

INSTREAM USES AND RECREATIONAL VALUE OF WATER¹

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Introduction

This subject is discussed in two parts. First is a perspective on what water resources administration in the various states is like, emphasizing the opportunities for protecting instream uses. Second is specific action that states have taken to effect the protection of stream flows. One way of understanding these subjects is in terms of change.

Change is frequent and ongoing. What administrators try to do in water management is protect against radical changes which threaten established water uses. In trying to protect against change, each administrator is rational. One defines rational behavior as including only those things which apply directly to oneself. For example, before this session began, Colonel Roth told the panelists of a complaint he had received about the lack of flood control in one area in northern New Mexico where the Corps of Engineers had built a flood control structure to protect a school located in an arroyo. The complainer's child went to school there, and he didn't think there was enough flood control. The very next week the Colonel was in another meeting and the same man stood up and said that, on another side of town, too much was being spent on flood control. He didn't live over there, so he didn't want to spend any more money on that project. One can understand instream flow needs in the context of people trying to protect their own interests.

In the development of western water law and western water management over the last one hundred years, there has been an apparent struggle for certainty: that is there has been a struggle to protect the certainty of water rights, and to understand the relative position of everyone's right on a stream system. Each right holder wants to ascertain just how secure he or she is in the use of water. With such certain knowledge one could go forward to spend money, time, and energy in developing the water. Development and growth have been promoted relative to the degree that certainty exists. However, this quest for certainty has also given rise to a certain amount of rigidity in interpretation. What is needed is flexibility in the quest for certainty so as to accommodate new uses.

¹ The views, opinions, and analyses contained herein are those of the author and do not necessarily represent the position of the U.S. Fish and Wildlife Service. The author is grateful for review comments on this article made by Dr. Clair B. Stalnaker. All errors of omission and commission, however, are those of the author.

The need for certainty has given rise to a consumptive use ideology. This ideology holds that (1) water which is not used is wasted; (2) water not used is lost; (3) only economic uses are good uses; and (4) individuals have a birthright to consumptively use water no matter what conditions exist. Such beliefs do not allow for much flexibility when new or different uses come on the scene.

While this ideology leads to rather rigid interpretations within the water resources administration community, there are some opportunities for flexibility. There are opportunities for flexibility in the law, because the law can be changed or modified. In addition, the law is often not specific. As a result, there is the possibility for flexibility in the exercise of administrative discretion.

In ideology itself, however, there is very little room for discretion because one holds his beliefs not only to be self evident but to be absolutely true. Numerous things fall into this category. First, the public believes in technicians. More specifically, they believe in engineers. The belief is that technology provides truth. But in fact most technical issues are really matters of policy. The business of technique and methodology sounds like science, but is really politics. Techniques and interpretations are chosen based upon a specific expected outcome.

Second, the cost-benefit ratio and the idea of "beneficial use" are pervasive concepts. These are perceived as inviolate. In reality, these are only ideas and as such are subject to change. They are, however, difficult to change because they are part of the consumptive use ideology.

In the face of new demands on the water resource, this prevailing ideology will change. There are various agents of change in this society. These agents are individuals and institutions whose job it is to recognize the change which is occurring in order to formulate rules and regulations which can ensure consideration of new uses while maintaining stability and a high level of certainty. Routinely these institutions need to provide answers to the following questions: What's a beneficial use? What ought to be protected? How ought the water be used? Who ought to get it first? Who ought not get any water?

I propose here a natural priority list of institutions which ought to deal with these questions. First, the state legislature should address these questions specifically, and on a frequent basis. But in many states the legislature has not considered these matters for years. This means that there will be competition among various publics. The conflict occurs because various segments of the public believe strongly in different answers to these questions. For example, environmental groups think that because the legislature has failed to address a certain issue, that issue is open to interpretation by administrators and the public. They think that the legislature should have resolved the questions; but because it has not, other remedies exist.

Second, administrative discretion provides a remedy. That is, state administrators have some discretion within the law. Given this discretion, administrators are charged to help resolve conflict. In some states, however,

this ability is constrained. Administrators may attempt to identify what beneficial uses are, unless they are clearly limited in statute; they may attempt to manage for the "best use," or they may protect some uses in the public interest. In short, administrators are constrained by statute, but they have a responsibility to satisfy the public interest. This responsibility entails paying attention to the various publics, and to the intensity of interest with which those publics express their desires.

Third, if the states do not act, responsibility is left to the federal agencies or the Congress. Occasionally federal agencies feel a responsibility because of the mandates they have received. Federal agencies may continue to advocate protection for instream uses of water; but most options put forward deal with only an incremental change in the way in which water is managed. This means that most suggestions for federal action will result in only an incremental difference in the way projects are operated, or land is managed.

In summary, the struggle for certainty has led to rigidity which has excluded some beneficial uses, this should be recognized. For example, in some states, instream uses are not recognized as beneficial. But, in order to ensure justice for all of the public, these new uses should be protected. Of course, there are other new interests, such as rapid energy development. When these new interests seek water, they seem to attack the quest for certainty. In fact, these pressures will cause some changes in the way that water is administered in the West. This change should be made incrementally by the states for their various purposes and should include instream protection.

Incremental Change

There are two kinds of change which might come about. First, incremental change includes action which may be deemed to be in the public interest, or action which may be deemed to be a re-definition of beneficial use. Second, radical change refers to challenges to current water rights or action which reallocates water from one use to another.

Nine possible types of incremental change are discussed below. First, water may be appropriated for instream purposes in some states. This means that the states have allowed for entities of the state to obtain a water right for an instream purpose for delivery from point A to point B. The water right for this use falls in priority of use with other water rights. In 1973 Colorado Senate Bill 97 allowed the State Water Conservation Board to appropriate water for instream purposes. This grants a junior water right, but also grants the right to protest transfers of use which might obstruct the instream interests on the stream. This is allowed because an injured water right holder has the right to protest a transfer or change of use. The same situation prevails in Idaho. The Idaho Water Administration Board is allowed to appropriate water for instream purposes. In Idaho, the state legislature has an opportunity to veto each of those appropriations it thinks may not be in the public interest.

Second, water may be protected through a "reservation system." This system currently causes the most confusion among water users because it falsely gives the appearance that the state is taking water outside of the

appropriation system. This system to protect instream uses is employed in Montana, Washington, and Oregon. In these cases, the state has established a minimum level below which water will not be appropriated on certain streams. This minimum flow level falls in the time of priority such that a senior appropriator could take water even though there has been a reservation established (even if he is junior to the reservation) so long as there is enough water in the stream. The reservation does not take away anybody's water rights. In this respect, a reservation is like an appropriation. In Montana, at least, there is the provision that every 10 years the state can re-think its protection of instream flows. If it has decided not to use water for instream purposes but to use it for coal gasification or a coal slurry pipeline to Arkansas, it could do that. Use of water originating in Montana for coal slurry outside of the state is now considered beneficial under Montana law.

The reservation system is quite logical. It is very difficult to understand why the state which either owns the water, or manages the water in trust for the people, should have to appropriate the water from itself to get a water right. It seems more logical that the state should reserve the water from appropriation. But there is little difference between the two techniques of appropriation or reservation.

Third, many states wish to adopt a preference list for water uses. Such a list establishes which water uses are preferred, often including instream flows for fish, wildlife, and recreation. Usually these instream uses are not first on the list. The states which have such a list are Idaho and Colorado. Recently the legislature considered establishing such a list in Montana. There are a number of reasons for such a list. (1) The list can be used for the purpose of telling which use can exercise the power of eminent domain over another use. In Colorado, for example, municipal use has eminent domain power over agricultural use. An agricultural use can exercise eminent domain power over an industrial use (if one can find a farmer with enough money to buy water rights from an industrialist). (2) A preference list can also be used as a guide in granting permits where there is conflict among uses. If two persons submit applications for different types of uses at the same time, the State Engineer could use a preference list to decide between the two. (3) A preference list could be used to amend the priority system. No state now uses this interpretation. (4) A preference list could be used as an exhaustive list of beneficial uses. Recent court decisions have stated that current lists of beneficial uses, specifically in Idaho, are not exhaustive lists. That ruling surprised a lot of people in Idaho who thought there were only four uses of water in that state.

Instream flow needs can be protected under all of these listing arrangements because they bring instream uses into the beneficial use picture. Specifically, if there is no provision for the state to apply for an instream flow water right, but such a use is on a preference list, it allows the state engineer to at least consider instream flows under the public interest rubric.

Fourth, the public interest concept for protecting instream uses is one of the most striking possibilities and it is the most difficult to implement. It provides an opportunity for protection in almost all western states, except Colorado. There are a number of ways in which instream

flows can be protected by using the public interest process. In some states there may be a moratorium on further appropriations until a state water plan is developed, or for some other purpose. Of course, any moratorium that allows water to flow protects instream uses. Any state could establish statutory criteria designed to allow consideration of the public interest. For example, rules and regulations might require consideration of the public interest in granting water rights. Where statutory provisions exist which say that in considering an application for permit, the state engineer must consider the public interest, it is possible to put conditions on exchanges, transfers, or the permits themselves.

This approach is rarely taken, however, and there are many reasons for this reluctance. One is that public interest protection can cut both ways. What is in the public interest today may not be in the public interest tomorrow. Another reason is that the process leaves the decision in the hands of only a few persons, possibly creating problems of accountability. However, several steps have been taken in this regard which seem reasonable. In the public interest South Dakota and Washington both put time limits on the permits they now issue. In Washington, the time limit for use is 50 years. After that period the state can reconsider whether it wants the water used in the same way.

Fifth, there is the water management approach. There has been a great deal of success in several western states in negotiating water management practices on various stream systems. One might negotiate with the Corps of Engineers, or with the Bureau of Reclamation for release schedules that fit the purposes of a project, but allow for instream uses.

Sixth, there are financial and contractual arrangements. Obviously, if one wants to protect stream flows, it might be necessary to purchase or lease space in a reservoir conservation pool. One would then be able to have some control over the release schedule. Another variation is to purchase and resell direct flow rights. Funds have been appropriated to the Division of Wildlife and the Water Conservation Board for this purpose in Colorado. This appropriation enables those agencies to buy some water rights, resell them downstream, put restrictions on their further transfer, and, by that technique, protect instream flows. Another related technique may be to lease water and deliver it to some user on a schedule that protects instream flows in the conveyance. These techniques are costly but a portion of the investment can be recovered for future use.

Seventh, there are interstate and federal opportunities to protect stream flows under current arrangements. One opportunity may be found in interstate compacts. Although there are a number of such compacts, none of them address the stream flow issue. Statewide water plans, however, may actually address the stream flow issue, especially in the context of interstate obligations. Furthermore, one might look at 208 plans. In its 208 plan the Northwest Colorado Council of Governments has provided for the protection of stream flows in order to do two things: (1) The COG hopes to protect the low salinity levels in their streams; and (2) they want to protect their investment in water treatment plants, which, without adequate protection of stream flow, would have to be redesigned at great cost.

Eighth, there are opportunities for federal funding. Dingle-Johnson funds, or grants from the Heritage Conservation and Recreation Service might be used for the purchase of water for instream purposes.

Finally, there is the "public trust," encompassing the concept of navigability. If a stream is navigable, it is possible to require that water remain in the stream so the river will continue to be navigable. Maintaining navigability is done in the exercise of the public trust. There is some difficulty in this because the definition of public trust responsibility may change because of the personalities involved. The basic notion is that all water management is carried on in trust for the public. Such an idea may allow public figures to be sued for violations of that trust if they do not protect instream uses.

Radical Change

There are a number of activities which could cause radical change in water administration. Some of these changes may prove to be useful elements in water management. First, there are some obvious processes that the federal government can and does use. (1) The government owns property, and, subsequent to the property clause of the Constitution, there is latitude in managing federal property. The Supreme Court case of U.S. vs. New Mexico (No. 77-510 July 3, 1978) suggests that federal reserved rights may be more restricted than previously thought. However, a recent Department of the Interior Solicitor's opinion suggests that federal land managing agencies may have water rights pursuant to their management of land according to Congressional purposes. (2) The commerce clause regulates actions that affect interstate commerce. Of course, this means the federal government can regulate navigable streams to some extent. (3) There are also treaty powers. The United States has treaties with several countries which require that we maintain habitat for various species--such as whooping cranes. The Department of State comes into play in enforcing treaties; and the treaties have the force of the Constitution. (4) Finally the federal government has spending powers. This is the basis on which the Fish and Wildlife Service interacts with the construction agencies. Of these activities, reserved rights, the commerce clause, and treaties provide a possibility for significant changes.

Second, with regard to the states, opportunities may be more surprising. It may be possible in some states to (1) condemn water rights and put the water to instream purposes; (2) tax water rights as real property; and (3) use the state's own spending powers. The approach that might be most interesting is condemnation under the exercise of the police power. Loss of property which occurs after such action generally is non-compensatory because it doesn't constitute a "taking of private property." For example, some counties in Colorado have considered the zoning of water rights. Just as they zone away junkyards and feed lots, counties could zone water use.

Summary

Which of these approaches to protecting instream uses is chosen depends to a large extent on ideology. Ideology, or belief in what is correct, determines which approach one will favor and which approach one will oppose. Because there are many diverse interests involved, there are many situations when proposed activities will clash.

The clashes will be less severe if the states are taking affirmative steps toward protecting instream uses. It is my belief that the states are the most appropriate entity to manage for these instream uses. If the states act, the best opportunity to serve a wide range of the public is preserved.