



## McGeorge Law Review

Volume 36

Issue 2 *Symposium on the 25th Anniversary of the  
Report of the Governor's Commission to Review  
California Water Rights Law; Part 2 of 2*

Article 2

1-1-2005

# Overview of the Protection of Instream Uses, An

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### Recommended Citation

Jill Wright, *Overview of the Protection of Instream Uses, An*, 36 MCGEORGE L. REV. 295 (2005).

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# *Protection of Instream Flows*

## **An Overview of the Protection of Instream Uses**

Jill Wright\*

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### I. INTRODUCTION

Instream uses of water include fish and wildlife preservation, aesthetic enjoyment, scientific study, commercial fisheries, and recreational and leisure uses such as swimming, boating and fishing.<sup>1</sup> The Governor's Commission to Review California Water Rights Law ("Commission") felt confident that preserving water for these uses was of great benefit to the general public.<sup>2</sup> After weighing the relative "offstream" uses of water, the Commission felt that the preservation of these uses in the overall system of water allocation was extremely important, not only for environmental reasons, but for the general public benefit as well.<sup>3</sup> For these reasons, the Commission chose to include instream flows in their recommendations for water rights law in California. However, it was noted that these particular uses of water could not be secured by

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1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 99 (Dec. 1978) [hereinafter FINAL REPORT].

2. *See id.* at 120 (proposing legislation declaring that the state has a "vital interest in . . . beneficial instream uses").

3. *Id.* at 101.

traditional appropriative water rights.<sup>4</sup> Because of this, many different theories evolved to protect these various and beneficial instream uses of water.

This article will include an examination of the history of California law dealing with instream flows, the Commission's recommendations and proposed legislation dealing with the subject, and the current state of California law dealing with the instream uses of water.

## II. THEN EXISTING LAW

### A. State Policy of Preservation

At the time the Commission issued its recommendations, the protection of instream uses of water was generally considered a matter of "state policy."<sup>5</sup> The California Water Code stated that "fish, wildlife, and recreation uses are beneficial uses of water which must be considered in administrative determinations of the public interest."<sup>6</sup> The Fish and Game Code also provided that "the protection and conservation of fish and wildlife resources are of utmost public interest, and recognizes the importance of commercial and sport uses as well as aesthetic, scientific and educational uses."<sup>7</sup>

### B. The California Permit System

One valuable tool in California's implementation of the policy of protecting instream flows was found in administrative actions of the State Water Resources Control Board ("SWRCB").<sup>8</sup> The SWRCB was responsible for the administration and review of appropriative water rights in California.<sup>9</sup> If a private individual or public entity wanted or needed to appropriate water in California, they would first need to obtain a permit from the SWRCB to do so.<sup>10</sup> In deciding whether to grant a permit to appropriate water, the SWRCB is required to consider whether there is enough water available to appropriate.<sup>11</sup> Specifically, the SWRCB is required to consider "the amount of water required for recreation and the preservation and enhancement of fish and wildlife resources," and has broad discretion to deny a permit if the proposed appropriation infringes on this amount.<sup>12</sup> The SWRCB must also consider the public interest in "instream

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4. *Id.* at 99.

5. *Id.* at 101. This policy was captured in various statutes, judicial decisions, and administrative duties. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 101-02.

9. *Id.*

10. *Id.* at 102.

11. *Id.*; see also CAL. WATER CODE §§ 1243, 1243.5 (West 1971 & Supp. 2004).

12. FINAL REPORT, *supra* note 1, at 102.

beneficial uses of water.”<sup>13</sup> If the proposed use will not “best conserve the public interest,” the SWRCB will reject the permit application.<sup>14</sup> In making this determination, the SWRCB is directed to consider three factors: (1) whether the proposed appropriation complies with the California Water Plan, which provides that the preservation of instream flows is an important state concern and states that “the planned stream flows should be protected;”<sup>15</sup> (2) whether the public interest would be best conserved by “‘competing uses of water,’ including fish wildlife and recreational uses;”<sup>16</sup> and (3) water quality control plans.<sup>17</sup> The decision to grant or deny a permit for an appropriative water use is the first instance in which the SWRCB is given the opportunity to consider and preserve instream flows. Although the statutes direct the SWRCB to reject an application if it is not in the public interest, typically the SWRCB imposes terms and conditions on the permit to protect instream flows.<sup>18</sup>

The SWRCB has broad discretion in setting the terms and conditions of permits for appropriative water use.<sup>19</sup> Often, these have included various provisions for the preservation of instream flows, including general “instream flow requirements, requirements for the release of stored water, and fish bypass and fishway requirements.”<sup>20</sup> In setting the terms and conditions imposed upon a permit, the SWRCB relies on data gathered by the California Department of Fish and Game.<sup>21</sup>

### C. The Department of Fish and Game

The Department of Fish and Game (“DFG”) plays an extremely important role in the permit process.<sup>22</sup> The SWRCB is required to notify the DFG when an application is filed. The DFG then makes recommendations to the SWRCB regarding the amount of water necessary for “the preservation and enhancement of fish and wildlife resources.”<sup>23</sup> The DFG can also issue a formal protest to the proposed application. However, it typically enters into a settlement with the

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13. *Id.*

14. *Id.*; CAL. WATER CODE § 1255 (West 1971).

15. FINAL REPORT, *supra* note 1, at 102; CAL. DEP’T OF WATER RES., BULLETIN NO. 3: THE CALIFORNIA WATER PLAN 221-22 (1957).

16. CAL. WATER CODE § 1255.

17. FINAL REPORT, *supra* note 1, at 102; CAL. WATER CODE § 1258 (West 1971). The water quality control plans are to have already taken “beneficial uses” of water into consideration. These “uses” include various forms of instream uses such as recreation, aesthetic enjoyment, and preservation of fish and wildlife. CAL. WATER CODE §§ 13050(e), 13241(a) (West 1992 & Supp. 2004).

18. FINAL REPORT, *supra* note 1, at 102.

19. *Id.* at 103.

20. *Id.*

21. *Id.*

22. *See id.* (discussing the role of DFG in the permit process).

23. *Id.*

applicant, which will then be written into the permit as various terms and conditions.<sup>24</sup>

The DFG also has protective powers outside of the application process. Any entity or individual wishing to divert or obstruct a stream must first notify the DFG.<sup>25</sup> If the DFG believes that a fish or wildlife resource will be negatively affected by the proposed use, it will propose “modifications” in order to more adequately protect the resource.<sup>26</sup>

#### D. Other Protections

In addition to the permit system, there are various more specific protections of instream flows in California. The California Wild and Scenic Rivers Act (“Act”)<sup>27</sup> protects nine rivers in California due to their “extraordinary scenic, recreational, fishery or wildlife value.”<sup>28</sup> The Act imposes restrictions on the uses of the recognized waters and directs the Secretary of the Resources Agency to prepare management plans “to administer the rivers and their adjacent land areas in accordance with such classification.”<sup>29</sup>

The California Environmental Quality Act<sup>30</sup> requires the preparation of an environmental impact report for any action that will have a significant impact on the environment.<sup>31</sup> This would certainly include the preservation of instream flows as part of any significant impact that the appropriation of instream uses would have on the environment.<sup>32</sup>

#### E. The Nature of the Problem

There are still many situations in California left unprotected by the specific statutes discussed above. For these situations, the permit system remains the sole line of defense of beneficial instream uses.<sup>33</sup> Unfortunately, this system has significant limitations. Due to the inherently ad hoc nature of the process, instream uses are often not considered until after a project is designed.<sup>34</sup> Modification of designs to protect instream uses can be extremely burdensome, time-consuming, and expensive

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24. *Id.*; CAL. WATER CODE § 1243 (West Supp. 2004). The Department of Water Resources is required to give the Department of Fish and Game’s recommendations “full consideration” in planning state water projects. *Id.* § 11910 (West Supp. 2004).

25. FINAL REPORT, *supra* note 1, at 103; CAL. FISH & GAME CODE §§ 1600-1616 (West Supp. 2004).

26. FINAL REPORT, *supra* note 1, at 103; CAL. FISH & GAME CODE § 1601.

27. CAL. PUB. RES. CODE §§ 5093.50-.70 (West 2001 & Supp. 2004).

28. FINAL REPORT, *supra* note 1, at 104.

29. *Id.*

30. CAL. PUB. RES. CODE §§ 21000-21078.1 (West 1996).

31. *Id.* § 21002.1 (including the issuance of permits by the SWRCB).

32. See generally FINAL REPORT, *supra* note 1, at 104; CAL. FISH & GAME CODE §§ 5937-5948 (West 1998).

33. FINAL REPORT, *supra* note 1, at 105.

34. *Id.* at 106.

for the applicant.<sup>35</sup> Also, instream flows protected under one appropriative permit remain subject to subsequent appropriation applications.<sup>36</sup>

Consistency in the granting of permit applications for water use is also a problem.<sup>37</sup> One year the SWRCB may be vigorous in their protections of instream flows, while they may be more relaxed the next.<sup>38</sup> As the Governor's Commission stated, "[o]ne set of Board-members may be staunch in their defense of instream values, but in their successors in interest hand out permits freely . . . the damage is done."<sup>39</sup>

California's most imminent obstacle to efficient preservation of instream flows is a simpler but serious problem: a lack of funds and understaffing of the administrative agencies charged with the protection of instream flows.<sup>40</sup> The inadequacy and inconsistency of available data regarding the allocation of a stream's water is a very serious problem facing the SWRCB each time it issues a permit.<sup>41</sup> Because of the financial and time restraints faced by the DFG in the collection of this data, the SWRCB is often left with the "lack of a definitive base of information" that a particular appropriation will be harmful to instream flows.<sup>42</sup> The SWRCB also lacks the resources to provide adequate post-permit follow-up to ascertain whether an appropriator is, in fact, complying with instream flow requirements.<sup>43</sup>

#### F. California's Responses to the Permit System

There were several attempts to alter the existing system prior to the Commission's Report. In one attempt, California Trout, Inc., a non-profit corporation made up of fisherman, biologists, conservationists and the like, brought suit against the SWRCB for refusing to issue an application for a permit to appropriate water for instream uses.<sup>44</sup> California Trout asserted they did not have to exercise physical control over the water that they were proposing to appropriate and that the use could simply be for the "public use of protecting fish

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35. See generally *id.*

36. *Id.* at 106-07. The SWRCB may still grant more permits that affect instream flows regardless of the protections afforded in a prior permit. See *id.* at 107 (discussing possible variances in instream flow protection from board to board).

37. *Id.* at 107.

38. *Id.*

39. *Id.* (quoting Barry Goode, Introductory Remarks, Governor's Commission to Review California Water Rights Law 17 (Feb. 1, 1978 workshop)).

40. *Id.* at 106.

41. *Id.*

42. *Id.*

43. *Id.* at 107.

44. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 153 Cal. Rptr. 672, 673 (Ct. App. 1979). The case went to trial prior to the Commission authoring its report in 1978. At the time the report was issued, the case was up for appeal. FINAL REPORT, *supra* note 1, at 109.

and wildlife.”<sup>45</sup> At the time the Commission issued its Final Report in December of 1978, the trial court had ruled in favor of California Trout, holding that water could be appropriated for instream uses under the California Water Code without exercising physical control over the water.<sup>46</sup> Although overturned by the appellate court after the recommendations were issued, the case was a novel attempt at using the existing system to further preserve instream flows.<sup>47</sup>

Efforts at preservation were also developed around various existing legal doctrines. At the time the Commission issued its recommendations, the doctrine of reasonable beneficial use was still being explored.<sup>48</sup> The doctrine presented two issues to be considered regarding instream flows. The first issue was whether the reduction of instream flows below a certain level could be an “unreasonable use.”<sup>49</sup> The second issue was whether an individual or entity diverting stream flows could be required to use alternate methods of diversion in order to protect instream values.<sup>50</sup> This second issue had been addressed in a case brought by the Environmental Defense Fund (“EDF”) challenging a proposed appropriation by the East Bay Municipal Utility District (“EBMUD”), which would reduce flows in the American River.<sup>51</sup> EDF alleged that a different diversion point was feasible and would allow for more beneficial uses of the water.<sup>52</sup> At the time, the case was decided on other grounds leaving both issues open.<sup>53</sup>

The public trust doctrine was another legal theory with the potential to preserve instream flows.<sup>54</sup> The public trust doctrine is a common law theory which essentially regards the State as the trustee of certain public rights.<sup>55</sup> At the time of the Final Report, no cases had been brought under this theory to protect

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45. *Cal. Trout, Inc.*, 153 Cal. Rptr. at 673.

46. *Id.* This finding was later overturned by the court of appeal interpreting California Water Code section 1260 and the statutory pattern of California Water Codes to require that physical control be a necessary factor in an application to appropriate water. *Id.* at 674-75.

47. FINAL REPORT, *supra* note 1, at 109. See generally *Cal. Trout, Inc.*, 153 Cal. Rptr. at 674-75.

48. FINAL REPORT, *supra* note 1, at 109. The reasonable beneficial use doctrine is embodied in the California Constitution Article X, Section 2 which states in part:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and 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 in the interest of the people and for the public welfare.

CAL. CONST. art. X, § 2.

49. FINAL REPORT, *supra* note 1, at 109. At the time the Commission issued the recommendations, no case had addressed this issue.

50. *Id.* at 110.

51. *Id.*; *Envtl. Def. Fund v. E. Bay Mun. Util. Dist.*, 605 P.2d 1 (Cal. 1980). Again, when the Commission issued the recommendations, the case had not come to a final close; instead, it had been remanded to the trial court for further consideration. FINAL REPORT, *supra* note 1, at 110.

52. FINAL REPORT, *supra* note 1, at 110; *Envtl. Def. Fund*, 605 P.2d at 3-4.

53. FINAL REPORT, *supra* note 1, at 110.

54. *Id.*

55. *Id.*

instream flows although the doctrine had been used to protect various other public resources.<sup>56</sup>

County of origin and watershed statutes were also considered in the attempt to protect instream flows.<sup>57</sup> The statutes themselves generally do not provide for the specific protection of instream flows, but they do provide that the area in which water originates will have superior rights to the water it needs for future development.<sup>58</sup> Perhaps the most significant response to the inadequacy of the system prior to the issuance of the Commission's recommendations was through private negotiations and agreements.<sup>59</sup> These agreements, generally between concerned individuals and groups, were a response to lack of action by the SWRCB.<sup>60</sup>

The Commission pointed to these agreements as examples of increased dissatisfaction with the existing system for preserving instream flows in California.<sup>61</sup> The Commission concluded that a clear and concise statutory procedure was needed to avoid "these uncoordinated and often unsuccessful attempts" to provide for instream flow protection.<sup>62</sup> Finding that the existing system was unsuited for the protection of instream flows in California, the Commission made several recommendations to remedy the inherent flaws in the law and to more adequately protect California's instream flows.<sup>63</sup>

### III. RECOMMENDATIONS AND IMPLEMENTATION

#### A. Recommendations

The Commission made five recommendations regarding instream flows in California.<sup>64</sup> The first recommendation related to instream flow standards. In an attempt to create measures for instream preservation, which were direct, substantive, and comprehensive, the Commission recommended that the SWRCB set instream flow standards on a stream-by-stream basis.<sup>65</sup> The SWRCB would then comply with these standards when deciding whether to grant an application

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56. *Id.* This doctrine has been further developed in recent years in the protection of instream flows. This will be discussed in detail in other articles appearing in this Symposium.

57. *Id.* at 110-11.

58. *Id.*; *County of Trinity v. Andrus*, 438 F. Supp. 1368, 1386 (E.D. Cal. 1977). While the county was unsuccessful in this case, the case did note that area of origin statutes could provide protection for instream flows.

59. FINAL REPORT, *supra* note 1, at 111.

60. *Id.* (listing local governments, the Department of Fish and Game, and municipal and environmental groups as among those concerned).

61. *Id.*

62. *Id.*

63. *Id.* at 112-19.

64. *Id.* at 113-19.

65. *Id.* at 113.



for an appropriative use.<sup>66</sup> First, the SWRCB would determine whether a particular stream required set standards in order to protect the public interest.<sup>67</sup> If a stream was chosen, the SWRCB would then investigate and consider recommendations made by other interested parties.<sup>68</sup> In its investigation of the stream, the SWRCB would balance the present or potential instream values against non-instream uses, economic or otherwise.<sup>69</sup> Before the SWRCB adopted an instream standard, the Commission recommended that it hold a public hearing.<sup>70</sup> Once adopted, the standards would prohibit the SWRCB from granting any application that would potentially impair the standard.<sup>71</sup>

The Commission recognized that the process for setting an instream standard might be extremely complex and lengthy.<sup>72</sup> Because of this, it recommended a program of interim protection. The Commission recommended that a process of allowing applications for instream appropriations be used to provide for this interim preservation.<sup>73</sup> The process for applying for an instream appropriation would be substantially the same as for other appropriations, except that the application must: (1) contain information relating to the public interest; (2) the need for instream protection; and, (3) address the non-instream demands for water.<sup>74</sup> The SWRCB would then act on the application within nine months of the filing date.<sup>75</sup> The SWRCB would still engage in the traditional weighing of the uses, but would do so in light of the need for interim protection, thus engaging in a less thorough analysis.<sup>76</sup>

The Commission also made recommendations for physical solutions to the instream flow problem.<sup>77</sup> The Commission proposed that compliance programs be introduced in order to “harmonize instream [uses] with other uses of water.”<sup>78</sup> Recognizing that the needs for water should be accommodated whenever possible, the Commission used the EBMUD’s diversion of water from the lower

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66. *Id.*

67. *Id.*

68. *Id.* (including other interested agencies and the public).

69. *Id.* (including physical solutions such as “water exchanges, modification of project operation, changes in points of diversion . . . time and rate diversion . . . and uses of water from alternative sources”).

70. *Id.* at 114.

71. *Id.* The Commission also introduced the idea of compliance programs for existing uses that would impair set standards. The programs would be promulgated after a public hearing, and would embody any physical solutions that may be required to avoid or mitigate the impact of compliance with the standards. The programs would also provide for the equitable distribution of losses ensuring that the existing user does not sustain any substantial harm. *Id.*

72. *Id.*

73. *Id.* at 115.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 115-17.

78. *Id.* at 116.

American River as an example of a compliance program.<sup>79</sup> In this situation, as addressed earlier in this article, EBMUD met with various other interested parties in order to change diversion patterns and use, making more water available for beneficial uses.<sup>80</sup> The Commission suggested that this agreement was a model for future compliance programs where interested parties could participate to secure the most beneficial uses of water.<sup>81</sup>

In situations where the enhancement of instream values is needed, or where the balancing engaged in by the SWRCB falls in favor of existing or potential economic values, the Commission recommended that the Secretary of the Resources Agency be allowed to purchase water rights specifically for instream uses.<sup>82</sup> The Commission analogized this situation to local governments purchasing land in conjunction with zoning requirements in order to accomplish a particular planning goal.<sup>83</sup> The Commission concluded that this would lend a particular flexibility to the state's powers in protecting instream flows.<sup>84</sup>

The Commission's final recommendations related to the argument asserted in the *California Trout* case.<sup>85</sup> Because the Commission did not believe that the permit process was the appropriate vehicle for preserving instream uses, it recommended that appropriation of water by private parties without physical control of the water itself generally should not be recognized.<sup>86</sup> However, the Commission did note some specific exceptions to this recommendation: (1) stockwatering purposes; (2) where existing rights are purchased in compliance programs or independently by the Resources Agency; and, (3) those situations where beneficial instream uses of water under appropriative rights were originally perfected for other uses requiring diversion or physical control.<sup>87</sup> In order to codify these five recommendations, the Commission proposed legislation embodying these ideas.

### B. Attempt at Implementation

The Commission attempted to add various provisions to California's water law in order to promulgate its recommendations. It proposed to add Part 3.5 to Division Two of the Water Code relating to recommendations regarding instream

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79. *Id.* at 116-17.

80. *Id.*

81. *See id.*

82. *Id.* at 117 (stating that the Secretary is the appropriate person to purchase the water because of his ability to represent the broad range of public interests).

83. *Id.* at 118.

84. *Id.* However, the Commission also noted that fiscal constraints would most likely restrict this practice to very narrow instances. *Id.*

85. *See generally* Cal. Trout, Inc. v. State Water Res. Control Bd., 153 Cal. Rptr. 672, 673 (Ct. App. 1979).

86. FINAL REPORT, *supra* note 1, at 118.

87. *Id.* at 119. However, the Commission noted that this recommendation should be contingent on the enactment of the instream flow standards. Otherwise the Commission felt the issue should be left to the courts. *Id.*

flow standards.<sup>88</sup> These sections were to codify the policy behind creating the standards, the establishment of the standards themselves, the interim protection, and the effect the standards were to have.<sup>89</sup> The Commission also proposed the addition of Chapter 1.1 to Division Five of the Public Resources Code. This section was to codify the acquisition of water specifically for instream uses by the Resources Agency.<sup>90</sup> The Commission further proposed to add section 1227 to the Water Code which would embody the recommendation that no appropriative right should attach to water without physical control.<sup>91</sup>

#### IV. CONCLUSION

The Legislature did not respond to the Commission's recommendations in this area. Nine measures to clarify the doctrine of instream flows were introduced and, with minor exceptions, all of them failed. As a result, the law governing instream flows in California has remained largely unchanged. Various attempts at using existing legal doctrines in novel or expansive ways have proven somewhat successful in the preservation of instream flows.<sup>92</sup> However, the system continues to be based on a myriad of statutory policy and guidelines, regulations, and judicial and administrative decisions, leaving the issue of instream flows largely unchecked in California.

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88. *Id.* at 122.

89. *Id.* at 122-28.

90. *Id.* at 129-30.

91. *Id.* at 131. This was later accomplished by the courts. *See* Cal. Trout, Inc. v. State Water Res. Control Bd., 153 Cal. Rptr. 672, 673 (Ct. App. 1979).

92. This article is meant purely as a background introductory piece. This will be discussed in much greater detail by other authors in the Symposium.