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STATUTORY RECOGNITION OF INSTREAM FLOW PRESERVATION: A PROPOSED SOLUTION FOR WYOMING

The appropriation doctrine of western water law, specifically designed to permit individuals to divert water from a watercourse, has been criticized for generally disregarding instream values.¹ In light of this fact, the majority of western states have recognized the value of dedicating water to instream uses through the enactment of statutes which provide for instream flows for fish, wildlife and recreational purposes.² Unfortunately, Wyoming is presently not a member of this majority, having failed to provide for instream flow rights by statutory or other means.³ However, the issue of instream flow recognition in the state of Wyoming has been of growing concern in recent years. In 1981, several instream flow bills were introduced into the Wyoming legislature and although considerable support was shown, none of them managed to gain

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1. U.S. NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 63 (1973) reported the following:

The water law systems of most of the States, both in the East and the West, are deficient in that they fail to give appropriate recognition to social values of water. These values arise primarily from such instream uses as fish and wildlife propagation, recreation, and aesthetics. The appropriation law of the Western States generally requires diversion of water from the stream or lake and its application to beneficial use in order for a water right to be created. Instream values are thus heavily discounted; water has been diverted from streams to such an extent that instream values which should have been protected frequently have been impaired, and sometimes destroyed . . . [W]here the action can be taken without impairing vested rights, State officials should be authorized to set minimum stream flows and lake levels to protect *in situ* values.

2. ALASKA CONST. art VIII, § 13; ARIZ. REV. STAT. § 45-141 (Cum. Supp. 1980); CAL. WATER CODE § 1243 (Cum. Supp. 1981); COLO. REV. STAT. § 37-92-101 to 103 (1973); IDAHO CODE §§ 42-1501 to 1505, (Cum. Supp. 1981); KAN. STAT. § 82a-703a (Cum. Supp. 1980); MONT. REV. CODES ANN. §§ 85-2-102(2), 85-2-316, 87-5-501 (1979); NEV. REV. STAT. § 533.030 (1979); N. D. CENT. CODE §§ 61-04-02, 06.1 (Supp. 1979); OR. REV. STAT. §§ 536.300(1), 537.170(3)(a), 538.110-.300, 543.225(3) (1979); TEX. WATER CODE ANN. tit. 2, §§ 5.023 to 5.024 (Vernon 1972); WASH. REV. CODE ANN. § 9.22.010-.040 (Cum. Supp. 1981).
3. The Wyoming legislature has made some attempt to recognize the value of fish, wildlife, recreation and aesthetics in the state water laws, but such recognition has not led to any direct statutory means of preserving instream flows. WYO. STAT. §§ 41-2-101, -103 (1977) provide in part:

A stream preservation feasibility study is authorized to determine methods and criteria for preserving the scenic and recreational quality of Wyoming rivers and streams.

The study committee shall: (i) Make preliminary surveys to define the character, quality, recreational, scenic, historical, aesthetic, fish and wildlife potential, and any other values to be considered in preserving streams for public use and benefit; (ii) Plan a state scenic and recreational stream preservation system to meet the needs of the people of Wyoming; (iii) Evaluate and describe the potential of any streams which might be identified as meeting the criteria of the preservation system; (iv) Prepare a report on the proposed preservation system for presentation to the governor on or before October 1, 1974, and also make the report available to the public; (v) Prepare and submit to the legislature any recommendations for a stream preservation system on or before January 1, 1975.

This 1973 enactment did not lead to any legislative stream flow preservation system.

passage.⁴ Nevertheless, future attempts by the state legislature to come up with a workable method of preserving instream flows in Wyoming can be expected, and understandably so. Fish, wildlife, recreation and scenic beauty are valuable assets to this state, but they are largely dependent upon the steady supply of at least some minimum amount of water for their continued existence. Without some means of instream flow protection, there is nothing to prevent streams from becoming completely dried up as a result of consumptive withdrawals. Wyoming needs some form of instream flow legislation to protect its valuable natural resources.

This Comment will (1) discuss the doctrinal barriers traditionally raised against the recognition of instream flow appropriations, (2) explore the potential of existing Wyoming law to protect instream flows, and (3) suggest a possible means by which the state of Wyoming could recognize instream flow uses without harming the interests of existing water users.

PROBLEMS OF PRESERVING INSTREAM FLOWS UNDER THE APPROPRIATION DOCTRINE

The elements of an appropriative water right have typically been said to consist of the following: (1) the intent to appropriate water, (2) notice to others of the appropriation, (3) compliance with State prescribed formalities, (4) a diversion of water, and (5) application of the water to a beneficial use.⁵ Under the modern permit system, the first three requirements are automatically satisfied by an appropriator's compliance with State prescribed procedures, since an application for a permit shows an intent to appropriate and the granting of the permit provides notice to others of the appropriation. Therefore, the first three requirements pose no problems for protecting minimum stream flows. Where problems do arise in preserving instream values is with regard to the last two requirements.

The Diversion Requirement

The requirement of an actual diversion is a major doctrinal barrier to the recognition of instream flow appropriations.⁶

4. House Bills 206, 256, 279, 330 and 440. See [1981] WYOMING TAXPAYERS ASSOCIATION LEGISLATIVE SUMMARY SERVICE.

5. TRELEASE, CASES AND MATERIALS ON WATER LAW 36 (3d ed. 1979).

6. Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-24 (1979).

The reason for such a diversion requirement may have originally been to provide notice, through some visible act, to subsequent claimants.⁷ However, with the advent of the modern permit or judicial administration systems which provide record notice of claims, it is difficult to conceive of any purpose now served by the diversion requirement.

In a recent Idaho case,⁸ the Idaho Supreme Court addressed the issue of whether a valid appropriation could be made without an actual physical diversion or artificial control of the water. The court, answering in the affirmative, held that an actual diversion was not required to perfect an appropriation of water for recreational and scenic purposes sought by the Idaho Department of Parks.⁹ Although the Idaho Constitution granted "[t]he right to divert and appropriate the unappropriated waters of any natural stream,"¹⁰ the court determined that the word 'divert' was used to mandate the supremacy of the appropriation doctrine over the riparian system and not to constitutionally limit the manner in which an appropriator could obtain his water right.¹¹ A concurring justice stated that: "Where an appropriative water right does not require a diversion to make it effective and beneficial, in the absence of a statute requiring a diversion there appears to be no practical reason why a diversion should be required."¹² Thus, the Idaho Supreme Court concluded that an actual diversion is not constitutionally required and is not an essential element of the appropriation doctrine.

Colorado has also recently removed the requirement that a diversion is necessary for an appropriative water right. Prior to the removal of that requirement, the diversion issue had arisen in several Colorado cases with varying results.¹³ In an

7. Meyers, *A Historical and Functional Analysis of the Appropriation System* 7 (1971); see also Comment, *In-Stream Appropriation for Recreation and Scenic Beauty: Idaho Department of Parks v. Idaho Department of Water Administration*, 12 IDAHO L. REV. 263, 273 (1976).

8. State Dep't of Parks v. Idaho Dep't of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974) [hereinafter cited as Idaho Dep't of Parks].

9. *Id.* It should be noted that it is not clear whether the Idaho court completely abrogated the diversion requirement. The majority opinion only stated that no diversion was required in this case since "the legislature intended no physical diversion of water be required in the appropriation of the subject waters." *Id.* at 926.

10. IDAHO CONST. art. 15, § 3.

11. Idaho Dep't of Parks, *supra* note 8, at 928 (Bakes, J., concurring).

12. *Id.*

13. See *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913), where a federal court applying Colorado law permitted an appropriation even though there was no man-made diversion. *But see Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 158 Colo. 331, 335, 405 P.2d 798, 800 (1965), suggesting that an actual diversion is required for an appropriation.

effort to eliminate the confusion existing in the case law, the Colorado legislature deleted the statutory diversion requirement in 1973.¹⁴ The definition of appropriation was amended to read: " 'Appropriation' means the application of a certain portion of the waters of the state to a beneficial use."¹⁵ Although there appears to be no justification for maintaining the diversion requirement as an element of the appropriation doctrine, courts in other jurisdictions have been reluctant to abandon it and will occasionally use the requirement as a basis for denying an appropriation.¹⁶

Beneficial Use

The last element of an appropriative water right is the application of the water to a beneficial use. The requirement of a beneficial use is one of the most deeply imbedded principles of the appropriation doctrine, and is, in fact, the very basis of an appropriation.¹⁷ While an appropriation of water may be acquired only for a beneficial use,¹⁸ most courts and legislatures have not attempted to define the term beneficial use, but have instead engaged in a process of categorizing a specific use as beneficial or nonbeneficial as challenges to the beneficial nature of the use have arisen.¹⁹

The beneficial use requirement has caused some difficulty in the recognition of instream flow appropriations. Instream uses have been subject to challenge as nonbeneficial because a certain amount of water must be left in-place, and thus the water is not available for distribution for consumptive withdrawals.²⁰ The argument that instream uses are *per se* wasteful, based on the assumption that the concept of beneficial use is limited to consumptive uses, was long ago rejected in the celebrated case of *Empire Water and Power Co. v. Cascade Town Co.*²¹ This case involved a conflict between a

14. The prior law, COLO. REV. STAT. § 148-21-3(6) (Supp. 1969), read: " 'Appropriation' means the diversion of a certain portion of the waters of the state and the application of the same to a beneficial use."

15. COLO. REV. STAT. § 37-92-103(3) (1973).

16. Gould, *Preserving Instream Flows Under the Appropriation Doctrine—Problems and Possibilities*, in U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERVICE, BIOLOGICAL SERVICES PROGRAM, PROMISING STRATEGIES FOR RESERVING INSTREAM FLOWS at viii (1977); Comment, *In-Stream Appropriation for Recreation and Scenic Beauty: Idaho Department of Parks v. Idaho Department of Water Administration*, 12 IDAHO L. REV. 263 (1976).

17. WYO. STAT. § 41-3-101 (1977 & Cum. Supp. 1981) provides in part: "Beneficial use shall be the basis, the measure and limit of the right to use water at all times. . . ."

18. See WYO. STAT. § 41-3-101 (1977).

19. Gould, *supra* note 16, at xi.

20. Tarlock, *supra* note 6, at 24-20.

21. *Empire Water and Power Co. v. Cascade Town Co.*, *supra* note 13.

resort town at the base of a scenic waterfall in the mountains of Colorado and an upstream appropriator who wanted to divert the water for hydroelectric power purposes, thereby destroying the falls and depriving the resort of water. A federal district court, applying Colorado law, permanently enjoined the power company from its proposed activity. On appeal, the power company argued that the use of water by the resort was not beneficial and consequently not entitled to protection. In deciding the case, the Eighth Circuit Court of Appeals rejected the power company's contention and held that places devoted to public health, rest and recreation constitute a beneficial use by stating: "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."²²

The trend of expanding the definition of beneficial use to include such uses as fishing, recreation and scenic beauty has been followed by a number of state courts,²³ as well as a majority of the legislative bodies of the western states.²⁴ These decisions and statutory enactments serve to illustrate the fact that beneficial use is an evolving concept, and a concept that can be expanded to reflect changes in society's recognition of the value of new uses of our resources.

METHODS OF PRESERVING INSTREAM FLOWS

The approaches most commonly suggested for the protection of instream flows are: (1) legislative withdrawal or reservation of specific streams or specific amounts of water in the stream from appropriation, (2) the denial of a permit to appropriate water when that appropriation would be contrary to the public interest in the maintenance of an instream flow, and (3) an appropriation by a public entity of a quantity of water that is to remain in the watercourse.²⁵ Two other methods of

22. *Id.* at 128. Although the court found this use to be a beneficial one, the appropriation was denied because the use was unnecessarily wasteful since it required the entire flow of the stream in this case. It should also be noted, however, that the court did not go so far as to say that a purely esthetic use was beneficial, but in fact concluded that the use of the falls solely for scenic beauty did not in itself constitute a beneficial use. The court's conclusion that the waterfall was a beneficial use rested partially upon the fact the mist and spray from the falls provided a means of natural irrigation of the vegetation around the falls.

23. Idaho Dep't of Parks, *supra* note 8; State *vs. rel.* State Game Commission v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); Brasher v. Gibson, 2 Ariz. App. 91, 406 P.2d 441 (1965); Osnes Livestock Co. v. Warren, 103 Mont. 284, 300, 62 P.2d 206, 214 (1936).

24. See note 2 *supra*.

25. Tarlock, *supra* note 6.

preserving instream flows that will not be considered here are the federal reserved water rights²⁶ and the navigation servitude.²⁷

Legislative Withdrawal or Reservation of Specific Streams

One alternative to appropriation of instream flows is legislative withdrawal of water from the appropriation system. This approach has the practical effect of taking water out of the system at certain points on the stream by making it unavailable for appropriation. Oregon has used this method to preserve stream flows for recreational and scenic purposes since 1929, when it enacted legislation withdrawing certain streams and springs from appropriation.²⁸

Closely related to the "withdrawal" approach, is the legislative "reservation" of waters approach. Although the words in the two statutory schemes differ slightly, they essentially achieve the same objective. The first comprehensive legislative reservation statute is the federal Wild and Scenic Rivers Act of 1968.²⁹ Several states have enacted statutes adopting a variant of the federal Act, including California and Oregon. California's wild and scenic rivers legislation, which follows the federal model, designates five specific streams and declares that preservation of them "is the highest and most beneficial use and is a reasonable beneficial use of water within the meaning of Section 3, Article XIV of the State Constitution."³⁰ The statute prohibits impoundments, diversion works and other projects which might impair the designated stream. California does provide a diversion exception to allow water to be taken from the stream for domestic purposes, provided the Secretary of the Resources Agency determines that the water diversion is necessary to supply domestic needs and will not adversely affect the free-flowing condition of the river.³¹

26. See Robie, *Modernizing State Water Rights Laws: Some Suggestions for New Directions*, 1974 UTAH L. REV. 760, 771; U.S. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 464-68 (1973); Tarlock, *supra* note 6, at 24-26.

27. See Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963); U.S. NATIONAL WATER COMMISSION, *supra* note 26, at 468-69 (1973).

28. OR. REV. STAT. §§ 538.110-300 (1979).

29. 16 U.S.C. §§ 1271-1287 (1976).

30. CAL. PUB. RES. CODE §§ 5093.50-.65 (West Cum. Supp. 1981).

31. *Id.* § 5093.50. Oregon, under similar legislation, allows diversions only for domestic, municipal and livestock uses on selected streams. See OR. REV. STAT. §§ 538.110-300 (1979).

Other western states have sought to achieve the same objective by similar means. Washington, for instance, has attempted to preserve stream flows by phrasing its statutes in terms of "establishment of a minimum flow" which is not to be appropriated.³² Montana, on the other hand, has enacted a provision allowing administrative reservations of instream flows.³³ Any state agency, political subdivision or the federal government may petition "to reserve waters 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."³⁴

Presumably, Wyoming could utilize a legislative reservation or withdrawal approach to protect the flows of designated streams or sections of streams located within the state. Article 8, Section 1 of the Wyoming Constitution provides that: "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be property of the state."³⁵ Since the state owns the water flowing in the streams, it would seem logical that the state could reserve or withdraw a portion of these waters from the appropriation system to protect and preserve public values dependent upon stream flows. This would appear to be true even though it has been held that the state holds the water merely as trustee for the public and not in a proprietary sense,³⁶ and even though an appropriation cannot be denied except when the denial is demanded by the public interest.³⁷ Thus, a promotion of the public interest is a necessary prerequisite to a reservation of state waters. The legislature could overcome this obstacle by declaring directly in the statute that

32. WASH. REV. CODE ANN. § 90.22.010 (Cum. Supp. 1981) provides in part:

The department of water resources may 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. In addition, the department of water resources shall, when requested by the department of fisheries or the game commission to protect fish, game or other wildlife resources under the jurisdiction of the requesting state agency, or by the water pollution control commission to preserve water quality, establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request.

33. MONT. REV. CODES ANN. § 85-2-316 (1979). Montana is the only state which allows administrative reservation of instream flows, although other states, in effect, provide for this by permitting public agencies to file on instream flows. Tarlock, *supra* note 6, at 24-36.

34. MONT. REV. CODES ANN. § 85-2-316 (1979).

35. WYO. CONST. art. 8, § 1.

36. Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955).

37. WYO. CONST. art. 8, § 3 provides in part: "No appropriation shall be denied except when such denial is demanded by the public interest."

the reservation has been determined to be in the best interest of the public.³⁸ A legislative reservation, deemed to be in the public interest, could become the basis for denying an appropriation or to condition a permit for an appropriation to protect the objectives of the reservation. Although legislative reservation may not be the best method available to protect stream flows in Wyoming, it is certainly one viable alternative to be considered.³⁹

Administrative Denials of Permits

State interest over water allocation includes, in many states, the power to deny or condition appropriations to promote the public interest. In Wyoming, an appropriation can be denied when "such denial is demanded by the public interest."⁴⁰ Due to the imprecise nature of the term "public interest," it is not clear how much authority is granted by this type of provision.⁴¹ As one commentator on the subject noted:

Western states have long denied appropriations to protect project users from economically unsound projects or to prevent smaller diversion projects from interfering with larger future projects. However, the power to deny or condition appropriations on the ground they are inconsistent with the public interest has been used sparingly. Historically an applicant has had only to prove that unappropriated water is available and that vested

38. This would be similar to the approach the California legislature used to satisfy the beneficial use requirement. See text accompanying note 30 *supra*.

39. One drawback to the legislative reservation approach is that it sidesteps the requirements of prior appropriation since it in essence removes certain waters from the substantive and procedural requirements of the appropriation system. Therefore, this approach would not fit as neatly into the prior appropriation regime as a method of straightforward appropriation by a public agency, which would exist in harmony with the state's present permit system. Another disadvantage to this approach is that if the proposed legislative reservation is comprehensive and extensive in nature, the legislature will be involved in a process that is very detailed and cumbersome because of the technical data that must be dealt with.

40. See note 37 *supra*.

41. Apart from the instream flow issue, it is recommended that the Wyoming statutes should be amended to spell out what considerations the state engineer is to use when determining if a proposed appropriation is in the public interest. The state engineer's authority to deny permits not in the public interest needs more direction as to what this power entails. Alaska has a good statute which provides a list of considerations for the commissioner (similar to Wyoming's state engineer) to use when determining the public interest. ALASKA STAT. § 46.15.80 (1977) provides in part:

- (a) The commissioner shall issue a permit if he finds that . . .
 - (4) the proposed appropriation is in the public interest.
- (b) In determining the public interest, commissioner shall consider
 - (1) the benefit to the applicant resulting from the proposed appropriation;
 - (2) the effect of the economic activity resulting from the proposed appropriation;

rights will not be impaired by the appropriation, but today the definition of public interest is expanding.⁴²

One reason for the expansion of the public interest definition is that environmental values are becoming important criteria in the consideration of appropriation applications.

It is submitted that under Wyoming's public interest provision, which permits the denial of an appropriation when demanded by the public interest,⁴³ the state engineer has the power to deny applications for the purpose of preserving instream flows. The maintenance of minimum stream flows necessary to preserve the natural stream habitat should certainly be regarded as promoting the public interest. If a proposed appropriation would adversely affect existing stream flows by reducing the flow below a minimum amount determined to be necessary to preserve the stream ecosystem, the state engineer should be able to deny the proposed appropriation for the benefit of the public. Utah, for instance, has given its state engineer express authority to deny applications which "unreasonably affect public use or the natural stream environment."⁴⁴ Since Wyoming's public interest provision is so general, it is uncertain whether the state engineer construes it as granting him the authority to deny or condition permits for the purpose of protecting instream flows. Even if the provision is construed to give the state engineer this power, which is arguably a proper construction, it is still difficult to determine whether the state engineer would be willing to exercise this power.

Although the method under discussion would appear to be a possible means of indirectly protecting stream flows, it is less desirable than straightforward appropriation by a public agen-

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- (3) the effect on fish and game resources and on public recreational opportunities;
 - (4) the effect on public health;
 - (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
 - (6) harm to other persons resulting from the proposed appropriation;
 - (7) the intent and ability of the applicant to complete the appropriation; and
 - (8) the effect upon access to navigable or public water.

See also N.D. CENT. CODE § 61-04-06 (Supp. 1979) which is a modified version of the above Alaska statute. The Alaska and North Dakota statutes, referred to above, would provide a good model for an amendment to the Wyoming statutes.

42. Tarlock, *supra* note 6, at 24-41.

43. *See* note 37 *supra*.

44. UTAH CODE ANN. § 73-3-8 (1980). *See also id.* § 73-3-29(3) (1980).

cy for several reasons. First, the administrative denial procedure provides no advance notice to the holder or seeker of a right that the application to the state engineer will be denied for the purpose of maintaining instream flows.⁴⁵ When considerable amounts of time and money have already been expended upon the planning and preparation of an application, it is difficult, and in some instances unfair, to deny those applications. Second, there is no orderly determination of the proper quantity of water to be reserved for minimum flow; and third, the success of this approach depends crucially upon the degree to which a particular state engineer is sensitive to the values protected by preserving instream flows.⁴⁶ Lastly, unless the administrative agency could make a blanket denial of all future applications for appropriation on a particular stream, this approach would impose upon the administrative agency the costs of continuing to reconsider new applications. Despite these disadvantages, administrative denials of permits remains as one possible means of preserving unappropriated instream flows if the legislature is unable to provide a solution.⁴⁷

Instream Flow Appropriations

It is submitted that the best method of preserving minimum flows of Wyoming streams is through enactment of special legislation which would permit appropriations of instream flows by public entities.⁴⁸ Unlike the two methods discussed above, this approach fits neatly into the state's existing permit system and thus provides other appropriators with the safeguards and rights inherent in the prior appropriation system. At the same time, the instream flow appropriations would also benefit from the normal safeguards given appropriative water rights, particularly those against impairment through change in use or place of use by other appropriators.⁴⁹ This legislation could declare instream flows

45. Robie, *supra* note 26, at 770.

46. Comment, *Appropriation By The State Of Minimum Flows In New Mexico Streams*, 15 NAT. RESOURCES J. 809, 813 (1975).

47. As will be seen later in this Comment, the effectiveness of this approach would be limited because it would only be able to help preserve instream flows of streams that have unappropriated water flowing in them. See note 59 and accompanying text *infra*.

48. Arguably, the Wyoming State Engineer could grant permits for instream appropriations absent special legislation. However, statutory regulation would appear to be preferable as it would eliminate uncertainties by providing definite administrative guidelines.

49. See WYO. STAT. § 41-3-104 (1977). This limitation on change in use or place of use by an appropriator is commonly referred to as the "no injury rule" of the prior appropriation system. This rule will be discussed in greater detail later in this comment. See note 58 and accompanying text *infra*.

for fish and wildlife purposes to be a beneficial use of water and the actual diversion requirement could be eliminated.

There would not seem to be any doubt that the legislature has the power to define the term "beneficial use," just as many other states have done.⁵⁰ It seems equally clear that although an actual diversion is typically thought of as an element of an appropriative water right, the legislature could abrogate this requirement since nothing in the state constitution requires it.⁵¹ Lack of an actual diversion should not be a basis for preventing instream flow appropriations, since there is no longer any purpose served by maintaining a diversion requirement where the appropriation system is utilized.⁵²

INSTREAM FLOW APPROPRIATIONS AS A SOLUTION

General Scope of Proposed Legislation

Although the law of prior appropriation generally allows both private as well as public entities to acquire water rights, instream flow appropriations should only be granted to public bodies. Instream uses differ from water rights applied to the more traditional beneficial uses in that the real benefit of the dedication accrues to the public. Because the benefits of instream uses inure to the public generally, rather than to a particular claimant, only public rather than private entities should be permitted to appropriate water for instream uses. Secondly, to allow private individuals to acquire instream flow appropriations would open the door to individuals seeking the right merely for speculative purposes. Public agencies, acting in the public interest, are more suitable holders of instream flow rights. The Game and Fish Commission is a particularly appropriate agency to initiate instream flow appropriations because its statutory duty to protect fish and wildlife resources⁵³ coincides with some of the purposes of preserving minimum stream flows.

It should be noted that each instream flow appropriation would not necessarily apply to an entire stream within the

50. See note 2 *supra*.

51. It is not clear whether the Wyoming courts believe actual diversion to be a necessary element of an appropriative water right since it has never been specifically ruled upon in this state. However, the legislature could eliminate any doubt by specifically abrogating the requirement in an instream flow statute.

52. See text accompanying note 7 *supra*.

53. See WYO. STAT. § 23-1-302 (1977).

state boundaries. Instead, an appropriation could be limited to a particular section of a stream located between two designated points on that stream.⁵⁴ Therefore, each instream flow appropriation would serve the purpose of protecting a minimum stream flow through the section of the stream between the two specific points designated in that appropriation permit. Consequently, on any particular stream, there could be a number of instream flow appropriations covering various sections of the stream. The length of a stream section to be covered by a single appropriation permit would vary according to the circumstances present in each individual case. There are two significant advantages to this type of instream flow appropriation. First, some portions of a stream may be more desirable or in more critical need of stream flow protection than other portions. The necessity or desirability of stream flow protection could be determined with respect to a particular section rather than an entire stream. Secondly, the amount of water necessary to preserve instream values may vary throughout the stream reach. The determination of the amount of stream flow necessary to protect instream uses could be made in reference to a particular stream section rather than on a stream-wide basis.

Misconceptions Regarding the Effects of Instream Flow Appropriation

One of the reasons that the Wyoming legislature has been unable to enact instream flow legislation is that many water users fear that their existing water rights will somehow be impaired by such an Act. A basic understanding of instream flow appropriations should help to alleviate these fears. First of all, an instream flow appropriation is really no different than any other appropriation of water except in the manner in which the water is put to use. It would be governed by all of the regulations inherent in the appropriation doctrine, including the rule of priority and the no injury rule.⁵⁵ An instream flow appropriation would be a junior water right as to all prior

54. Colorado has used this approach in its instream flow statutes. COLO. REV. STAT. § 37-92-103(4) (1973) provides in part:

"Beneficial" use . . . includes the impoundment of water for recreational purposes, including fishery or wildlife. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of 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. (emphasis added).

55. See note 49 and accompanying text *supra*.

existing appropriations on the stream. The prior existing water users, as senior appropriators, would still have the right to take water from the stream before the instream appropriator would have any right to claim water for instream purposes. It should be made clear that public agencies receiving an instream flow appropriation would not have a condemnation power. This means that if, after the senior appropriators divert their allotted amount of water, the stream flow falls below the amount determined to be the minimum stream flow, the instream flow appropriator would not have the power to condemn the water rights of the senior appropriators in an attempt to maintain a minimum stream flow.⁵⁶ An instream flow appropriation simply would not harm the rights of existing appropriators to continue using water in the same manner and place for which it was appropriated.

Another common misconception often brought up by opponents to instream flow legislation is the belief that since an instream appropriation would be a water right junior to all prior existing water rights on the stream, coupled with the fact that most streams in Wyoming are already over-appropriated,⁵⁷ it must follow that instream flow appropriations will be an ineffective measure to preserve instream flows. What these opponents fail to realize is that, although most streams in Wyoming are indeed over-appropriated, many of the senior appropriators on these streams are located at downstream points. As a result of this, many streams still have good flows, at least through a large portion of the stream reach. Instream flow legislation can protect these existing flows.

The no injury rule of the appropriation doctrine provides that an appropriator may not make a change in use, or change in place of use, of his water right if that change will injure other existing appropriators in any manner.⁵⁸ It is primarily under this rule that an instream flow appropriation would be able to preserve instream flows where the existing flows are due largely to the fact that senior appropriators are located

56. The instream appropriator would, of course, have the same rights as any other appropriator which would include the right to have upstream junior appropriators regulated in case of water shortage.

57. The term "over-appropriated" is used in the sense that the aggregate amount of water granted in all the appropriation permits on a particular stream exceeds the amount of water in the stream actually available for appropriation.

58. WYO. STAT. § 41-3-104 (1977) codifies this rule.

downstream. If the minimum flow of a particular stream was appropriated by a public entity, then the no injury rule would prohibit other appropriators from changing the manner or place of use of their water right if such a change would impair the stream flow through the protected section, since that would constitute an injury to the instream flow appropriation. One practical effect of this is that a senior appropriator would not be able to transfer his water right to a place considerably higher on the stream and thereby adversely affect the flow of the stream through the portions protected by the instream appropriation. This would be a significant step to help assure the continuance of existing stream flows where senior appropriators are located on lower parts of the stream.⁵⁹

Administration

Another concern that is frequently expressed is the administrative difficulties that accompany the recognition of instream flow rights, such as determining the minimum flow for each watercourse and monitoring stream flows to assure maintenance of the minimum flow. Under the proposed legislation, a separate commission could be created for the purpose of handling the administrative duties. This instream flow commission would have the function of determining the minimum flow for each water course,⁶⁰ and determining the quantity of instream flows presently existing. The appropriation of the minimum stream flow could also be made by this commission or by other public agencies such as the Game and Fish Commission. The entity receiving the appropriation should have the

59. This is one major advantage that this approach has over the administrative denials of permits approach. To merely be able to deny new permits will not help preserve instream flows where the stream is already over-appropriated. This would be true, even if stream flows presently existed on the over-appropriated stream, due to downstream senior appropriators, unless the state engineer (or board of control) also has the power to deny a change in use due to the public interest. For example, Nevada has expressly provided that its state engineer can deny petitions for change in use, in certain situations, based upon the public interest. NEV. REV. STAT. § 533.370 (2)(1979).

60. There is a wealth of research and a number of excellent publications devoted to minimum stream flow determinations. See, e.g., STALNAKER & ARNETTE, *METHODOLOGIES FOR THE DETERMINATION OF STREAM RESOURCE FLOW REQUIREMENTS: AN ASSESSMENT* (1976). This series of papers summarizes the literature on instream flow methodologies and is a valuable starting point to understand both the technical and judgmental aspects of preservation flow standards. The purpose of the study is to provide advice to those setting flow standards by presenting a discussion of the strengths and weaknesses of present methods. Another useful publication is OSBORN & ALLMAN, *INSTREAM FLOW NEEDS* (1976), which contains the proceedings of the Symposium and Specialty Conference on In-stream Flow Needs presented by the American Fisheries Society and the American Society of Civil Engineers in Boise, Idaho, May, 1976.

responsibility of administrative regulation⁶¹ necessary to monitor enforcement measures of the state engineer in order to maintain the appropriated flows. It would be the responsibility of the appropriating agency to protest⁶² applications for changes in existing water rights that would impair the instream flow appropriation. The commission or other public entity receiving the instream flow appropriation would be required to follow all normal statutory procedures for establishing and protecting water rights. The determination of minimum flows to be appropriated could be made at public hearing after giving notice to the public and allowing opportunity for comment.⁶³ The hearing would be chaired by the state engineer, board of control and a representative from the Instream Flow Commission.

To summarize, it is suggested that good instream flow legislation should achieve the following: (1) designate instream flows for fish and wildlife preservation as a beneficial use, (2) eliminate the actual diversion requirement, (3) only grant instream flow appropriations to public, as opposed to private, entities, (4) specify that the instream flow appropriation does not carry with it a power of condemnation, (5) create an Instream Flow Commission for the purpose of handling administrative responsibilities, and (6) provide for public hearings allowing public comment upon the determination of minimum stream flows to be appropriated.⁶⁴

CONCLUSION

Due to increased public awareness of environmental values, the dedication to preserve instream uses is becoming an established part of western water law. As a result, most of the western states have revised their water laws in order to provide mechanisms for the maintenance of instream flows. Wyoming, while aware of the value of preserving streams for public use and benefit,⁶⁵ does not presently have any direct

61. This would include such responsibilities as bearing the expense of installing necessary gauging stations and making periodic surveys of stream flows.

62. See WYO. STAT. § 41-3-104 (1977).

63. For an example of other states that have good notice and hearing provisions with respect to proposed instream flow appropriations, see WASH. REV. CODE ANN. § 90.22.020 (Cum. Supp. 1981); IDAHO CODE § 42-1503 (Cum. Supp. 1981).

64. For an example of good instream flow legislation in other western states, see WASH. REV. CODE ANN. §§ 90.22.010 to .040 (Cum. Supp. 1981); COLO. REV. STAT. §§ 37-92-101 to 103 (1973 & Cum. Supp. 1981); IDAHO CODE §§ 42-1501 to 1505 (Cum. Supp. 1981).

65. See note 3 *supra*.

means of protecting instream flows. The state could indirectly accomplish this result by denying applications for new appropriation permits where such appropriations would decrease stream flows below the minimum amount necessary to preserve the public interest. However, this is not the recommended approach to the problem since it would result in hit-and-miss appropriation without the benefit of an overall plan or the scientific and engineering expertise available under a legislative scheme. The enactment of special legislation which would provide for instream flow appropriations by a public agency of a minimum amount of water necessary for fish, wildlife and recreational purposes is the recommended solution and perhaps the most expeditious means of undertaking this important task.

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