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INSTREAM FLOW PROTECTION IN THE WESTERN STATES:

A SURVEY AND COMPARISON

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Water as a Public Resource:
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I. INTRODUCTION

A. Established in large part to free water resources development from the shackles of the place of use restrictions of the riparian system, the prior appropriation doctrine historically has neglected instream uses of water, such as recreation, fish and wildlife, commercial and pleasure boating and rafting, and protection of scenic beauty and other aesthetic values. Over the years, however, the state courts and legislatures have recognized the social and economic importance of instream uses and have incorporated into the common law of prior appropriation a variety of means of protecting minimum stream flows and lake levels.

B. This outline presents a brief summary of the instream flow protection laws of six Western states: Arizona, California, Colorado, Idaho, Montana, and Washington. For a description of the instream flow protection strategies of other states, such as Alaska, Oregon, South Dakota, Utah, and Wyoming, see Western States Water Council, Instream Flows and the Public Trust (1986).

Each analysis is organized around four basic methods of protecting instream flows:

1. Instream Appropriation--This category includes appropriations, either by private parties or state agencies, that are recognized in the state's water rights system along with the more traditional types of appropriations for consumptive purposes.

2. Administrative Protection--This category represents the methods by which the state's water rights agency is authorized to protect instream uses when it grants a permit for a new water right, modifies a permit, polices the state's water resources system, or administers the state's water quality system.

3. Direct Legislative Protection--This category describes the ways in which state legislatures have acted directly--i.e., not through the courts or a state administrative agency--to protect instream uses. Examples include state wild and scenic rivers systems and legislative reservations of minimum stream flows or lake levels.

4. Direct Judicial Protection--This category discusses ways in which state courts have protected instream uses, either through enforcement of reasonable and beneficial use limitations on consumptive uses of water or through application of the public trust doctrine.

C. References

Western States Water Council, Instream Flows and the Public Trust (1986), available from the Western States Water Council, 220 South 200 East, Suite 200, Salt Lake City, Utah 84111, Telephone No. (801) 521-2800.

R. Dewsnup & D. Jensen, State Laws and Instream Flows (1977) (U.S. Dep't of Fish and Wildlife Contract No. 14-16-0008-2120FWS).

Shupe, Legal Implications of Instream Flows and Other Nonconsumptive Uses, in University of Colorado, Natural Resources Law Center, Western Water Law in Transition (1985).

Tarlock, Recent Developments in the Recognition of Instream Uses in Western Water Law, 1975 Utah L. Rev. 871.

Tarlock, Appropriation For Instream Flow Maintenance: A Progress Report On "New" Public Western Water Rights, 1978 Utah L. Rev. 211.

II. ARIZONA

A. General

Probably because instream uses of water have played a relatively small role in the state's economic and social development, Arizona has one of the least sophisticated systems for protecting minimum stream flows.

B. Instream Appropriation

The Arizona Water Resources Code authorizes "[a]ny person or the state of Arizona or a political subdivision thereof [to] appropriate unappropriated water for . . . recreation [and] wildlife, including fish." Ariz. Rev. Stat. Ann. § 45-141A. The Arizona Court of Appeals has interpreted this statute to permit the "in situ appropriation of water" without a physical diversion. McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494, 496 (1976). The court also stated that "[c]onceivably then, the Game & Fish Department could prohibit the draining of a lake for irrigation purposes . . . if that draining interfered with the fish therein.

Despite this authority, some commentators believe that instream appropriation is not permitted in Arizona. See Note, Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators, 21 Ariz. L. Rev. 1095 (1979).

C. Administrative Protection

In considering an application to appropriate water, the Department of Water Resources may deny the application if it finds that the proposed use would be "against the interests and welfare of the public." Ariz. Rev. Stat. Ann. § 45-143A. This provision is not well-defined and it is uncertain whether the Department may reject an application on the ground that the proposed use would be harmful to instream uses.

In setting water quality standards, the Department of Environmental Quality must inter alia "enhance the quality of water taking into consideration its use and value for public water supplies, the propagation of fish and wildlife, and recreational . . . and other purposes including navigation." Id. § 49-222A.

D. Direct Legislative Protection

Arizona has no direct legislative scheme, such as a wild and scenic rivers system, to protect instream flows.

E. Direct Judicial Protection

The Arizona courts have not recognized the public trust doctrine.

III. CALIFORNIA

A. General

As described more fully below, California applies three of the four basic methods of instream flow protection. In addition, California continues to recognize riparian rights. As a class, riparian rights generally are the most senior water rights in the state. See In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979). Because all junior users must maintain sufficient flows to supply the demands of the riparians, many observers believe that the existence of riparian rights in California contributes to the maintenance of flows for instream uses.

B. Instream Appropriation

The California courts have refused to recognize claims to appropriate water for the purpose of protecting instream flows. In California Trout, Inc. v. State Water Resources Control Board, 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (3d Dist. 1979), and in Fullerton v. State Water Resources Control Board, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1st Dist. 1979), the courts held that the California statutes that establish appropriative rights prohibit the Water Board from granting a permit to appropriate water to applicants that do not intend to divert or to exercise some physical control over the water. Accordingly, in California Trout, the court upheld the Board's denial of an application by a private fishing and conservation organization to appropriate

water for the preservation and enhancement of fish and wildlife. And, in Fullerton, the court affirmed the Board's denial of an application by the California Department of Fish and Game to appropriate water to protects the state's interests in fisheries during periods of low flow. For criticism of the courts' narrow reading of California appropriation law, see California Trout, 90 Cal. App. 3d at 822, 153 Cal. Rptr. at 676 (Reynoso, J. dissenting); Lilly, Protecting Streamflows in California, 8 Ecology L. Q. 697 (1980).

C. Administrative Protection

The primary mechanism for protecting instream flows in California is through the State Water Resources Control Board's administration of the state's water rights system. The Board has direct jurisdiction over all appropriative rights acquired since December 19, 1914, and over all water rights based on prescriptive uses. People v. Shirokow, 26 Cal. 3d 301, 605 P.2d 859, 162 Cal. Rptr. 30 (1980). Although the Board has no authority to issue permits to riparians and pre-1914 appropriators, the Board has indirect jurisdiction over such users through its powers to prevent waste and unreasonable use of water, Imperial Irrigation District v. State Water Resources Control Board, 186 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (4th Dist. 1986); People ex rel. State Water Resources Control Board v. Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1st Dist. 1976). The Board also may regulate the water rights of riparians

and pre-1914 appropriators when it invokes its powers to conduct a basin-wide or statutory adjudication of all water rights in a surface stream system. In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rprt. 350 (1979). Finally, the Board has asserted jurisdiction over all users and uses of water when acting pursuant to its statutory authority to establish water quality standards and to protect the public trust. See United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1st Dist. 1986); California State Water Resources Control Board, Workplan for the Hearing Process on the San Francisco Bay / Sacramento-San Joaquin Delta Estuary (Feb. 1987).

1. Water Rights Applications

The California Lagislature has directed the Board to protect instream flows when it evaluates new permits to appropriate water. Thus, the Legislature has declared, "[t]he use of water for recreation and preservation and enhancement of fish and wild life resources is a beneficial use of water." Calif. Water Code § 1243.

Before the Board may grant a permit, it must perform three tasks: First, the Board must notify the California Department of Fish and Game of the permit application and consider the Department's recommendation of "the amounts of water, if any,

required for the preservation and enhancement of fish and wildlife resources." Id. Second, "[i]n determining the amount of water available for appropriation," the Board must "take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife purposes." Id; see id. § 1257.5. Third, the Board must "take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of . . . any uses specified to be protected in any relevant water quality control plan" established pursuant to state and federal water pollution laws. Id. § 1243.5; see id. §1258.

In granting applications to appropriate water, it has become increasingly common for the Board to include in the permit terms that require the applicant to release specified quantities of water to supply instream uses downriver and to reserve jurisdiction to modify the quantity of water granted to the applicant if further investigation indicates that additonal water is needed for instream flows.

The Board also has the authority to require that the point of diversion for a new appropriation of water be

moved to a downstream location in order to protect instream flows in the river between the proposed point of diversion and the downstream location. See Environmental Defense Fund v. East Bay Municipal Utility District, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

2. Regulation of Water Rights

The California Legislature also has directed the Board and the Department of Water Resources "to take all appropriate proceedings or actions . . . to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water." Calif. Water Code § 275. Pursuant to this authority, the Board may modify an existing permit if it finds that the appropriation pursuant to the permit is unreasonably harmful to instream beneficial uses. See United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 129-30, 227 Cal. Rptr. 161, 187-88 (1st Dist. 1986).

The Board also has authority under the public trust doctrine to modify the water rights of all users--including riparians and appropriators that are not under the Board's permit jurisdiction--when it finds that the consumptive use is unreasonably harmful to the

public trust. Id. at 148-52, 227 Cal. Rptr. at 200-02; see National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

3. Water Quality Standards

In addition to its water rights functions, the Board is the primary state agency responsible for the administration of the federal and state water pollution laws. Calif. Water Code § 13160. Acting either directly, or through the Regional Water Quality Control Boards, the Board is empowered to establish regional water quality control plans and to regulate point and nonpoint sources that contribute to water pollution. Id. §§ 13160, 13170.

In formulating a water quality control plan, the Board is directed "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." Id. § 13000. The Board also is required to "ensure the reasonable protection of beneficial uses." Id. § 13241. Consistent with other law, California's water pollution control statutes define beneficial uses to include: "recreation; aesthetic enjoyment; navigation; and

preservation and enhancement of fish, wildlife, and other aquatic resources or preserves." Id. § 13050(f).

The California courts recently have affirmed the Board's powers to protect instream uses through its administration of the state's water pollution laws. United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1st Dist. 1986). The Board may accomplish its water quality goals both by regulating point and nonpoint sources and through its administration of water rights by requiring consumptive users to maintain sufficient flows to provide enough freshwater to fulfill the requirements of the water quality control plan. Id.

D. Direct Statutory Protection

Pursuant to the California Wild and Scenic Rivers Act, the Legislature has withdrawn nine rivers and some of their tributaries from further development. Calif. Pub. Res. Code §§ 5093.54-5093.545. The Act prohibits the construction of dams on the component rivers and prohibits the construction of other diversion facilities unless the Secretary of Resources determines that the facilities are needed to supply water to the residents of the county through which the river flows and that the facilities "will not adversely affect the free-flowing condition and natural character of the river." Id. § 5093.55. The Act

also directs that no state agency shall assist any other federal, state, or local agency in planning or constructing any dam or other water faciility "that could have an adverse effect on the free-flowing condition and natural character" of a component river.

E. Direct Judicial Protection

The California Supreme Court has held that the courts generally have concurrent jurisdiction with the State Water Resources Control Board to adjudicate claims that a use of water is wasteful, unreasonable, or nonbeneficial, Environmental Defense Fund v. East Bay Municipal Utility District, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980), and to decide cases involving the public trust doctrine. National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr.346 (1983). Thus, the courts have jurisdiction directly to protect instream flows, either under the public trust doctrine or based on a determination that consumptive uses of water unreasonably harm instream uses.

IV. COLORADO

A. General

Since 1973, Colorado has relied principally on instream appropriation of water by the Colorado Water Conservation Board to protect minimum stream flows and lake levels. Outdoor recreation is an important aspect of the economy and life of Colorado. Today, approximately 6,700 miles along 1,074 segments of Colorado's rivers have been protected by instream appropriation.

B. Instream Appropriation

In 1973, the Colorado Legislature amended the definition of benefical use and its policy for appropriating water to recognize instream uses. "For the benefit and enjoyment of present and future generations," beneficial uses include "the appropriation by the state of Colorado in the manner prescribed by law such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." Colo. Rev. Stat. § 37-92-103(4).

The Colorado Water Conservation Board is authorized to appropriate "such waters of natural streams and lakes as the board determines may be required to preserve the natural environment to a reasonable degree." Id. § 37-92-102(3). These instream appropriations carry a priority as of the date of their

establishment. Id. § 37-92-102(3)(b).

Before the Board may initiate an instream appropriation, it must determine that "the natural environment will be preserved to a reasonable degree with the board's water right, if granted and that such environment can exist without material injury to water rights." Id. § 37-92-102(3)(c).

In Colorado River Conservation District v. Colorado Water Conservation Board, 594 P.2d 570 (1979), the Colorado Supreme Court held that the instream appropriation statutes do not violate article XVI, section 6 of the state's constitution, which provides: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."

C. Administrative Protection

In administering Colorado's water resources system--e.g., approving new appropriations or granting changes in the place of use or point of diversion--the state water courts must protect instream appropriations by the Water Conservation Board.

D. Direct Legislative Protection

Colorado does not have a state wild and scenic rivers system, nor has the Legislature withdrawn certain rivers or lakes from further appropriations or consumptive uses.

E. Direct Judicial Protection

The Colorado courts have not recognized the public trust as a potential limit on appropriative rights.

V. IDAHO

A. General

Idaho is at the forefront of instream flow protection and provides a good example of the interrelationship among the four basic methods. The Idaho Water Resources Board is responsible for the development of a comprehensive state water plan. The Department of Water Resources is the chief administrator of the state's water resources system. See Beeman & Arment, Instream Flows and the Public Trust--Idaho, in Western States Water Council, Instream Flows and the Public Trust (1986).

B. Instream Appropriation

In 1978, the Idaho Legislature declared that "the public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality." Idaho Code § 42-1501.

To accomplish this purpose, the Legislature (1) declared that the

preservation of water for minimum stream flows is in the public interest and constitutes a beneficial use, id., and (2) authorized the Water Resources Board to appropriate water for maintenance of minimum stream flows. Id. § 42-1503. Although the Board is the only agency that may apply for a permit for instream uses, any person or other government agency may request the Board to make such an application. Id. § 42-1504.

Before the Department of Water Resources may issue a permit to the Board, it must find that the appropriation of minimum stream flow:

> (1) will not interfere with any senior water right;
>
> (2) is in the public interest;
>
> (3) "is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream";
>
> (4) is the minimum flow, rather than the ideal flow for such purposes; and
>
> (5) "is capable of being maintained as evidenced by records of stream flows and water levels and the existing or future establishment of necessary gauging stations and bench marks." Id.

Decisions by the Department are subject to judicial review. Id. Moreover, permits for instream appropriation do not become final

until they are approved by the Legislature. If the Legislature fails to act on a permit, it is deemed to be final upon the end of the legislative session. Id.

Once a permit for instream appropriation becomes final, the water remaining in the river or lake "shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum" set forth in the permit. Id. § 42-1505.

As of 1986, the Board had obtained twelve licenses and permits for minimum stream flows. See Beeman & Arment, supra.

C. Administrative Protection

1. Water Resources

In addition to its responsibility to consider applications for permits for miminum stream flows described above, the Department of Water Resources also has authority to protect instream uses when it considers any application to appropriate water. Before it may grant a permit, the Department must determine inter alia that the proposed appropriation will not "conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed

use." Idaho Code § 42-203A(5)(e).

The Idaho Supreme Court has held that the term "public interest" includes the "public interest elements listed in § 42-1501: `fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality,'" as well as "discouraging waste and encouraging conservation." Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441, 449 (1985). Thus, the Department may deny or condition a permit to ensure that the appropriation conforms to the public interest.

2. Water Quality

The Department of Health and Welfare has primary jurisdiction over the state's compliance with Idaho and federal water pollution standards. See Idaho Code § 39-103. Although the relationship between the Department of Water Resources and the Department of Health and Welfare is not well-defined, the Idaho Supreme Court has held that "Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare." Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441, 450 (1985).

D. Direct Legislative Protection

Beginning in 1925, the Idaho Legislature began the most direct system of legislative protection of lake levels and stream flows applicable in the Western states by directing the Governor to appropriate in trust for the people of Idaho "all the unappropriated water of Big Payette Lake, or so much thereofas may be necessary to preserve said lake in its present condition." Idaho Code § 67-4301. The Legislature also declared that the reservation of water in the lake "for scenic beauty, health and recreation purposes" is a beneficial use. Id.

Since then, the Legislature has directed either the Governor or the Department of Parks to appropriate the waters of seven additional lakes, rivers, and springs in order to preserve their scenic beauty and recreational uses. Id. §§ 67-4304 to 67-4312. In State ex rel. Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974), the Idaho Supreme Court upheld the appropriation of the waters of Malad Canyon for instream flow protection, concluding that this use is a beneficial use within the meaning of the Idaho Constitution and that the Legislature had waived the common law requirement that all appropriations of water be made by a physical diversion.

E. Direct Judicial Protection

The Idaho Supreme Court has recognized the public trust doctrine as a limit on the rights of private landowners to encroach upon

the navigable waters of the state, and has held that "[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary." Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085, 1092 (1983). Although the case did not involve a conflict between the public trust and water rights, some commentators have interpreted Kootenai as adopting the public trust doctrine as a potential limit on appropriative rights. See Beeman & Arment, supra, at 44 & 49, who rely on the court's analysis of the California Supreme Court's Audubon decision and on the following dicta from Kootenai: "The public trust doctrine takes precedent even over vested water rights. . . . Grants to individuals of public trust resources will be construed as given subject to the public trust doctrine unless the legislature explicitly provides otherwise." 671 P.2d at 1094.

VI. MONTANA

A. General

Montana also has a sophisticated system for protecting instream flows. It relies heavily on public agencies to reserve water for various instream uses. Montana is a prior appropriation jurisdiction. After 1973, every appropriation of water must be pursuant to a permit issued by the Montana Department of Natural Resources and Conservation. See Mont. Code Ann. §§ 85-2-301 et

seq.

B. Instream Appropriation

The Montana Legislature has provided that the state, any state agency, any political subdivision, or the United States may apply to the Board of Natural Resources and Conservation to reserve the waters of six designated rivers and their tributaries "for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates." Mont. Code Ann. § 85-2-316.

C. Administrative Protection

1. Water Rights

As with most state water administrators, in determining whether to grant a permit for a new appropriation of water, the Department of Natural Resources and Conservation must consider a variety of factors relevant to the application. For applications to appropriate of 4000 afa or 5.5 cfs or greater, before the Department may issue a permit, it must consider inter alia "the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including . . . minimum instream flows for the protection of existing water rights and aquatic life."

Mont. Code Ann. § 85-2-311(2).

Similar provisions are applicable to proposals to transfer water or to change the place of use or purpose of use. See id. § 85-4-402.

If the application is to appropriate water from a river from which water previously has been reserved as described above in section B, the applicant must prove "by substantial credible evidence" that the proposed use will not unreasonably interfere with the uses for which water has been reserved. Id. § 85-2-311(1)(e).

2. Water Quality

The Montana Legislature has declared that it is the policy of the state "to conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses." Mont. Code Ann. § 75-5-101(1). Montana has adopted a nondegradation policy, which requires that "any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated . . . that a change is justifiable as a result of necessary economic or social

development and will not preclude present and anticipated use of these waters." Id. § 75-5-303(1).

The Legislature also has adopted a system of aquatic ecosystem protection for rivers and lakes. The purpose of this system is to establish a permit system, administered by local agencies, for any project that involves dredging, filling, or alteration of the level or flow of a river or lake. See id. §§ 75-7-101 et seq.

D. Direct Legislative Protection

Montana does not have a state wild and scenic rivers system that is analogous to the National Wild and Scenic Rivers System. Rather, it has enacted a stream protection system that is administered by the Department of Fish, Wildlife, and Parks.

The Legislature has declared that it is the policy of the state that "its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved." Mont. Code Ann. § 87-5-501. To implement this policy, the statute requires all state and local agencies to notify the Department of Fish, Wildlife, and Game of any proposal to

construct, modify, operate, or fail to operate "any construction project or hydraulic project which may or will obstruct, damage, diminish, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries." Id. § 87-5-502.

The Department then must investigate the proposal and determine whether the project would adversely affect any fish or game habitat. Id. § 87-5-504. If the Department concludes that it would it may deny the project or it may recommend an alternative that would "eliminate or diminish such adverse effect." Id. The applicant has the right to arbitrate the decision of the Department. Id. § 85-5-505.

E. Direct Judicial Protection

Although the Montana Supreme Court has held that the public trust doctrine protects the public's right to use the navigable waters of the state for boating, fishing and recreation, Montana Coalition For Stream Access v. Hildreth, 684 P.2d 1088 (1984); Montana Coalition For Stream Access v. Curran, 682 P.2d 163 (1984), it has not recognized the public trust as a potential limit on appropriative rights. See generally Thorson, Brown & Desmond, Forging Public Rights in Montana's Waters, 6 Public Land L. Rev. 1 (1985).

VII. WASHINGTON

A. General

Washington has long depended on water-based activities, such as commercial and sport fishing, to help sustain its economy and to fulfill the recreational needs of its own residents. As a consequence, the Washington Legislature has enacted relatively strong statutory protections for instream uses of water.

Thus, the Legislature declared in 1979 that "[i]t is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantiry and quality to protect instream and natural values and rights." Wash. Rev. Code Ann. § 90.03.005.

To accomplish this policy, Washington employs three of the four basic methods of instream flow protection.

B. Instream Appropriation

1. The Department of Ecology is authorized to "establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public

interest to establish the same." Wash. Rev. Code Ann. § 90.22.010. The Department also has the power to set minimum flow levels to protect water quality. Id.

2. The Department of Ecology also has complementary authority to "[r]eserve and set aside waters for beneficial utilization in the future." Id. § 90.54.050. "Beneficial utilization" is defined to include recreational uses, maintenance of fish and wildlife, and "the retention of water in lakes and streams for the protection of environmental, scenic, aesthetic and related purposes, upon which economic values have not been placed historically and are difficult to quantify." Id. § 90.54.120(2); see id. § 90.14.031(2). Indeed, in determining whether to reserve water for future beneficial uses, the Department must follow, inter alia, the Legislature's directive that

> Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawls of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

Id. § 90.54.020(3)(a).

3. These administrative reservations of water are defined as appropriations for purposes of Washington's permit system. The reservations carry priority dates "as of the effective dates of their establishment." Id. § 90.03.345.

4. As of 1986, the Department had adopted six basin plans and eleven instream resources protection programs. See Slattery, Washington State's Instream Resources Protection Program, in Western States Water Council, Instream Flows and the Public Trust 184 (1986).

C. Administrative Protection

1. Under Washington law, appropriators of water are required to obtain a permit from the Department of Ecology. In reviewing an application for a permit, the Department must consider the effects of the proposed appropriation on the minimum flow levels established as described above in section B and place conditions on the permit to protect the levels or flows. Wash. Rev. Code Ann. § 90.03.247.

2. In addition, the Department of Ecology is required to notify the Director of Fisheries and the Director of Game of each application to appropriate water. The

Department "may refuse to issue a permit if, in the opinion of the director of fisheries or the director of game, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream." Id. § 75.20.050.

3. As the principal state water pollution control agency charged with administering the federal and state water pollution laws, the Department of Ecology has authority to protect instream uses from harm caused by the discharge of pollutants. See generally id. §§ 90.48.037-90.48.910.

D. Direct Statutory Protection

The Legislature has designated three rivers as components of the Washington Scenic River System. Wash. Rev. Code Ann. § 79.72.080. Once a river is included in the Scenic Rivers System, the state must preserve it "in as natural condition as practical." Id. § 79.72.010.

E. Direct Judicial Protection

Although the Washington Supreme Court has held that the filling of a navigable lake may be enjoined because it interferes with the public's right of navigation, Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970),

it has not recognized the public trust as a potential limit on appropriative rights or other consumptive uses of water. See Slattery, supra, at 188-91.