed and held that pollution problems raised by the riparian owners must be considered. The court further held that the Department of Ecology had to file an environmental impact statement on the basis that the State Environmental Policy Act of 1971 (SEPA)[97] obligated the Department "to consider the total environmental and ecological factors to the fullest in deciding major matters."[98] *Stempel* is consistent with the federal precedents which have held that NEPA broadens the mandate of federal licensing agencies.[99] If *Stempel* is followed in those states with similar acts, any doubts about the state's power to reserve water for instream uses pursuant to general statutes permitting public interest denials will be resolved in favor of expanding "public interest" to include environmental as well as traditional economic considerations.[100] In addition, the range of factors to be considered by state agencies in small scale diversions will be broadened.[101]

The far-reaching impact on flow maintenance of state environmental policy acts and specific directives to maintain fish and wildlife is also illustrated by the California State Water Resources Board's *Delta Water Rights Decision*.[102] The Delta of the San Joaquin and Sacramento rivers is a rich agricultural and recreational region depending on the maintenance of adequate fresh water inflows during the low flow months to

97. WASH. REV. CODE ANN. § 43.21C (Supp. 1973).

98. 82 Wash. 2d at 114, 508 P.2d at 171.

99. *See* Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 238, 286-97 (E. Dolgin & T. Guilbert eds. 1974).

100. *Stempel* should come as less of a surprise in Washington than many other states, since Washington has legislation that provides that "[l]akes and ponds shall be retained substantially in their natural condition," and that wastes shall be treated with "all known, available, and reasonable methods of treatment prior to entry . . . ." WASH. REV. CODE ANN. §§ 90.54.020(3)(a)-(b) (Supp. 1974).

101. *See* Environmental Defense Fund, Inc. v. Coastside County Water Dist., 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972). In *Environmental Defense Fund*, the court approved a statement of a water quality biologist employed by the Department of Fish and Game that the issuance of water rights permits does not imply that all concerns of the Department are satisfied, and required a coastal water district to file a supplemental environmental impact statement under the state environmental policy act.

102. Delta Water Rights Decision, Cal. Water Res. Control Bd. Decision No. 1379 (July 28, 1971). *See generally* Note, *The Delta Water Rights Decision*, 2 ECOLOGY L.Q. 733 (1972).

offset the intrusion of salt water from San Francisco Bay. Large quantities of water flow across the Delta on their way to contract beneficiaries served by the federal Central Valley Project and the California State Water Project. The California State Water Resources Board (and its successor) had been hearing appropriation applications for these two projects since 1958 and had reserved jurisdiction to condition withdrawals in order to prevent salt water intrusion and to protect fishery resources. After a long and complex series of proceedings, the Board held that

> on the basis of legislative policy and the Board's statutory powers to condition permits so as to best develop, conserve and utilize in the public interest the water sought to be appropriated, [the Board] may not only require the project operators to refrain from interfering with the natural flow required for proper salinity control and for fish and wildlife in the Delta, but may also provide a reasonable quantity of water that has been conserved by storage under authority of their permit for these purposes.[103]

For the first time, the Board required that water stored under a previously granted permit might have to be released to provide adequate supplies of water to maintain public environmental benefits, as opposed to protection of discrete existing users. The question of who should pay for the release of the previously stored water , however, remained unanswered.[104] Of "controlling importance" in the *Delta Water Rights*

103. Delta Water Rights Decision, *supra* note 102, at 15-16.

104. The Board in the *Delta Water Rights Decision* considered the interests of four classes of water users — holders of prior upstream rights, Delta Water users, federal and state contract beneficiaries, and the general public. The Board, however, lacked jurisdiction over the first two groups, and with respect to the latter groups of users, there seems to be no a priori reason for imposing the costs of maintaining and protecting the natural Delta conditions on the federal and state contract project beneficiaries, as opposed to the taxpayers generally. Although somewhat obliquely, the Board seemed to recognize the force of this argument:

> The Legislature has determined that an adequate water supply for all uses in the Delta, including industrial and urban, must be maintained. It has indicated that this may be accomplished by providing a substitute water supply at no added financial burden to the users by virtue of such substitution. . . . [T]he Department [of Water Resources] suggests that the Board should distinguish between reimbursable and nonreimbursable project costs and indicate those who have responsibility for payment for benefits derived from project operations. However, how much those who receive benefits from the use of project waters, either as the result of better quality water or in other ways, should pay is a matter to be resolved by execution of repayment contracts with the Department or to be determined by the Legislature and not this Board. . . . Nowhere does the Board find any California law which provides that the Delta users shall be provided with supplies in excess of their vested rights without payment. On the other hand depletions of water in the Delta are also caused by diversions from upstream tributaries that have been made by many metropolitan and agricultural systems for the last century or more. California law provides no method by which all of these diverters must share in the cost of maintaining an adequate water environment in the Delta channels. Some streams have been drastically depleted. The state and federal water projects have

Decision were several sections of the Water Code which gave the Board an express mandate to protect the Delta. The Board concluded that the legislature intended

> to give first priority to satisfying all needs for water in the Delta and to relegate to second priority all exports of water from the Delta to other areas for any purpose.[105]

In light of the express directives to protect the salinity balance in the Delta, the Board's construction of the "public interest" requirement is not surprising. More important for purposes of this article, however, is the Board's reference to the Environmental Policy Act of 1970 as an additional basis for defining the public interest. This reference suggests that the decision will be an important precedent for including instream uses within the definition of beneficial use and public interest.[106]

Environmental considerations, of course, should be incorporated into all phases of water resource allocation administration and planning. States considering the adoption of environmental policy acts should, however, carefully weigh the costs of subjecting a large number of diversion permits to the environmental impact statement requirement

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no effect on many of those streams.
Delta Water Rights Decision, Cal. Water Res. Control Bd. Decision 1379, at 14-15 (July 28, 1971).

It has been argued, however, that a decision to require the contract users to pay the diversion costs can be supported by analogy to the recent California case of Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), where the court upheld the constitutionality of requiring subdividers to dedicate land for park and recreation purposes as a condition to granting a permit for housing development. *See* The Delta Water Rights Decision, supra note 102, at 750-54. The case for "in-lien fees" to finance a public recreation system is weak, however, Justice Mosk in *Associated Home Builders* suggested that new subdivision residents can be forced to finance parks simply because a city decides it needs more parks for general use to make up for the loss of open space throughout the community caused by new development. However, such reasoning raises serious equal protection problems that have not been resolved by the courts. These problems are magnified in the *Delta Water Rights Decision* where the benefits of salinity maintenance in the name of ecosystem stability are statewide. Thus, there are grounds for arguing that flow releases of this magnitude should only be allowed if they are financed by general public revenues, since the preferred solution of user charge financing seems unworkable.

105. Delta Water Rights Decision, *supra* note 102, at 13. CAL. WATER CODE §§ 12201-204 (West 1971). The Board refused to apply Town of Antioch v. Williams Irr. Dist., 188 Cal. 451, 205 P. 688 (1922), which suggests that the maintenance of large outflows for municipal and other consumptive uses is not a reasonable use; "[P]resent laws such as the Environmental Quality Act of 1970 might well compel a different decision from that reached in the Antioch case." Delta Water Rights Decision, *supra* note 102, at 14.

106. The ultimate impact of the *Delta Water Rights Decision*, however, is hard to estimate since it is only an interim decision. The Board imposed elaborate quality standards, but did not require the release of any water. Delta Water Rights Decision, *supra* note 102, at 21. It did estimate, however, that about 200,000 acre feet of presently stored water scheduled to satisfy Central Valley and State Water Project contracts would have to be released in a critical year to meet the standards set for the Delta. *Id.* at 43-45.

against the benefits to be derived from other means of recognizing environmental values, such as administrative or legislative qualification of public rights through minimum flows and lake levels, or public appropriations based on the Colorado or Idaho model.[107] The advantage of these latter procedures is that appropriators receive advance notice that appropriated water will include water withdrawn to protect public rights, thereby reducing the inevitable uncertainty that must accompany the recognition of public rights. Full scale, case by case environmental impact review will still be necessary for large projects. For some withdrawals, however, environmental impact analysis may introduce considerable uncertainty into the law of water rights without a corresponding gain in the ultimate recognition of environmental values. As the court in *Stempel* observed, an environmental impact statement "does not demand any particular substantive result in governmental decision-making."[108] Therefore, there is no assurance that these procedures, involving increased administrative inefficiency, will actually result in the reservation of any water in place.

E. The Impact of Federal Water Rights

With regard to minimum flow maintenance programs, the federal government may either complement or frustrate a state program. The federal government has the right, by ownership of the public domain or land adjacent to navigable rivers, to reserve water to fulfill the purposes of federal water programs. These federal rights are superior to all state created rights arising after the date of the federal reservation, not the date federal usage is initiated. Also, since federal reserved rights are not quantified, all state minimum flow programs must be coordinated with assertions of those rights, and a particular state program may be frustrated if the purpose of the federal reservation requires withdrawals along streams in which the state wishes to reserve water.[109]

Federal power can also preserve minimum flows where state rights authorize withdrawals. The Federal Power Commission has successfully asserted the power to require minimum flow releases as a condition to granting licenses, even if vested state rights may be impaired.[110] In addi-

107. See text accompanying notes 36-46 *supra*.

108. 82 Wash. 2d at 115, 508 P.2d at 172.

109. *See* NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES BY THE NATIONAL WATER COMMISSION 459-83 (1973).

110. California v. Federal Power Comm'n, 345 F.2d 917 (9th Cir. 1965). In this case, the Ninth Circuit held that section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a) (1970), which requires the Commission to consider all beneficial public uses of a project, was sufficient authority for the Federal Power Commission to impose a condition that *might* impair the full use of water rights. *Cf.* FPC v. Idaho Power Co., 344 U.S. 17 (1952); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Pacific Power & Light Co. v. FPC, 333 F.2d 689 (9th Cir.), *cert. denied*, 379 U.S. 969 (1964).

tion, the Wild and Scenic Rivers Act of 1968 depends on the "reserved rights" doctrine to protect designated rivers in the Far West.[111] Both the assertion of federal reserved rights and Federal Power Commission license conditions to preserve minimum flows are thought to depend on the discretion of the federal government.[112] Recently, however, the argument has been made that NEPA requires a federal agency to accept state mandated flow releases.[113]

Under NEPA, the requirement that a government agency prepare an impact statement for any "major Federal action"[114] has been uniformly held to apply to such significant water resources projects as dams and stream channelizations.[115] Courts have read NEPA to require only a full disclosure of the benefits of a project in light of environmental risks, and a comparison of the "net benefit" for the proposed project with the environmental risks presented by alternative courses of action.[116] Full disclosure, which is potentially unlimited, however, has been tempered by a "rule of reason."[117] It is unlikely that many projects

111. 16 U.S.C. §§ 1271-87 (1970). For discussion of the Act see Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707 (1970), and Turner, *The Preservation of Rivers As Wild and Scenic*, in A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES ch. 8 (1974). For an argument that the federal government can guarantee minimum stream flows through the exercise of the navigation servitude see Note, *Minimum Stream Flows—Federal Power to Secure*, 15 NATURAL RESOURCES J. 799 (1975). Under the navigation servitude, the federal government can impair vested state rights without paying compensation, Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1 (1963), but the author urges that the government pay to minimize uncertainty.

112. New wild and scenic rivers require congressional approval or a governor's designation of a state administered river as a unit in the national system. Tarlock & Tippy, *supra* note 111, at 713. Traditionally the federal government has been reluctant to assert reserved rights but this is changing as a result of United States v. Eagle County District Court, 401 U.S. 520 (1971). *Eagle County* holds that both federal appropriative and reserved rights can be adjudicated in a general state proceeding, and thus the case places pressure on the federal government to assert and quantify minimum stream flows in connection with national forests and other reservations.

113. See text accompanying notes 118-19 *infra*.

114. 42 U.S.C. § 4332(2)(C) (1970).

115. *See, e.g.*, Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974) (dam); Simmons v. Grant, 370 F. Supp. 5 (D. Tex. 1974) (channelization); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356 (D.N.C. 1972) (channelization).

116. *See, e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974). Also, despite assertions of the power to review project proposals on the merits, courts have, on the whole, confined themselves to enforcing the procedural full disclosure aspects of NEPA. *See id.*

117. The rule was first announced in Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972), which limited the duty of the agency to the study of reasonable alternatives. Other circuits have applied a "rule of reason" to other NEPA requirements, such as whether an environmental impact statement is sufficiently detailed. These cases are collected in Natural Resources Defense Council, Inc. v. TVA, 502 F.2d 852 (6th Cir. 1974).

will be permanently enjoined on the ground that the final balance of benefits and environmental risks is arbitrary, although there is some indication that NEPA may require mitigation measures where risks are displayed that can be minimized by reasonable means. These mitigation measures could take the form of restrictions on the operation of a reservoir, for example, thereby protecting downstream water rights or future uses.

F. Imposition of State Environmental Restrictions on the Federal Government

Although NEPA seems to add nothing to the federal government's acknowledged authority to operate a project in disregard of state water policies to promote environmental values (assuming that there is no impairment of vested rights), environmentalists have argued, although weakly, that the Act permits a state to impose environmental conditions on the federal government. In *Environmental Defense Fund v. Armstrong*,[118] for example, the plaintiff fund challenged the construction of a California dam, contending that the federal environmental impact statement failed to consider both non-structural alternatives and a detailed consideration of alternative methods of using the water, as well as their respective environmental impacts. The Environmental Defense Fund further argued that the Bureau of Reclamation had failed to secure the necessary state appropriation permit from the California State Water Resources Control Board. Although the Bureau objected to discussing alternative uses of the "conservation yield" because the reservoir would not be filled for eight years, the district court held that a tentative discussion of the best estimate was required and that the environmental impact statement would be subject to later supplementation. The court also held that it was impossible to evaluate the merits of the proposed project until the Bureau had obtained the necessary permits.

Subsequently, the California State Water Resources Board decided to grant the appropriation upon the condition that the Bureau agreed to comply with twenty-four requirements relating primarily to the environment. The Board also reduced the amounts of water requested, granting permission to the Bureau to fill the reservoir to one-fourth of its proposed capacity during normal conditions. This capacity reduction was to be at the expense of storage for power generation in order to ensure that water would be available for preservation and enhancement of fish and wildlife, white water boating, and water control purposes. The Board left open the possibility that an increase in storage would be

118. 352 F. Supp. 50 (N.D. Cal. 1972), *supplemented*, 356 F. Supp. 131, *aff'd*, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974). For a case history of the conflict between federal and state governments see Randolph & Ortolano, *Effect of NEPA on the Corps of Engineers' New Melones Project*, 1 COLUM. J. ENVIRON. L. 233 (1975).

permitted if a justifiable need were demonstrated in the future, thus suggesting that the environmental uses could be displaced by more beneficial uses. The Bureau is presently contesting the permit limitations on the ground that California cannot impose these conditions on the federal government,[119] and a federal district court has held that the Bureau is not bound by state law.[120]

Following the decision by the California State Water Resources Control Board, Russell Train, Chairman of the Council on Environmental Quality, suggested that the Corps of Engineers reevaluate the merits of the project in light of the Board's mandated reduction in storage capacity. The Corps and the Bureau of Reclamation declined to do so on the basis that the federal government is not bound by state administrative determinations. Ultimately, the Ninth Circuit held that the preparation of a supplemental impact statement and the Board's later

119. Federal courts have consistently held that state law cannot control the operation of federal projects, despite the lack of a clear legislative basis for this construction of federal water resources laws. The preference for federal supremacy rests on two Supreme Court precedents. City of Fresno v. California, 372 U.S. 627 (1963); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 297 (1958). *Ivanhoe* holds that section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 (1970), which says that nothing in the Act should interfere with state laws relating to the control and distribution of water from federal projects, must yield to a specific federal statute inconsistent with state law. The federal statute in question was section 5 of the Reclamation Act which limits the amount of land that can be served by a federal water project to 160 acres per individual. However, the Court construed section 8 to mean only that the United States must respect state definitions of what rights are vested when it condemns water rights for a federal project. 357 U.S. at 291. *City of Fresno* reaffirmed *Ivanhoe* in holding that a state statute cannot interfere with the federal government's power to exercise the power of eminent domain in the acquisition of water rights belonging to others. The preference for federal supremacy has been extended to flood control legislation on the more sweeping ground that federal law must control when the court decides that allowing state law to control "would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes . . . ." Turner v. King River Conservation Dist., 360 F.2d 184, 198 (9th Cir. 1966).

120. United States v. California, 403 F. Supp. 874 (E.D. Cal. 1975), held that the state cannot require minimum flow releases for the New Melones project, since the irrigation and power purposes for which Congress authorized the project could not be achieved if a California Water Resources Board decision were upheld. For a close analysis of the cases arguing that the courts should respect a congressional preference for a state veto unless federal legislation expressly provides otherwise see Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 58-65 (1966). For an argument that state laws and decisions designed to further environmental quality should control operation of the New Melonies Reservoir see Note, *Allocation of Water from Federal Reclamation Projects; Can States Decide?*, 4 ECOLOGY L.Q. 343 (1974). Even if the Supreme Court adheres to its past precedents, there is another means by which state flow maintenance policies may control the operation of federal reservoirs. The Environmental Protection Agency is now arguing that the Bureau of Reclamation must follow federally approved state water quality standards. Since many standards will require flow maintenance, state law may ultimately be enforced though federal water pollution control articles. To date, the dispute between the EPA and the Bureau of Reclamation is only an interagency conflict and has not been politically or judicially resolved.

decision (prior to the water rights decision) fulfilled the requirements of NEPA to obtain a full examination of the project's objectives.[121] *Armstrong* does not, however, end the issue of NEPA's power to compel incorporation of state water use conditions. The Council on Environmental Quality is now commenting more aggressively on impact statements, and there is some evidence that the courts will give these comments substantial weight, even though the Council has no legislative rulemaking authority or the right to veto a project on the basis of an inadequate impact statement.[122]

When federal agencies apply for a state appropriation permit in the future, and the permit is granted subject to various environmental conditions, a final question regarding the federal appropriation may arise. In some cases, an agency may duly consider and reject the imposition of environmental conditions by a state, and an exemption from compliance may be upheld by the courts. However, it is likely that plaintiffs who support environmental preservation will disagree with the court's decision and contend that completion of the project free from state conditions is arbitrary. The Ninth Circuit, under the *Armstrong* rationale, would reject such an argument, since NEPA does not authorize judicial approval or disapproval of a properly authorized project. In other words, the court would apparently consider the impact statement to be complete so long as a state water rights decision is included. Since the D.C., Eighth, and perhaps Second Circuits do not appear to follow this rule,[123] however, the issue of a private plaintiff's standing to contest such a decision remains open.

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121. 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

122. See Justice Douglas's opinion granting a stay pending appeal to the Ninth Circuit in Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1310 (1974). *See* Conservation Council v. Castango, 398 F. Supp. 653 (E.D.N.C. 1975) (CEQ Guidelines exemption of general revenue sharing from NEPA upheld). *See also* Sierra Club v. Morton, 514 F.2d 856, 870-74 (D.C. Cir. 1975).

123. Five circuits have held that agency action which violates the substantive provisions of NEPA may be enjoined. However, the standard is the narrow, "arbitrary and capricious" language of the Administrative Procedure Act (APA). Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

The Tenth Circuit does not review the merits of a federal action. Originally, the Ninth Circuit authorized such review. Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973). But in Lathan v. Bringar, 506 F.2d 677 (9th Cir. 1974), NEPA was characterized as essentially a procedural statute. Thus, the Ninth Circuit follows the "without observance of procedure required by law" language, rather than the arbitrary and capricious standards of the APA. *Id.* at 693. 5 U.S.C. § 706(2)(D) (1970). *See* Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974). NEPA contains no a priori ranking of environmental as against non-environmental factors. The literature on this issue is discussed in Robie, *Recognition of Substantive Rights Under NEPA*, 7 NATURAL RESOURCES LAW. 387 (1974).

VI. CONCLUSION

The value of allocating water for instream uses is becoming more widely recognized. Although it is difficult to place dollar values on these uses when compared with traditional consumptive uses, instream uses have gained legitimacy through political decisions which respond to public demands for the provision of amenity values and the maintenance of ecosystem stability to prevent risks of future deterioration of resource bases.[124]

Doctrines positing that a state's power to control its waters are limited to the formulation of ground rules for distribution to traditional consumptive uses or distribution of the water itself are no longer valid. States now appear clearly to have adequate power to allocate water for the maintenance of public rights. And if the recent Idaho Supreme Court decision in *State Department of Parks* is followed in other jurisdictions, as it should be, the technical barriers to recognition of instream values within the appropriation system will have been removed, although important procedural problems for the perfection of an instream permit must still be resolved.[125]

Elimination of the actual diversion requirement and doubts about whether instream uses are beneficial on the ground that the simplistic anti-monopoly policies underlying these doctrines are no longer applicable, are only first steps toward the integration of instream uses into western water management decisions. Western states must now develop the necessary institutional procedures for the recognition of these values. The thrust of this article has been that these values should be recognized and perfected by public processes and, wherever possible, should be integrated with existing appropriative rights in order to minimize the uncertainties in future development planning. It is possible, as the State of Washington has done, to allow private persons to claim an instream appropriation.[126] But, since the benefits of instream uses are so widespread and their recognition may withdraw substantial quantities of water from valuable alternative uses, administrative agencies, acting pursuant to statutory guidelines, should weigh the costs and benefits of reserving water in place. Also, if states begin to implement minimum flow programs by requiring the release of water from reservoirs, as opposed to permitting unappropriated water to remain undiv-

124. Judge Sneed recently observed in the course of refusing to find an environmental impact statement inadequate because it did not include a mathematically expressed cost-benefit ratio, that "[p]ublic affairs defy the control that precise quantification of its issues would impose." Trout Unlimited v. Morton, 509 F.2d 1276, 1287 (9th Cir. 1974).

125. See Comment, *Water Appropriation for Recreation*, 1 LAND & WATER L. REV. 209, 217-19 (1966).

126. See F. TRELEASE, WATER LAW 37-38 (2d ed. 1974), for a report of a Washington Pollution Control Hearing Board decision allowing a private instream appropriation for fish raising research.

erted, public allocation of water for instream uses will be necessary to insure that the costs of such releases are equitably financed.

In addition to development of state procedures for the recognition of instream values, the continuing conflict between the federal government and the State of California over minimum flow releases from federally constructed reservoirs illustrates the need for improvements in federal water resources planning. A more systematic recognition of aesthetic and ecological values must be insured. To further this objective, the National Water Commission has recommended that better environmental information be introduced into water resources planning in the early stages of project evaluation. This will not only insure that environmental matters will be brought before Congress,[127] but will facilitate congressional determination of the adequacy of compliance with environmental requirements, including NEPA and state water resources policies.[128] The Commission also recommended that any legislation quantifying reserved rights should provide standards and procedures for establishing minimum flows for streams crossing federal lands, but that these stream flows should be limited to unappropriated water and should be recorded in state water rights records. If federal water resource development is better coordinated with the emerging recognition of environmental values in western water law, the West will have the opportunity to preserve some of the scenic resources that made it unique, and at the same time, the region will receive a more equitable share of national economic growth.

127. NATIONAL WATER COMM'N, *supra* note 109, at 224-25. *See also* Hillhouse, *The Federal Law of Water Resources Development*, in FEDERAL ENVIRONMENTAL LAW 844 (E. Doglin & T. Guilbert eds. 1974).

128. NATIONAL WATER COMM'N, *supra* note 109, at 466.