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COMMENT

WATER APPROPRIATION FOR RECREATION

INTRODUCTION

In contemporary America the increased demand for recreational facilities of all kinds, due to increased population and shorter working weeks, has been phenomenal. Water recreation has felt this increased demand and its popularity is rapidly increasing. The 1962 report of the United States Outdoor Recreation Resources Review Commission reported that forty-four per cent of the population of the United States preferred water-based recreational activities to all others. The Commission's studies indicate that by the year 2000, swimming will be the most popular single outdoor recreational activity.¹ It is also estimated that by the year 2000 the population of the United States will have increased ninety-eight per cent above the 1960 figure, but during the same time period the fishermen of the country will have increased one hundred fifty per cent.² In addition water often enhances the recreational value of surrounding land areas for many other popular recreational activities, such as camping and sight seeing.

In light of the above factors some thought must be given to the problem of protecting existing recreational uses of water and to increasing the development of such recreational facilities. Consequently, a major concern is how such protection and development fits into the picture of western state water law, which is primarily based on the appropriation of water. "Many courts have stated definitions of an appropriation, usually in terms of the physical acts involved in a typical appropriation. A composite of these might be that an appropriation requires an intent to appropriate, notice of the appropriation, compliance with state laws, a diversion of water from a natural stream, and its application with reason-

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1. OUTDOOR RECREATION RESOURCES REVIEW COMM'N, A REPORT TO THE PRESIDENT AND TO CONGRESS ON OUTDOOR RECREATION FOR AMERICA 173 (1962).
 2. 7 OUTDOOR RECREATION RESOURCES REVIEW COMM'N STUDY REPORT, SPORT FISHING—TODAY AND TOMORROW 1 (1962).

able diligence and within a reasonable time to a beneficial use."³

The two main conceptual problems concerning the appropriation of water for recreational purposes are (1) whether recreation is a beneficial use and (2) whether a diversion is necessary in order to perfect a valid appropriation.⁴ A third consideration concerns the action a state might take in order to protect water which has a high recreational value in its natural state from appropriation for more mundane purposes.

RECREATION AS A BENEFICIAL USE

While an appropriation of water may be acquired only for a beneficial purpose,⁵ curiously most state statutes authorizing appropriations make no attempt to define beneficial use,⁶ nor does research disclose a single case where a court has attempted to define it. Nevertheless, assuming that a diversion has been made or that no diversion is necessary, recreation could be considered a beneficial use so as to serve as a basis on which to establish a valid appropriation. One writer has said, that it is undoubtedly beneficial "to use water for beautifying parks and resorts where people may rest and enjoy themselves, and for forming pools and lakes for swimming, boating, fishing, and hunting . . . but the limits of appropriation for these purposes have not been fully explored or stated by the courts."⁷

Although there is little case law on this legal problem, the courts of several western states have recognized recreation as a beneficial use. *Empire Water & Power Co. v. Cascade Town Co.* concerned a dispute arising before the Federal Court in Colorado.⁸ The plaintiff owned a tract of land which had been improved at great expense as a summer resort and on which there flowed a small, precipitous stream, the spray from

3. TRELEASE, BLOOMENTHAL & GERAUD, CASES ON NATURAL RESOURCES 28 (1965). Compare *Mearis v. Bicknell*, 7 Cal. 262 (1857) (diversion of water solely for for drainage not a valid appropriation).

4. KINNEY, IRRIGATION AND WATER RIGHTS 1243 (2d ed. 1912). The rule is often stated that to establish a valid appropriation there must be an actual diversion from the stream.

5. WYO. STAT. § 41-2 (1957). See also *Drach v. Isola*, 48 Colo. 134 109 Pac. 748 (1910).

6. *E.g.*, WYO. STAT. § 41-2 (1957), IDAHO CODE ANN. § 42-104 (1949).

7. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L. J. 1, 11 (1957).

8. 205 Fed. 123 (8th Cir. 1913).

which produced a luxuriant vegetation. He sought to perpetually enjoin defendant from interfering with the normal flow of the stream. The court held that places devoted to public health, rest and recreation constitute a beneficial use and stated: "Places such as that described here, favored by climate conditions, improved by the work of man, and designed to promote health by affording rest and relaxation are assuredly beneficial."⁹

The Supreme Court of Colorado has held that water diverted and used for the propagation of fish is devoted to a useful purpose for which a valid appropriation may be made.¹⁰ The New Mexico court has also held that the use to which water may be put include uses for recreation and fishing.¹¹ Water for the purpose of maintaining a swimming pool or fish pond has been held to be a beneficial use and a basis upon which a valid appropriation may be founded.¹²

Three states, Texas,¹³ Oregon,¹⁴ and Idaho¹⁵ specifically list recreation as a beneficial use for which an appropriation may be made. In others, various state statutes can be construed together so as to determine that recreation is a beneficial use. Using Wyoming as an example, the statute on preferred uses does not list recreation as a preferred use,¹⁶ but Wyoming's statute on the nature of a water right and beneficial use provides, "Water being always the property of the state, rights to its use shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives *public recognition* under the law and the administration provided thereby."¹⁷ (Emphasis supplied) In addition the statute on water conservancy districts provides that it is declared to be the policy of the State of Wyoming, "to control, make use of and apply to beneficial use all unappro-

9. *Id.* at 128. However, the appropriation was denied because the use was unnecessarily wasteful.

10. *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

11. *State v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945).

12. *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 62 P.2d 206 (1936).

13. TEX. REV. CIV. STAT. ANN. art. 7471 (1954).

14. ORE. REV. STAT. § 536.300 (1963).

15. IDAHO CODE ANN. § 67-430 (1949).

16. WYO. STAT. § 41-3 (1957).

17. WYO. STAT. § 41-2 (1957).

propriated waters in this state to a direct and supplemental use of such waters for domestic, industrial, manufacturing, irrigation, power, *recreation* and other beneficial uses."¹⁸ (Emphasize supplied) Thus, by reading these statutes together, although recreation is not specifically listed as a beneficial use, it could be recognized as such through statutory construction. Being a beneficial use, it would follow that water for recreation is subject to appropriation.

Most appropriations for recreation involve a use by the general public. A Utah case raises a serious problem on a related point.¹⁹ The case involved the question of whether an appropriation of water could be made for the irrigation of public land for the production of food for wild water fowl. The land would have been accessible for hunting by any person as well as the members of the club seeking the appropriation. The court stated:

We are not disposed to hold that any use of water tending to supply man or domestic animals with food is not beneficial. But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be one that inures to the exclusive benefit of the appropriator and subject to his complete dominion and control.²⁰

No other state seems to have placed a similar limitation on appropriations. In *Scherck v. Nichols* the Wyoming court (in a different context) stated:

[I]t is not contrary to the policy of this state that a man may apply for the diversion of water for the ultimate use of it by another. A man cannot apply for water, or divert it, for idle purposes. He must claim it, if he wants to separate it from the unappropriated body of water. But the claim need not, we think, be personal in the sense that no one else can reap the benefit thereof.²¹

18. WYO. STAT. § 41-77 (1957).

19. *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 Pac. 300 (1917).

20. *Id.* at 311.

21. *Scherck v. Nichols*, 55 Wyo. 4, 19, 95 P.2d 74, 78 (1939).

If the position advocated by the Utah court was given full effect, it would mean there could not be an appropriation of water by a district or distributing company for use by its consumers since the beneficial use contemplated in making the appropriation would not inure to the exclusive benefit of the appropriator and be subject to his complete dominion and control. For the same reason the rule would not allow an appropriation such as the one attempted in *Empire Water & Power Co. v. Cascade Town Co.*²² Consequently, it would appear that the exclusive benefit rule is inconsistent with the policy of favoring maximum use of water since the public benefit would seem to be more compelling than that of a single appropriator. For example, the use of water in a public swimming pool would offer greater possibilities of maximum use than would the use of the same water in a private pool. Generally in an appropriation state, the state is the owner of the water and holds it in trust for the equal use and benefit of the public.²³ However, an appropriation would be invalid under the Utah rule if it benefits the public. The greater the number of people able to derive benefits from the use of water, the greater the possibility that maximum use in the public interest will be achieved. Maximum use in the public interest is the ultimate goal of any good water law.²⁴

There can be no hard and fast rules stated that in every case recreational use of water will be deemed a beneficial use, but the result will depend upon the facts and circumstances of each particular case. Courts inherently tend to weigh the competing uses in determining whether one use as compared to another is beneficial, although the courts seldom express this. This, however, is not necessarily undesirable since some flexibility is necessary in administering the water law in order

22. *Supra* note 8.

23. WYO. CONST. art. 8, § 1. Also see *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961).

24. TRELEASE, A WATER CODE FOR ALASKA, A REPORT TO THE STATE OF ALASKA, 14-17 (1962). As to the rights of a riparian owner to use the entire surface of a lake or reservoir see *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956). Not all courts accept the rule of this case; for courts reaching different results see: *Tripp v. Richter*, 158 App. Div. 136, 142 N.Y.S. 536 (1913); *Walden v. Pines Lake Land Co.*, 126 N.J. Eq. 249, 8 A.2d 581 (1939). For a treatment of public use of the surface of streams flowing over private land see *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961); 12 Wyo. L.J. 167 (1958); 53 CALIF. L. REV. 171 (1964).

to promote the most beneficial use. When the advantages of recreation outweigh those of a competing use, recreation should be held to represent a beneficial use.

DIVERSION AS A NECESSARY REQUISITE

In modern western water law, a would be recreational appropriator is squarely confronted with the question of whether a diversion of the water from the natural channel is necessary in order to obtain an appropriation. Since many recreational uses of water are on-site uses, a diversion requirement would present a serious obstacle to acquiring an appropriation.

The requirements of a diversion may be met where water is impounded by a dam and use in or on the reservoir. Recreational facilities are normal by-products of any sizeable dam or reservoir project, at least until drawn down for other uses. In fact, the applications for a permit to build such projects, generally label recreation as one of the beneficial uses to be derived. When a conflict arises between recreational use of the water and other uses, a compromise might be worked out which would set a minimum water level so that there would always be sufficient water for fishing and boating.²⁵

A dam may be used in another way to acquire an appropriation for on-site recreational use of water in the stream. Under this plan the water would be stored in a reservoir for later release to maintain a minimum flow of the stream to assure preservation of aquatic life. The dam itself would provide the necessary diversion and satisfy this requirement for a valid appropriation.²⁶

A lake with a natural outlet may also provide an excellent opportunity for acquiring an appropriation for recreational use of its water. Typically these lakes have a higher level of water in the spring because of the runoff from melting snows, but the level of the lake decreases as the summer progresses and refill ceases. One way to assure that the lake will be maintained at a sufficient level throughout the season

25. Manual of Regulations and Instructions for Filing Applications and Petitions Involving Surface Water Appropriations in the Office of the State Engineer and the State Board of Control, State of Wyoming, C-13, 1965.

26. This may be compared to the situation where water is impounded in a reservoir for later use such as irrigation.

for recreational use would be to build some type of control structure at the outlet. Such a structure would not only control the level of the lake but might also fulfill the requirement of a diversion.²⁷

One serious problem in attempting to establish an appropriation for recreational purposes arises in the situation where the desire is to use the water in the natural stream or bed, without any diversion at all, such as setting aside a stream for fishing purposes. In practice the vast majority of appropriations consist of an actual diversion of water from its natural course, or, of a reservoir on the stream used to store the water before it is diverted as needed; however, the requirement that there be an actual diversion was laid down by the early courts to cope with the situations that existed at that time.²⁸ Only exceptional cases in early Western America such as stock watering and irrigation by natural overflow justified an appropriation of water without a diversion.²⁹ Water recreation, however, should be a modern day exception to the diversion requirement, because in many cases use of the water may be made as it exists in its natural state. The Supreme Court of Utah has stated that the public has a lawful right to take water for camp purposes from public streams provided the exercise thereof does not appreciably decrease the quantity or deteriorate the quality of water to which prior rights have been established.³⁰ This does not require an actual diversion of the flow from the natural channel, however, if the water is to be used for a private purpose then there must be a diversion.³¹ Another court has stated:

It is now well settled that where practically no artificial works for irrigation are necessary, the re-

27. *Thomas v. Guiraud*, 6 Colo. 530 (1883).

28. *E.g.*, *McPhail v. Forney*, 4 Wyo. 556, 35 Pac. 773 (1894); in which the court stated, "[I]t is just as necessary to the creation and preservation of a water right to provide means for the continual diversion of the water from its natural channel . . . as it is to apply it to a beneficial purpose." *Id.* at 561, 35 Pac. at 774.

29. *Thomas v. Guiraud*, *supra* note 27.

30. *Adams v. Portage Irr., Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937), *rehearing denied* 95 Utah 20, 81 P.2d 368 (1938). In a more recent case the Utah court reaffirmed the three principal elements necessary to constitute a valid appropriation of water as being (1) an intent to apply the water to a beneficial use; (2) a diversion from natural channel; and (3) an application to a beneficial use within a reasonable time. *Tanner v. Provo Reservoir Co.*, 99 Utah 139, 98 P.2d 695 (1940).

31. *Ibid.*

quirement of a valid appropriation that there be a diversion from the natural channel is satisfied when the appropriator accepts the gift of nature and indicates his intent to reap the benefits of natural irrigation.³²

The Colorado courts have rendered some of the earliest decisions on this issue of the diversion requirement and have rendered what investigation indicates to be the most recent treatment of the problem. A Colorado statute provides that persons who have enjoyed the use of water from a natural stream for the irrigation of meadow land by the natural overflow or operation of the stream, might in case of diminution of flow construct ditches for that purpose with priorities as of that time of the first use.³³ The Colorado Supreme Court held that this statute gave an appropriation without any affirmative act on the part of an owner of a meadow in withdrawing water from a stream.³⁴ Subsequently, the same court recognized an appropriation where a dam alone caused overflow of a meadow without the aid of ditches.³⁵ In *Empire Water & Power Co. v. Cascade Town Co.*, a dispute arising in Colorado but litigated in the Federal Court, the court stated "if nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary."³⁶ The most recent case in which the Colorado court dealt with the problems of the necessity of diversion in establishing a valid appropriation was *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*³⁷ The plaintiff claimed the water should not be diverted from the stream but should be kept in the stream to the extent necessary for the preservation of fish life and their propagation. He claimed that the stream has been used for the propagation of fish and by the public for recreational activities and asserted that a valid appropriation had been made which had existed since 1937.

32. *Masterson v. Pacific Livestock Co.*, 144 Ore. 396, 24 P.2d 1046, 1050 (1933). An earlier case which suggested that while an appropriation could be affected by irrigation of natural overflow, the change to a control system should be made within a reasonable time. *In re Water Rights in Silvies River*, 115 Ore. 27, 237 Pac. 322 (1925).

33. COLO. REV. STAT. ANN. § 148-3-14 (1963).

34. *Broad Run Inv. Co. v. Deuel & Snyder Improvement Co.*, 47 Colo. 573, 108 Pac. 755 (1910).

35. *Thomas v. Guirard*, *supra* note 27.

36. *Supra* note 8, at 129.

37. 406 P.2d 798 (Colo. 1965).

The defendant contended that no valid appropriation had been made because appropriation of the flow of a stream for fish maintenance and recreational purposes is not a beneficial use. The court held for the defendant but based their decision on the fact that there had been no diversion.³⁸ They held: "There is no support in the law of this state that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream."³⁹

The requirement of a diversion for a valid appropriation, however, cannot be justified in light of basic appropriation principles. Since the doctrine of prior appropriation is founded upon the principle of beneficial use, it would appear that to apply mere mechanical laws requiring a diversion is unjustified. If a prospective appropriator may make a beneficial use of water in its "natural state" such beneficial use should serve as a basis for a valid appropriation. To repeat again what the federal court had said in an earlier case: "If nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary."⁴⁰ Aside from these questions of whether a diversion is a substantive requirement of an appropriation, procedural problems may hinder an appropriator in acquiring an on-site recreational appropriation. Though statutes do not specifically require a diversion, they typically phrase the procedural aspect of acquiring an appropriation in terms of a diversion.⁴¹ Consequently, the appropriation application form requests a description, and location of the point of diversion.⁴² This, of course, raises the question of how one will file for an appropriation where he has no diversion. However, it would appear that since substantively a diversion should not be a necessity,

38. *Ibid.* The same court previously held that water "diverted" and used for propagation of fish is devoted to a useful purpose for which a valid appropriation may be made. *Faden v. Hubbell*, 93 Colo. 358, 28 P.2d 247 (1933).

39. *Id.* at 800.

40. *Empire Water & Power Co. v. Cascade Town Co.*, 205 Fed. 123, 129 (8th Cir. 1913).

41. For example, under WYO. STAT. § 41-201 (1957): Application for Permit for Appropriation; Procedure—"[A]pplication must set forth . . . the location and description of the proposed ditch, canal or other work, the time within which it is proposed to begin construction, the time required for completion of construction . . ."

42. WYO. STAT. § 41-201 (1957).

the failure to complete the application in this request should not be grounds for denying the appropriation.⁴³ Another problem an appropriator will face in attempting to file his appropriation is to define the limits of the appropriation. It would not appear reasonable that he would be entitled to the full flow of the stream. Therefore, an appropriator of water for recreational use should define the quantity of his appropriation, *e.g.*, seven cubic feet per second.⁴⁴ Since the amount of water to which the recreational appropriator would be entitled would be specifically defined, future appropriators would be able to determine how much water would remain subject to appropriation.

A different problem may arise in the minority of western appropriation states which do not require an application for a permit. This is the establishment of a priority date for the appropriation. In the majority of the states the date the application is filed constitutes the date of the priority.⁴⁵ However, the priority date, under the minority view, is that time when the first "open step" is taken giving notice of the intent to acquire the appropriation.⁴⁶ This may be a simple procedure where the construction of ditches or canals are involved but what type of "open step" acts may be used where recreation is involved, *i.e.*, is fishing in the stream every Monday, Wednesday and Friday enough?

A similar problem is that of notice of the appropriation, one of the physical acts required in all appropriation states.⁴⁷ Again, this may be a simple matter where there is a diversion since construction of a ditch or canal gives such notice, but how can this notice be given where there is no diversion?

43. S.D. CODE § 61.0110 (Supp. 1960).

44. The minimum would vary depending upon the different recreational uses. For example, the necessary minimum flow for a trout stream would be different than the necessary flow for boating or swimming.

45. WYO. STAT. § 41-3 (1937).

46. *City and County of Denver v. Northern Colorado Water Conservancy Dist.* 130 Colo. 375, 276 P.2d 992 (1954); *Compare* COLO. REV. STAT. ANN. § 90-27 (1955) *with* WYO. STAT. § 41-203 (1957). Both of these statutes set forth similar procedural requirements to obtain a valid appropriation but case law of the respective states reach opposite results in applying these statutes: *Compare* *Wyoming Hereford Ranch v. Hammond Packing Co.* 33 Wyo. 14, 236 Pac. 533 (1928) *with* *De Hass v. Benerch*, 116 Colo. 344, 181 P.2d 453 (1947).

47. TRELEASE, BLOOMENTHAL & GERAUD, CASES ON NATURAL RESOURCES 28 (1965).

Finally there is the question of whether a private individual could acquire an appropriation for an on-site recreational use or whether an organization representative of the public such as the Isaac Walton League⁴⁸ would be required. The above problems and questions have no definite answers or solutions at this time, however, they must be faced if any on-site recreational appropriation is ever to be acquired.

STATE ACTION

If private appropriation of water for recreational use fails, then action by the states may offer a recourse in order to protect and develop water recreation facilities. The state governments have effective means at their disposal for insuring that bodies of water and streams will be preserved for the recreational use of the public. The legislatures of Idaho and Oregon have provided unique means to devote certain lakes and water courses to the public use. An Idaho statute provides for appropriation by the governor of the unappropriated water of certain lakes "in trust for the people."⁴⁹ The water in these lakes is preserved for "scenic beauty, health and recreation purposes necessary and desirable for all the inhabitants of the state . . ."⁵⁰ This statute declares such purposes, including recreation, to be a beneficial use of water. In Oregon the State Water Resources Board is authorized, if it deems it necessary in the public interest, to withdraw any unappropriated water of the state from appropriation.⁵¹ The Board is expressly directed to consider recreation, wildlife and fish life uses of water and the ways and means of conserving such resources. The Oregon statute, like the Idaho statute, declares recreation to be a beneficial use.⁵² A number of Oregon streams have been withdrawn from appropriation by the state water resources board pursuant to this authority.⁵³

48. Sportsmen, conservationists and others interested in the protection and preservation of natural resources for future generations and encouraging the inclusion of conservation in an educational system. 1 ENCYCLOPEDIA OF ASSOCIATIONS, NATIONAL ORGANIZATION OF THE U.S. 228 (3d ed. 1961).

49. IDAHO CODE ANN. § 67-4301 (1949).

50. *Ibid.*

51. ORE. REV. STAT. § 536.410 (1963).

52. ORE. REV. STAT. § 536.300 (1963).

53. ORE. REV. STAT. § 538.110 to .300 (1963).

In a package of laws modifying practice and procedure of the State Water Rights Board, a new California statute requires an application for a permit to appropriate water to set forth all data and information reasonably available to the applicant or that can be obtained from the Department of Fish and Game concerning the extent, if any, to which fish and wildlife would be affected by the appropriation, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the appropriation.⁵⁴ This statute affords the State Water Rights Board the means to reject any application for an appropriation which would have an adverse affect on fish and wildlife.

A state engineer may be able to deny an appropriation if the public interest so demands.⁵⁵ It would seem this power carries with it the prerogative to deny an application for appropriation if he feels that the benefits derived from existing recreational uses outweigh the benefits of the proposed use.

Protection and development of recreational resources can also be accomplished by the states through the use of interstate compacts. The Columbia Compact Commission, for example, is directed to "give proper recognition to recreational and fish and wildlife values by recommending such steps as may be necessary and practicable—to protect and develop recreational resources"⁵⁶ It should be noted that this is in the form of a recommendation so it would not be absolutely binding on the state water board.

Although the federal aspects of recreational use of water are beyond the scope of this paper, Congress and the Federal Government have recently shown an increased interest in this area.⁵⁷ As public recreational demands increase, greater fed-

54. Cal. Sess. Laws 1965, ch. 48.

55. *Big Horn Power Co. v. State*, 23 Wyo. 271, 148 Pac. 1110 (1915).

56. WYO. STAT. § 41-512.3 (Supp. 1965).

57. *The Federal Water Project Recreation Act (Public Law 89-72) (1965)* establishes a uniform policy to govern Federal participation in the recreation, fish and wildlife phases of multi-purpose water projects. In a recent Federal case, which arose in Wisconsin, the Federal Power Commission was upheld in its refusal to grant permission for the construction of a power dam specifically because the dam would have impaired the beauty of a stream that is used for recreation. *Namekagon Hydro Co. v. F.P.C.*, 216 F.2d 509 (7th Cir. 1954). For a discussion of the legal problems involved in condemning land for water and land recreational purposes and for acquiring easements, and other interests in land which are less than a fee interest

eral action can be expected to assure adequate recreational facilities for use by the public.

CONCLUSION

In theory, it would appear that no new laws are necessary in this area since adequate means are available under the existing framework to establish an appropriation for a recreational use. Courts should no longer mechanically apply the rule requiring a diversion when it is contrary to public policy. In evaluating any given recreational project and determining whether to allow an appropriation or not, a court should consider the economic cost-benefit approach. If all the benefits outweigh all the costs, then the project is desirable, if it does not interfere with another project having an even more favorable cost benefit ratio.⁵⁸ For example, by comparing two hypothetical recreation projects and assuming the benefits of each project to be equal, the cost of a project where a diversion is necessary would be greater than the cost of a project where a diversion is not required. Where the benefits are equal it is only common sense to adopt that project which gives the greater ratio of benefits to the cost involved.

On-site recreational use should not unduly interfere with other existing uses on the same water course since by basic principles of the doctrine of prior appropriations, priority gives the better right. Thus, upstream users with prior appropriations would not be affected. Also, since on-site use for recreation is essentially non-consumptive in nature, the water will be left for reuse by downstream appropriators.

A good water law is one that will promote some fundamental and generally accepted public policy. It should have two ideals, maximum use and public interest.⁵⁹ It is difficult, if not impossible, to assign any meaningful, concrete valuation to an intangible such as recreation. As a consequence, it

at all levels of government see, 16 OUTDOOR RECREATION RESOURCES REVIEW COMM'N STUDY REPORT, LAND ACQUISITION FOR OUTDOOR RECREATION-ANALYSIS OF SELECTED LEGAL PROBLEMS (1962). Also see the Wild River's Bill now pending S. 1446, 89th Congress, 1st Sess. (1965).

58. For an excellent discussion of the cost-benefit approach and its application to an evaluation of intangibles such as recreation see Trelease, *Policies for Water Law, Property, Rights, Economic Forces, and Public Regulations*, 5 NATURAL RESOURCES J. 1, 17-23 (1965).

59. TRELEASE, A WATER CODE FOR ALASKA, A REPORT TO THE STATE OF ALASKA, 14-17 (1962).

is difficult to compare recreation with other more tangible uses of water. However, this does not mean that it should be exempt from rational consideration or economic analysis. It is a well known fact that water recreation and recreation connected with water draws tourists and millions of dollars to the western states. Perhaps the best approach is that "No dogmatic rule should be adopted allowing or forbidding the taking of water for . . . recreation, but each such attempted appropriation should be scrutinized and the effect of its allowance upon foreseeable demands for water for other purposes should be considered."⁶⁰

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60. Trelease, *The Concept of Reasonable Beneficial Use in the Law of the Surface Streams*, 12 WYO. L.J. 1, 11 (1957).