

1988

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Recommended Citation

Potter, Lori (1988) "The Public's Role in the Acquisition and Enforcement of Instream Flows," *Land & Water Law Review*: Vol. 23 : Iss. 2 , pp. 419 - 441.

Available at: https://scholarship.law.uwyo.edu/land_water/vol23/iss2/9

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University of Wyoming

College of Law

LAND AND WATER LAW REVIEW

VOLUME XXIII

1988

NUMBER 2

The Public's Role in the Acquisition and Enforcement of Instream Flows

*Lori Potter**

Nearly all of the western states have statutes and programs which allow the state to establish instream flows to protect fish, wildlife, riparian habitat, recreational conditions, aesthetics, or other stated values.¹ Drawing particularly on cases involving the Colorado and Arizona programs, this article analyzes relevant instream flow laws and critiques their implementation. This article presents a case for allowing the citizens of the western states to appropriate instream flows under these statutes and to enforce instream flow rights even where they nominally are held by a state agency. This theory finds considerable support in federal statutes that authorize citizen's suits to enforce public rights, and in a number of important policy considerations.

Western states may find that innovations in their instream flow programs are not only advantageous but necessary, as the economy of the West relies more heavily on tourism and residents demand a better environment. Accordingly, this article concludes with several recommendations for administration of present programs or for changes in them.

*Attorney, Sierra Club Legal Defense Fund, Inc. B.A. 1975, Univ. of Illinois; M.A. 1977, Univ. of Illinois; J.D. 1980, Harvard Law School.

1. See COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.); ALASKA STAT. § 15.145 (1984); ARIZ. REV. STAT. ANN. § 45-145A (1986); CAL. WATER CODE § 1243 (West 1988); IDAHO CODE § 42-1503 (1987); MONT. CODE ANN. § 85-2-316 (1985); OR. REV. STAT. § 536.325 (1985); WASH. REV. CODE ANN. § 90.22.010 (1962 & 1987 Supp.); WYO. STAT. § 41-3-1001-1014 (1977 & Cum. Supp. 1987); UTAH CODE ANN. § 73-3-3 (1987). See also proceedings of *Instream Flow Protection in the Western United States: A Practical Symposium*, Natural Resources Law Center, Univ. of Colo. (March 31-April 1, 1988); Third Annual Proceedings of the Western States Water Council, *Instream Flows and the Public Trust* (1986); Bagley, Larson & Kapaloski, *Adapting Appropriation Water Law to Accommodate Equitable Consideration of Instream Flow Uses*, Utah Water Research Laboratory (1983); Tarlock, *The Recognition of Instream Flow Rights: New "Public" Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-1, 24-21 (1979).

DEFINING THE "PUBLIC" AS USERS OF INSTREAM FLOWS

As a strong environmental ethic has taken hold in the United States, the segment of the public that is affected by instream flow rights has grown as dramatically as has the environmental movement at large. What is most noteworthy about this segment of the "public" is its diversity. It is not simply a matter of more like-minded individuals joining existing environmental organizations, although that phenomenon has occurred as well. Instead, the affected public is composed of many different types of individuals and groups who almost certainly did not hold this interest in preserving instream flows as little as two decades ago.

The interested public clearly includes sportsmen's groups, particularly those with an interest in fishing, such as Trout Unlimited, the Izaak Walton League, the National Wildlife Federation and its state affiliates, local angling associations, and similar groups.² These groups have played an instrumental part in the passage of state instream flow legislation, much of which is initially aimed solely at the protection of fisheries and aquatic habitat.³ As recent legislation in Texas has shown, instream flows also benefit commercial fishery interests.⁴ Commercial fishing entities frequently operate in bays and estuaries, which are dependent upon inflows of fresh water to maintain the proper salinity and nutrients for the production of fish and shellfish.⁵

Hunting groups such as the Wildlife Federation and Ducks Unlimited share a similar, but somewhat more attenuated, interest.⁶ The population of ducks and other waterfowl bears a direct relation to wetlands acreage.⁷ Instream flows can recharge or saturate wetlands and thus help preserve the conditions necessary for breeding.

Conservation organizations such as the Sierra Club, The Wilderness Society, and Friends of the Earth, and wildlife protection groups such as the National Audubon Society and Defenders of Wildlife have also supported instream flows. These organizations favor instream flows both for the recreational and aesthetic enjoyment of their members and for the preservation of wildlife and its essential habitat. These groups, which over

2. The categorization of various interest groups as "sportsmen's groups", "wildlife protection groups", and the like in part I of this article is necessarily somewhat of an oversimplification. In actuality, the goals and purposes of these groups overlap considerably.

3. See for example, Note, *Wyoming's New Instream Flow Act*, 21 LAND & WATER L. REV. 455, 456-61 (1986), regarding the role of the Wyoming Wildlife Federation and Wyoming Outdoor Council in the drafting and enactment of Wyoming's instream flow law.

4. In 1986, the Texas legislature amended its water code to provide for the release of water from reservoirs for management by the Parks and Wildlife Department for bays, estuaries, and instream uses. TEXAS WATER CODE ANN. § 15.3041 (Vernon 1987 Supp.).

5. See generally Kaiser & Kelly, *Water Rights for Texas Estuaries*, 18 TEX. TECH L. REV. 1121 (1987).

6. The Foundation News reported that the National Wildlife Federation and Ducks Unlimited are the two largest national environmental groups, based upon the size of their budgets as reflected in audited 1983 financial statements. Foundation News, Jan./Feb. 1985, at 18.

7. See Shabecoff, *Urgent Effort to Save Ducks Begins in United States and Canada*, N.Y. Times, Feb. 9, 1987 at Y21.

the years have actively litigated against dam construction and hydropower projects, advocate instream flows as an affirmative measure for the preservation of free-flowing stream segments.

Another segment of the interested conservation community consists of canoeing, kayaking, and whitewater associations, including Friends of the River and American Rivers. The interests of these groups are often served either by maintenance of peak or near-peak flows sufficient to support boating, or by the management of release flows on regulated streams so as not to disrupt trips in progress or the float season generally.

Of course, individual users and visitors of streams and riparian areas who are not affiliated with a particular group may engage in all of the activities that depend upon instream flow protection. Further, Native Americans share many of these interests in instream flows.⁸

Finally, there is a range of values which accrue even to non-visitors of areas protected by instream flows. For those who have not visited an area, but plan to at some future time, there is an "option value" associated with knowing that the area's resources have been preserved. People who likely will never visit areas benefitted by instream flows obtain satisfaction, sometimes called the "existence value," from knowing that these areas exist and enjoy legal protection. Similarly, individuals appreciate knowing that protected areas and resources will be available for future generations, a factor known as the "bequest value."⁹

Instream flows are also of concern to land-owning non-profit organizations, such as the Trust for Public Land, the Nature Conservancy, and other holders of land or of conservation easements. In 1983, the Nature Conservancy acquired one of the first rights under Arizona's instream flow law for the Conservancy's Ramsey Canyon and Canelo Hills Cienega Preserves.¹⁰

Scientists and researchers also advocate instream flows to help establish a baseline for scientific study and research. One of the principal forces behind enactment of the Wilderness Act of 1964,¹¹ which preserved natural flows in the watersheds of designated lands, was the protection of "living laboratories" for study and experimentation. California case law also recognizes scientific study as one of the valid purposes of preserving stream flows.¹²

8. For a discussion of reserved water rights for tribal fishing and hunting, see *Adair v. U.S.*, 478 F.Supp. 336 (D. Or. 1979), *aff'd*, 723 F.2d 1394 (9th Cir. 1983). See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 585-90 (1982 ed.).

9. See, e.g., Shabecoff, *supra* note 7, at Y26.

10. See generally, Arizona Nature Conservancy Chapter of the Nature Conservancy, No. 33-78419, 33-78421 (Dept. of Water Resources April 29, 1983) (Decision and Order).

11. 16 U.S.C. § 1131 (1982).

12. Note, *The Public Trust Doctrine as a Source of State Reserved Water Rights*, 63 DEN. U.L. REV. 585, 591 n.46 (1986) (quoting *Marks v. Whitney*, 6 Cal. 3d 251, 260-61, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971)).

While state programs typically vest authority for appropriation of instream flows in a state agency or sub-agency, other government entities also have interests in acquiring instream flow rights. For example, the City of Fort Collins, Colorado, filed an application in the Colorado Water Court to appropriate an instream flow in the Cache la Poudre River as it flows through the city limits for the purposes of recreation and dilution of pollutants.¹³ Although Congress designated upper reaches of the river as wild and scenic,¹⁴ and portions of the upper South Fork have been subject to state-held instream flow rights for several years,¹⁵ the urban segment of the river had not enjoyed similar protections. The stretch of the Poudre that flows through Fort Collins has been studied for designation as a recreational river under the Wild and Scenic Rivers Act.¹⁶ Thus, in order to promote these recreational attributes and prevent pollution on its own, the City filed its application to appropriate instream flows.¹⁷

The recreational and aesthetic benefits of instream flow preservation are of increasing concern to various commercial entities, including fishing resorts, hunting lodges, rafting companies, outfitters, and associated tourism-related businesses. The West has recently experienced a major reorientation of its economic structure. In many western states, recreation and tourism comprise the only growth industry and contribute the stability that mining, agriculture, and manufacturing can no longer provide.¹⁸ One example of this trend is the large-scale conversion of ranches to private hunting clubs and reserves.¹⁹

In sum, the public which is affected by and concerned about instream flow preservation has both broadened and deepened in the recent past. The same increase in numbers and in sophistication that has made conservationists a driving force on the federal level is making them a force to be reckoned with, accommodated, and included in the acquisition and enforcement of state instream flows. As Charles Wilkinson has cogently observed, we are undergoing a revolutionary process of changing our way of thinking about western water.²⁰ It is a reconceptualization which makes the rafter and the trout fisherman every bit the "water user" that municipalities and ranchers are. And, once the rafter and trout fisherman think of themselves as water users, the notion of exercising the rights and remedies associated with traditional water users is not far behind.

13. Application for Surface Water Rights, *In re* the Application for Water Rights of the City of Fort Collins, No. 86-CW-371 (Colo. Water Ct., Div. No. 1 Dec. 29, 1986).

14. 16 U.S.C. § 1274(a)(56) (Supp. IV 1986).

15. See Colorado Water Conservation Board Instream Flow Appropriations, January 1985 Tabulation, Case Nos. 1-W9258, 1-W9261 (Colorado Water Ct., Div. No. 1).

16. 16 U.S.C. § 1271 (Supp. IV 1986).

17. The protection of water quality through appropriation of instream flows is a specific purpose of Oregon's statute. OR. REV. STAT. § 536.325(1) (1985).

18. Getches, *Water Use Efficiency: The Value of Water in the West*, 8 PUB. LAND L. REV. 1, 7-8 (1987).

19. See *Ranchers Finding Profit in the Wildlife*, N.Y. Times, Dec. 13, 1987 at E9.

20. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 345 (1985).

PUBLIC INVOLVEMENT AND PUBLIC ENFORCEMENT:
PARALLELS IN THE FEDERAL FORUM

Public involvement and enforcement in land and resource management have their roots in modern federal statutes, most of which were enacted during the first years of the environmental movement in the early 1970s. These statutes, the cases interpreting them, and the agencies' implementation of them provide ample evidence of the workability and the vital contribution that public involvement and enforcement can make.

Involvement

The National Environmental Policy Act of 1969 (NEPA)²¹ is the paradigmatic public involvement law. The statute and its implementing regulations²² provide that all federal actions²³ are subject to written description, analysis, consideration of alternatives, and varying degrees of public participation. Public participation measures range from perfunctory to comprehensive, depending upon the scope of the action, its impacts, controversy, and other factors. These measures can entail simply circulating an environmental assessment to interested citizens, or, on the other end of the spectrum, including the public in framing the issues to be addressed, providing opportunity for comment on both draft and final versions of the document, and holding public hearings on the proposed action.²⁴

NEPA's public participation provisions are echoed in subsequent environmental and land management legislation. For example, in the Federal Land Policy and Management Act of 1976,²⁵ Congress declared its policy that adjudication procedures assure adequate third party participation.²⁶ The Act also requires opportunities for public involvement in all land use planning.²⁷ The National Forest Management Act of 1976²⁸ likewise makes public participation opportunities mandatory in decisions affecting forest planning and resource use. Similarly, the Emergency Planning and Community Right-to-Know Act²⁹ creates new rights for members of the public to obtain information from businesses concerning hazardous substances, and provides a mechanism to force the release of information withheld by those businesses in violation of the statute.

21. 42 U.S.C. § 4321-4335 (1982 & Supp. III 1985).

22. 40 C.F.R. pt. 1500 (1987) (also, individual agencies have supplemented these regulations with additional rules scattered throughout the Code of Federal Regulations).

23. There are certain exceptions for emergency actions, actions with minimal effects (called "categorical exclusions"), and actions on which Congress has waived compliance. See MANDELKER, NEPA LAW AND LITIGATION §§ 5:06-5:15 (1984 & 1987 Cum. Supp.).

24. See, e.g., 40 C.F.R. § 1501-03 (1987).

25. 43 U.S.C. § 1701 (1982).

26. 43 U.S.C. § 1701(a)(5) (1982).

27. 43 U.S.C. § 1712 (1982).

28. 16 U.S.C. §§ 1601(c), 1604(d) (1982).

29. Superfund Amendments and Reauthorization Act, Title III, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (to be codified at 42 U.S.C. §§ 11001-11050); see also *The Emergency Planning and Community Right-to-Know Act of 1986*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10007 (Jan. 1988).

The implicit policy underlying these laws is that it is the *public's* health, the *public* lands, and the *human* environment which are at stake in agency decision-making, and that therefore the public deserves a meaningful role in influencing (and, later, in challenging) agency decisions on these issues. There is an obvious parallel to the interrelationship between the public's interest in, and state agency action affecting, instream flows. While a state agency may appropriate and hold the rights, it does so because and on behalf of the public that benefits from them.

Most, if not all, of the western states have a public notice or comment process that is something of an analogue to NEPA and NEPA-inspired procedures. These processes typically permit public review and comment on instream flow filings before a formal decree or permit is sought by a state agency or granted by the appropriate state entity.³⁰ But the regulations and the agencies' mailing lists suggest that the primary concern of the notice and comment procedure is to obtain the views of prior appropriators on the streams in question.³¹ As such, the purpose of the public notice and comment procedures is as much to inform holders of existing consumptive rights as it is to involve the individual interested in the recreational, aesthetic, fish, and wildlife values that an instream right would support. While informing water conservancy districts, ditch companies and other prior appropriators may be necessary and important, placing undue emphasis on their rights and views may skew the filings or enforcement in several ways.

First, the state agency or entity which administers the program is often the same agency in charge of developing the state's water resources for consumptive use.³² As such, the agency may have a long history of promoting dam and reservoir projects and of attempting to ensure full consumptive use of the state's share of various compact entitlements and equitable apportionment decrees.³³ The membership of the boards of such agencies often consists of representatives from water conservancy districts or other water development entities or of state officials who are

30. These procedures are described in Proceedings of the Third Annual Western States Water Council Water Management Symposium (Sept. 1986) [hereinafter WSWC Proceedings]: Idaho at 46, Montana at 100, Wyoming at 116, Oregon at 126, Colorado at 165-66, Alaska at 174-75, Washington at 183, 185; see also UTAH CODE ANN. § 73-3-3 (1987). Arizona is in the process of promulgating its regulations. See H. Dishlip, *Instream Flow Water Rights: Arizona's Approach* (April 1, 1988) (a paper presented at the University of Colorado Symposium on Instream Flow Protection in the Western United States).

31. WSWC Proceedings, *supra* note 30, Idaho at 46, Montana at 100, Wyoming at 116, Oregon at 126, Colorado at 165-66, Alaska at 174-75, Washington at 183, 185; see also UTAH CODE ANN. § 73-3-3 (1987).

32. For example, the Colorado Water Conservation Board (CWCB) is vested with authority to appropriate instream flows to protect the natural environment, COLO. REV. STAT. § 37-92-102(3) (1973 & 1987 Cum. Supp.), and with the responsibility for development of the state's water resources, COLO. REV. STAT. § 37-60-106 (1973 & 1987 Cum. Supp.); the examples given in text are drawn from the author's experience with the CWCB.

The Idaho Water Resources Board is constitutionally responsible for formulation of a comprehensive state water plan for optimum development and utilization of the state's water resources, IDAHO CONST. art. 15, § 7 and IDAHO CODE § 42-1731 (1986), and is also the authorized entity to hold instream flows. IDAHO CODE § 42-1503 (1986 Supp.).

33. See COLO. REV. STAT. § 37-60-106 (1973 & 1987 Cum. Supp.).

charged with significant competing responsibilities in the area of traditional water development projects.

This orientation toward traditional water development may have a significant chilling effect on public participation. The consumptive user who objects to an instream flow filing will be operating in a familiar forum. This user is likely to have spoken there before, to have a colleague on the board, or even to have served as a former member. And, assuming that an agency has a conflicting duty to develop water for consumptive use, the traditional user may find a receptive audience for his objections. On the other hand, a member of the public who appears to support the filing may have little in common with the agency decision-makers.

One method of dealing with the conflict of interest problem is to create a separate agency to deal with instream flow protection or natural resource issues generally. Wisconsin provides a viable model with its Office of the Public Intervenor, a position which allows legal intervention in all proceedings where it is "needed for the protection of 'public rights' in water and other natural resources."³⁴ The Public Intervenor may also initiate legal action.³⁵

Second, it is legally unclear whether senior appropriators need to object to junior instream flow rights. Given their superior priorities and the first-in-time, first-in-right principle of the appropriation system, these users may rely on the administration of the stream system to ensure delivery of their water rights according to their priority.³⁶ Objecting to the junior, nonconsumptive instream flow filing may serve only to have the instream flow request needlessly amended or withdrawn. Even a stream which is fully appropriated or over-appropriated at lower reaches may have substantial flows at higher reaches which could properly be the subject of an instream flow application. Likewise, the instream flow appropriator may seek a right on a segment of a stream between consumptive appropriators, essentially appropriating the instream flow regime as it exists subject to those senior appropriations.³⁷

Many state statutes impose the condition on instream flow filings that the agency first determine that the filing will not harm existing appropriators.³⁸ Given the principles under which prior appropriation systems are administered, this statutory requirement as applied to instream flow filings may be superfluous, since the "no-injury" rule operates to protect

34. WISC. STAT. ANN. § 165.07 (West 1987 Cum. Supp.).

35. *Id.* at § 165.075.

36. *See, e.g.,* COLO. REV. STAT. § 37-92-501, 502(2) (1973); WYO. STAT. § 41-3-1008 (1977 & Cum. Supp. 1987); *see generally* F. TRELEASE, WATER LAW CASES AND MATERIALS 184-85 (3d ed. 1979).

37. *See, e.g.,* Kelly Ranch v. Southeastern Colo. Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297, 299 (1976).

38. *E.g.,* COLO. REV. STAT. § 37-92-102(3)(c) (1987 Cum. Supp.); ALASKA STAT. § 46.15.080(b)(6) (1987); WYO. STAT. § 41-3-1001(b) (1977 & Cum Supp. 1987); IDAHO CODE § 42-1503 (1987 Cum. Supp.).

an existing right against all rights junior to it.³⁹ Instead, this condition may serve only to inhibit vigorous implementation of the program or the appropriation of junior instream flow rights in stream segments where even junior status brings long-term safeguards to important instream values. Junior instream flows can preserve existing conditions on a stream and prevent future changes in place, type, or amount of use that could diminish or injure the instream right.⁴⁰

The limited nature of the present public involvement schemes has brought further criticism. A review of the agencies' description of these procedures⁴¹ suggests that public notice and comment are limited to when the agencies initially file for instream rights. This practice fails to recognize that public input has equal validity and importance when a competing user on the stream seeks to appropriate or change a water right in a manner which would adversely affect the instream flow. Public input also allows the agency to debate and decide whether to take action to enforce its instream flow rights without the interjection of legal and policy considerations by the public on whose behalf the rights were purportedly appropriated.⁴² This practice contravenes the fundamental precept of public involvement law — that environmental analysis and public input are essential before an agency makes an irretrievable commitment of resources.

39. *Green v. Chaffee Ditch Co.*, 150 Colo. 91, 106, 371 P.2d 775, 783 (1962). "Equally well established, . . . is the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights." *Id.* (quoting *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 579, 272 P.2d 629, 631-32 (1954)).

40. See *Wilkinson*, *supra* note 20, at 334 n.73.

41. See generally *WSWC Proceedings*, *supra* note 30.

42. Contrast the detailed notice and comment procedures employed by the Colorado Water Conservation Board, described in *WSWC Proceedings*, *supra* note 30, at 165-66, with its practice in the event that an existing instream flow right is threatened. In the former instance, the Board mails preliminary written notice of its intended filing to interested individuals. The notice contains the name of the stream; the county, watershed, and water division in which the segment lies; a legal description of the upper and lower points of the affected segment; the length of the segment; the amount of the flow, in cubic feet per second, sought to be appropriated; and the name of the U.S.G.S. topographical quad map on which the stream segment can be located. Recipients have 90 days in which to comment, and can also appear at a scheduled Board meeting to make a statement regarding the proposed filing. After the preliminary recommendation is finalized, recipients get a final written notice containing all of the above information and have an additional 30 days for review and comment, and again have the right to appear at a scheduled Board meeting to speak to the matter. *WSWC Proceedings*, *supra* note 30, at 165-66.

In contrast, when an instream flow is potentially affected by a new or changed consumptive use on the stream, the Board mails a meeting agenda 15 days prior to the scheduled meeting. The mailing list for the meeting agenda differs from that for the preliminary and final filing notices; thus, those individuals who are informed of initial appropriations may not learn of later injury to the rights. The agenda states only the water division case number and the competing water right applicant. In some instances, the agenda also names the affected stream. It includes no information as to the type or magnitude of the potential injury, nor does it give the Board's or the staff's position on the issue. There is no provision for written comment, although the Board meetings are held in various locations throughout the state on a rotating basis and may not easily be attended by the interested stream user. When

Increased public involvement could also help to make more unappropriated water available for instream flows.⁴³ Consumptive users can donate their rights to state programs for dedication to instream uses.⁴⁴ Tax benefits are available to those who transfer valuable water rights to non-profit or governmental entities for use as instream flows.⁴⁵ More, and more open, public participation could only help to expand the network of willing "donors" of water.

Enforcement

Federal statutes again provide a model for public enforcement of environmental laws. Citizens may file suit to enforce public rights or enjoin violations under, inter alia, the Clean Air Act,⁴⁶ the Endangered Species Act,⁴⁷ the Clean Water Act,⁴⁸ the Outer Continental Shelf Lands Act,⁴⁹ the Toxic Substances Control Act,⁵⁰ the Deep Seabed Hard Mineral Resources Act,⁵¹ the Safe Drinking Water Act,⁵² the Noise Control Act,⁵³ the Energy Policy and Conservation Act,⁵⁴ the Surface Mining Control and Reclamation Act,⁵⁵ the Natural Gas Pipeline Safety Act,⁵⁶ the Resource Conservation and Recovery Act,⁵⁷ and the Emergency Planning and Community Right-to-Know Act.⁵⁸ Citizens and groups have used these remedies effectively.⁵⁹

a potential injury to an instream flow right becomes the subject of ongoing litigation, the Board schedules its discussion of the issue for its executive session, excluding the public entirely. Colorado Water Conservation Board's Responses to Objectors' Third Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Intervenor CWCBB, *In re the Application for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582 and 85CW583 (Colo. Water Ct., Div. No. 5 Jan. 22, 1988).

43. See generally Harrison & Wigington, *Converting Conditional Water Rights to Instream Flow Protection, in Water as a Public Resource: Emerging Rights and Obligations*, Proceedings of Natural Resources Law Center (June 1-3, 1987).

44. See, e.g., COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.); WYO. STAT. § 41-3-1007(a) (1977 & Cum. Supp. 1987).

45. See, e.g., Wild and Scenic Rivers Act, § 14, 16 U.S.C. § 1285 (1982) (concerning the charitable contributions of "easements" for wild and scenic river purposes).

46. 42 U.S.C. § 7604(a) (1982).

47. 16 U.S.C. § 1540(g) (1982).

48. 33 U.S.C. § 1365(a) (1982).

49. 43 U.S.C. § 1349(a)(1) (1982).

50. 15 U.S.C. § 2619(a) (1982 & Supp. IV 1986).

51. 30 U.S.C. § 1427(a) (1982).

52. 42 U.S.C. § 300j-8(a) (1982).

53. 42 U.S.C. § 4911(a) (1982).

54. 42 U.S.C. § 6305(a) (1982).

55. 30 U.S.C. § 1270(a) (1982).

56. 49 U.S.C. app. § 1675(a) (1982).

57. 42 U.S.C. § 6972(a) (1982 & Supp. III 1985).

58. 42 U.S.C.A. § 11046(a)(1) (West Pamph. 1987).

59. See generally Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U.L. REV. 220 (1987); *The Role of the Citizen in Enforcing Environmental Laws*, 16 ENVTL. L. REP. (ENVTL. L. INST.) 10163 (July 1986); *Citizen's Suits: A Defense Perspective*, 16 ENVTL. L. REP. (ENVTL. L. INST.) 10162 (July 1986); Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23 (1985).

Most of these citizen suit provisions also contain a requirement that the plaintiff give 60 days notice prior to commencing the action.⁶⁰ The notice requirement enhances voluntary compliance and also serves to inform the affected public agency of a possible violation.

There is no reported case law directly defining the scope of the right of an organization or individual member of the public, such as those listed in section I of this article, to enforce instream flow rights nominally held by a state agency. Most states' water codes grant a broad right, usually to "any person," to object to applications for water rights.⁶¹ Conservation groups have effectively asserted the right to enforce instream flow decrees held by the Colorado Water Conservation Board (CWCB) in two cases before the Colorado Water Courts for Water Division 1 and Water Division 5.⁶²

In Division 1, the City of Longmont and the St. Vrain/Left Hand Water Conservancy District filed applications for water storage rights on North St. Vrain Creek.⁶³ The applicants intended to use the storage rights for construction of a new, on-stream reservoir (the North Sheep Mountain reservoir) and for enlargement of the existing Button Rock reservoir. Together, the reservoirs would have inundated approximately five

60. See, e.g., Emergency Planning and Community Right-to-Know Act, 42 U.S.C.A. § 11046(d) (West Pamph. 1987); Clean Air Act, 42 U.S.C. § 7604(b) (1982); Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A) (1982); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(2) (1982); Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1427(b) (1982); Clean Water Act, 33 U.S.C. § 1365(b) (1982); Energy Policy and Conservation Act, 42 U.S.C. § 6305(b) (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(b) (1982); Noise Control Act, 42 U.S.C. § 4911(b) (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-8(b) (1982); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(c) (1982).

61. For example Colorado allows "any person" to file a statement of opposition to an application for a water right, COLO. REV. STAT. § 37-92-302(1)(b) (1987 Cum. Supp.). "Any person" may protest or support a ruling of the water referee. *Id.* at -304(2). "Any person" opposed to a change application may propose terms or conditions on the change to prevent injury to a water right. *Id.* at -305(3). In certain circumstances, "any person" may move to intervene in water court proceedings. *Id.* at -304(3). See also MONT. CODE ANN. § 85-2-233(1), -307(2) (1987) ("persons" may file written objections); MONT. CONST. art. IX, § 1(3) ("The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."); OR. REV. STAT. § 540.520(5) (1987) ("any person" may protest approval of a water right application); UTAH CODE ANN. §§ 73-3-7(1), -14(1)(a) (1987) ("any person interested" may file a protest; "any person aggrieved" may seek judicial review); NEV. REV. STAT. § 533.365(1) (1986) ("any person interested" may file a protest); ALASKA STAT. §§ 46.15.133(c), (e), .065(e) (1987) ("an interested person" may file an objection; "a person aggrieved" may seek judicial review); IDAHO CODE §§ 42-203A(4), (6) (1987) ("any person . . . concerned in such application" may file a protest; "any person . . . aggrieved by the [administrative] judgment" may seek judicial review); WASH. REV. CODE § 90.03.200 (1987) ("any interested party" may file exceptions); WYO. STAT. § 41-4-312 (1977) ("any person . . . claiming any interest in the stream or streams involved in the adjudication").

62. *In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5, June 27, 1985); *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1, Dec. 31, 1985); COLO. REV. STAT. § 37-92-201 (1973) (establishing Water Divisions).

63. Application for Water Storage Right, *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1, Dec. 31, 1985).

miles of North St. Vrain Creek, state-designated "Wild Trout Waters" which arise in Rocky Mountain National Park and flow through a canyon that is part of Colorado's Natural Areas program.⁶⁴ The CWCB holds an instream flow right of 14 cubic feet per second (cfs) with a 1978 priority for the stretch of the North St. Vrain between the boundary of Rocky Mountain National Park and the inlet of Button Rock reservoir at its current level.⁶⁵

The CWCB deliberated, but voted against, filing statements of opposition to the applications.⁶⁶ The CWCB discussed whether, as a general matter, it should enforce its instream flow rights when such rights could block water storage projects. Members expressed the view that enforcing instream flows in derogation of junior water storage rights was not the legislature's intent in creating the instream flow program.⁶⁷

After the CWCB decided not to protect its instream flow rights, the Sierra Club filed a motion to intervene⁶⁸ and statements of opposition⁶⁹ to the applications. The Sierra Club alleged that the proposed storage of water in reservoirs on the creek would injure the instream flows by converting a flowing stream to flat water, changing the aesthetics, the riparian habitat, and the ability of the stream to support native species of trout.⁷⁰ Because the instream flow decree incorporated the provision of Colorado law which states that instream flows are appropriated "on behalf of the people of the State of Colorado,"⁷¹ the Sierra Club asserted that it was entitled to protect this public right to the extent of the decree.

64. Sierra Club's Motion to Intervene at 2-3, *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1 Dec. 31, 1985). Colorado's Natural Areas program identifies areas in need of enduring protection for their special natural features, ecosystems or ecological communities. See COLO. REV. STAT. § 36-10-102 (1987 Cum. Supp.).

65. The CWCB's decree was granted in *In re Application for Water Rights of the Colorado Water Conservation Bd.*, No. W-9363-78 (Colo. Water Ct., Div. No. 1 June 28, 1983).

66. Transcript of regularly scheduled meeting of the Colorado Water Conservation Board (March 13-14, 1986).

67. *Id.* Board member Lochhead stated: "I don't think the legislature intended this program to be used to block storage development . . . I think we need to operate the program consistently with our other purposes, which are to promote water resource development." *Id.* Board member Johnson remarked that "if we start using the instream flows to block the development of water storage facilities, that [sic] we are usurping power that was not given to us." *Id.*

68. Sierra Club's Motion to Intervene, *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1 Dec. 31, 1985). See generally, COLO. REV. STAT. § 37-92-304(3) (1987 Cum. Supp.) (allowing intervention).

69. Statement of Opposition, *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1 June 6, 1986). See generally COLO. REV. STAT. § 37-92-302(b) (1987 Cum. Supp.) (allowing statements of opposition).

70. Sierra Club's Motion to Intervene, *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1 Dec. 31, 1985).

71. COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.); see Findings and Ruling of the Referee and Decree of the Water Court, *In re Application for Water Rights of Colo. Water Conservation Bd. in North St. Vrain Creek*, No. W-9363-78 (Colo. Water Ct., Div. No. 1 June 28, 1983), referencing COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.).

The water court did not address the Sierra Club's theory, however. On the date the response to the Sierra Club's motion was due, the developers instead withdrew the applications for water storage rights.⁷² Soon afterward, North St. Vrain Creek was placed on the Nationwide Rivers Inventory for study as a wild and scenic river.⁷³

In Colorado Water Division 5, the Colorado Mountain Club and Holy Cross Wilderness Defense Fund filed statements of opposition to applications to change the proposed points of diversion for dams which are part of the Homestake II water project.⁷⁴ The east-slope cities of Aurora and Colorado Springs proposed to construct the Homestake II collection system on several streams within the Holy Cross Wilderness, which Congress designated as part of the National Wilderness Preservation System in 1980.⁷⁵ The designation exempted part of the area from the Wilderness Act's ban on water projects within wilderness.⁷⁶ The scope and intent of that exemption are also at issue in the case.

The conservation groups opposed the changes on the ground, *inter alia*, that the movement of the diversion points would injure the public's instream flow rights of 5 cfs in Cross Creek, 4 cfs in East Cross Creek, and 5 cfs in Fall Creek on the reaches of the streams between the originally decreed points of diversion and the new, higher points on the streams.⁷⁷ Despite the fact that the instream flow decrees were junior to the cities' conditional rights, the conservationists argued that the instream rights could guarantee that conditions on the stream remain as they were when the junior priority was acquired.⁷⁸ The cities contested the conservationists' standing to prevent injury to the instream flow rights, arguing that opposition was solely within the province of the CWCB.⁷⁹ The Court ruled, however, that the groups were "entitled to participate fully in all aspects" of the proceedings.⁸⁰

72. *Withdrawal of Application for Water Storage Right, In re Application for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1 Aug. 19, 1986).

73. NATIONWIDE RIVERS INVENTORY, UNITED STATES DEPARTMENT OF INTERIOR, NATIONAL PARK SERVICE (1982) (Updated to include North St. Vrain Creek. Author communication with Duane Holmes, Rocky Mountain Regional Branch Chief, National Park Service, Feb. 1988.).

74. *Application to Conform the Description of Certain Points of Diversion in the Decree, In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 June 27, 1985).

75. Act of Dec. 22, 1980, § 102(a)(5), 94 Stat. 3265, 3266.

76. *Id.* at 3266.

77. *Statements of Opposition, In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 Mar. 27, 1986). The CWCB decrees are contained in Case Nos. 5-W3791, 5-W3794, and 5-W3789, Colorado Water Ct., Div. No. 5, Feb. 3, 1981.

78. *Statements of Opposition, In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 Mar. 27, 1986).

79. *Response to Statement of Opposition and Motion to Consolidate, In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 April 15, 1986).

80. *Order, In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 May 20, 1986).

The CWCB intervened in the Holy Cross case after the conservation groups filed their statements of opposition and argued that it alone had authority to litigate questions involving the instream flow program.⁸¹ In response to a motion for summary judgment by the cities, however, the Court again ruled that the Colorado Mountain Club and Holy Cross Wilderness Defense Fund had standing to oppose the proposed changes in diversion points, which could also cause injury to federal reserved water rights for the Holy Cross Wilderness.⁸²

The public's right to oppose water rights applications which would adversely affect instream flows (that is, to protect or enforce the instream rights where the state agency which is the nominal holder declines to do so) derives from the nature of the public's right in the resource. The public's right or entitlement in a decreed or permitted instream flow differs from state to state, but may be traced to one of four general, but related, concepts: specific statutory entitlements or rights as third party beneficiaries; public interest provisions in the states' water codes; contract rights; and public trust notions of the people's heritage or resources. Under each of these concepts, the public may acquire an interest in the instream flow right that could not be lost or injured without proper constitutional protections.⁸³

As mentioned above, in Colorado the CWCB appropriates instream flows "on behalf of the people of the State of Colorado."⁸⁴ Further, water court decrees typically either incorporate that section expressly or specifically grant instream flows "on behalf of the people".⁸⁵ Therefore, in Colorado, the people acquire an explicit interest in instream flow rights.

In other western states with instream flow rights, citizens acquire an implied interest in those rights as the actual beneficiaries. Western water

81. Motion to Intervene, *In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 Sept. 17, 1986); see also *infra* note 105. The CWCB later withdrew its statement of opposition, and the substantive issue of injury to state-held instream flow rights was dismissed by stipulation. Stipulation, *In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 March 28, 1988). The conservation groups remained parties to the case, however, concentrating on injury to federal reserved rights and a jurisdictional issue. *Id.*

82. Order, *In re the Applications of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 July 1, 1987). The water court cited COLO. REV. STAT. § 37-92-302(1)(b) (1973 & 1987 Cum. Supp.) and *Bunger v. Uncompahgre Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389 (1976) for this point.

83. Water rights are property interests. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982). The question of loss or injury to water rights without affording due process is discussed in *Town of Breckenridge v. City and County of Denver*, 620 P.2d 1048, 1051 (Colo. 1980).

84. COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.).

85. Findings and Ruling of the Referee and Decree of the Water Court, *In re the Applications for Water Rights of St. Vrain and Left Hand Water Conservancy Dist. and City of Longmont*, Nos. 85CW456 and 85CW457 (Colo. Water Ct., Div. No. 1 June 28, 1983); Ruling of the Referee, *In re The Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 Mar. 27, 1986). The decrees are contained in Case Nos. 5-W3791, 5-W3794, and 5-W3789 (Colo. Water Ct., Div. No. 5 Feb. 3, 1981).

law recognizes the right of beneficiaries who are the users, but not the legal owners, of water rights to enforce those rights.⁸⁶

The public interest provisions found in most western states' water codes supply a similar argument. These provisions typically require the administrative agency to review a water rights application to ensure that its issuance will conform with the public interest or public welfare.⁸⁷ The provisions further specify that water right applications may be denied if approval is contrary to the public interest. Instream flow rights that are granted under such statutory schemes must be presumed to meet this explicit public interest standard. Thus, members of the public may be able to argue that instream rights, which are held for the public and its welfare, cannot be injured or abandoned without the public's consent.

The public may also obtain rights to enforce instream flows through contract or deed evidencing the dedication of a traditional water right to instream flow purposes.⁸⁸ In 1987, the Colorado law was amended to clarify that holders of traditional water rights may convey them to the CWCB by grant, bequest, sale, lease, exchange, or contractual agreement for dedication as instream flows.⁸⁹ The law further provides that the grantor may condition the gift by such terms as she deems desirable.⁹⁰ Thus, a contract or deed of donation may include terms of enforcement.

The new provisions were intended to clarify what had already been accepted practice. Such donations are consistent with the provisions of Colorado's, and other western states', instream flow programs if the resultant instream flow right meets all pertinent statutory standards for such flows. It is logical to assume that the grantors who intend their gifts of water rights to preserve fish, riparian habitat, recreation, or other protected values intend the grantee, the grantor, or both, to enforce such rights. If the agency fails to do so, the right to enforce (or the rights them-

86. *City and County of Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 518, 276 P.2d 992, 1012 (Colo. 1954) ("[W]here the interests of beneficiaries are not represented or protected by their trustees, the beneficiaries become proper and necessary parties with the right to appear and present their case.").

87. ALASKA STAT. §§ 46.15.040, .080(a) (1984 & Supp. 1986); ARIZ. REV. STAT. ANN. §§ 45-142, -143 (Supp. 1986); CAL. WATER CODE §§ 1225, 1255 (West 1971 & Supp. 1987); IDAHO CODE §§ 42-201, -203A, -203C (Supp. 1986); KAN. STAT. ANN. §§ 82a-705, -711 (1984); MONT. CODE ANN. §§ 85-2-302, -311(2) (1987); NEB. REV. STAT. §§ 46-233, -234, -2, -116 (1984); NEV. REV. STAT. §§ 533.325, .370(3), 534.040(1) (1985); N.M. STAT. ANN. §§ 72-5-1, -6, -7, 72-12-3, -3.E (1985); N.D. CENT. CODE §§ 61-04-02, -06 (1985); OR. REV. STAT. §§ 537.130, .170(4) (1985); S.D. CODIFIED LAWS ANN. §§ 46-1-15, -5-10, -6-3, -2A-9 (1983); TEX. WATER CODE ANN. §§ 11.121, .134(3) (Vernon Supp. 1987); UTAH CODE ANN. §§ 90.03.250, .290, 44.050, .060 (1962); and WYO. STAT. §§ 41-4-503, -3-930 to -932 (1977 & Cum. Supp. 1986); see generally Clyde, *Legal and Institutional Barriers to Transfers and Reallocation of Water Resources*, 29 S.D. L. REV. 232, 243-44 (1984); Clyde, *Allocation of Water for Resource Development*, 14 NAT. RESOURCES J. 519 (1981); Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917 (1977).

88. See *supra* notes 43-45.

89. COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.).

90. *Id.*

selves) may, by contract, revert to the grantor. Private citizens thus may acquire enforcement rights explicitly by contract or deed of conveyance.⁹¹

Finally, instream flow rights may be regarded as having been obtained and held as part of the public trust.⁹² Different commentators have conceptualized the public trust in different ways, and even individual authorities view the trust as a constellation of varied rights and powers. One commentator views the public trust as an evolving doctrine with different characteristics in different eras: once an obligation to the states, then a source of federal power, now a source of public rights.⁹³ Another commentator analogizes the public trust to both the federal navigation power and the state police power, but concludes that in important respects it differs from both.⁹⁴

The notion that instream flows may be protected by the public trust arises from the growing body of case law holding that streams, lakes, marshlands, and other water resources are part of the people's heritage, and that the state has both the authority and the duty to protect those resources.⁹⁵ A surprising number of the western states have invoked the public trust doctrine to protect some aspect of their water resources and surrounding environment, including stream access in Montana,⁹⁶ preservation of land for scientific study, habitat, and open space in California,⁹⁷ recreation, aesthetics, water quality, and a range of wildlife and habitat

91. Citizens may also acquire enforcement rights impliedly through the operation of the doctrine of *cy pres*. *Cy pres* is an equitable rule for the construction of conveyances. It directs that when a grantor creates a trust for specified purposes, and changed conditions make the fulfillment of those purposes impossible, the conveyance will be construed to carry out the intent of the grantor as closely as possible. G. BOGERT, *TRUSTS* § 147 (6th ed. 1987). Thus, if the state agency receives a donation of instream flows for the express purpose of preservation of recreational values or the environment, and fails to protect those flows, the original grantor or another citizen beneficiary may claim the equitable right to take enforcement action. The courts attempt to enforce charitable trusts and have given them very liberal construction in order to achieve the intended benefits to the public. *Id.*, § 147, at 520.

92. For an overview of the public trust, its historical roots, and present-day issues, see generally Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 MICH. L. REV. 471 (1970); Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); and Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony*, 30 ROCKY MTN. MIN. L. INST. 17-1 (1985).

93. See, e.g., Wilkinson, *The Public Trust in Public Land Law*, 14 U. CAL.-DAVIS L. REV. 269, 278-93 (1980).

94. Walston, *The Public Trust and Water Rights*, 22 LAND & WATER L. REV. 701, 707-11 (1987).

95. The leading case for this proposition is *National Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 446, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 365 (1983). Many commentators have examined the "Mono Lake" case. See, e.g., *The Mono Lake Decision: Protecting a Common Heritage Resource from Death by Diversion*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10144 (May 1983); Note, *Protecting the People's Waters*, 59 WASH. L. REV. 357 (1984); See generally, Walston, *supra* note 94.

96. *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984); *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984).

97. *National Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 658 P.2d 709, 719, 189 Cal. Rptr. 346 (1983) (quoting *Marks v. Whitney*, 6 Cal. 3d 419, 491 P.2d 374, 380, 98 Cal. Rptr. 790 (1971)).

values in Idaho,⁹⁸ fishing, boating, swimming, water skiing, and related purposes in Washington,⁹⁹ water supply, fisheries, and future water needs in North Dakota,¹⁰⁰ and all "public resources" in Hawaii.¹⁰¹

The public trust theory, like those previously outlined, draws upon the fact that the state has obtained permits or decrees for instream flows for the benefit of its citizens. The state holds these instream water rights not for its own use, nor for consumptive development by others, but for the varying environmental purposes specified by law.¹⁰² Whether that retention is an explicit trust, or an implied trust, or a contractual or statutory right, the argument remains the same: once obtained for specific purposes, those rights may be protected against diminution or injury which would frustrate those purposes.¹⁰³

POLICY CONSIDERATIONS AFFECTING CITIZEN ENFORCEMENT

Citizen enforcement of instream flow rights presents emerging issues that have only been broadly outlined here. Further testing of this concept and elaboration of the legal and policy points is certain to occur. The federal experience with citizen enforcement indicates, however, that permitting citizen enforcement is a wise policy choice.¹⁰⁴

In one of the cases in which conservation groups have acted to enforce rights under Colorado's program, however, the Colorado Water Conservation Board intervened "to assure that . . . the nature and means of protection of [instream flow] water rights is [sic] not subject to the varying or inconsistent interpretations of different third parties."¹⁰⁵ Without seeking the dismissal of the conservation groups' statements of opposition,

98. *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085, 1095 (1983); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441, 451 (1985).

99. *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989, 992 (1987).

100. *United Plainsmen v. North Dakota State Water Conserv. Comm'n*, 247 N.W.2d 457, 461-63 (N.D. 1976).

101. *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287, 311 n.34 (1982).

102. The constitutions and laws of most western states lend further support for this point. Echoing one of the basic premises of the public trust doctrine, these provisions declare that water is a resource belonging to the people. COLO. CONST. art. XVI, § 5; MONT. CONST. art. IX, § 3; N.M. CONST. art. XVI, § 2; WYO. CONST. art. 8, § 1; CAL. WATER CODE § 102 (West 1971 and Supp. 1987); ARIZ. REV. STAT. ANN. § 45-131A (Supp. 1986); NEB. REV. STAT. § 46-202 (1984); NEV. REV. STAT. ANN. § 533.025 (1986); S.D. CODIFIED LAWS ANN. § 46-1-3 (1983); OR. REV. STAT. § 573.110 (1985); UTAH CODE ANN. § 73-1-1 (1980 & 1987 Supp.); WASH. REV. CODE ANN. § 90.03.010 (1962). Idaho (IDAHO CODE ANN. § 42-101 (1977)) and Texas (TEX. WATER CODE ANN. § 5.021 (Vernon 1972 & Supp. 1987)) declare water to be the property of the state. When some of these waters are dedicated to particular instream purposes, it may be argued that a form of public trust to protect those purposes is thereby impressed.

103. For a variation on this theory, see generally, Note, *The Public Trust Doctrine as a Source of State Reserved Water Rights*, 63 DEN. U.L. REV. 585 (1986).

104. See generally Boyer & Meidinger, *Privatizing Regulatory Enforcement: Preliminary Assessment of Citizen Suits Under the Federal Environmental Laws*, 34 BUFFALO L. REV. 833 (1985).

105. Answers to Objectors' Colorado Mountain Club and Holy Cross Wilderness Defense Fund First Set of Interrogatories at 8, *In re the Applications for Water Rights of the Cities of Aurora and Colo. Springs*, Nos. 85CW151, 85CW582, and 85CW583 (Colo. Water Ct., Div. No. 5 Jan. 23, 1987).

the Board framed the issue of its participation in terms of the policy questions surrounding establishment of legal precedent by conservation groups.¹⁰⁶

Again, experience with citizen enforcement in the federal forum provides guidance on this point. Reference to the annotations for the statutes with citizen suit provisions¹⁰⁷ shows that the majority of reported cases under the Clean Water Act, Endangered Species Act, and other such laws have been brought by citizens or groups, not the government. Private citizens and non-profit organizations are effectively interpreting, shaping — indeed, *making* — the law in these areas. By its delegation of enforcement authority to the public, Congress has, in essence, decided that in order to vigorously and thoroughly enforce our federal environmental laws, substantial citizen participation is needed. In an era of increased concern about instream flow protection, the same argument applies to enforcement of instream rights.

The western states may contend that decisions regarding water are inherently more sensitive or more far-reaching than decisions affecting other public rights, and thus that the government alone should be allowed to enforce them. Civil rights actions present perhaps the most sensitive and profound issues of our time, yet the federal government has shared the litigation of these questions with citizens and community organizations throughout the country.¹⁰⁸ Indeed, the landmark decision which resulted in desegregation of our schools came in a case brought not by the federal government but by the NAACP Legal Defense Fund.¹⁰⁹

Like federal anti-pollution statutes, instream flow laws have been enacted relatively recently — within the past 15 or 20 years. Since the rights held under instream flow programs are relatively junior in time, agricultural, industrial, and municipal water rights have, in effect, a 100-year head start in priority. As with citizen suits under the federal laws, active citizen enforcement may help to equalize the imbalance of power which results from disparate priorities. This is especially true in instances, like the North St. Vrain Creek case described above, in which the state agency administering the program fails to protect the stream, whether because it lacks the resources, is unaware of a threat, or simply decides to forego protective action for policy reasons.

The shift in demand for water from energy and agricultural development to tourism and recreation-related uses¹¹⁰ also suggests that vigorous implementation and enforcement of instream flows are needed to protect

106. *Id.*

107. *See supra* note 60.

108. *See, for example, Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), a nationally significant decision in which the Supreme Court upheld affirmative action to aid racial minorities in the medical school admissions process. *See generally* annotations to 42 U.S.C.A. § 1983 (West 1981) and U.S. CONST. amend. XIV.

109. *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *see generally, KLUGER, SIMPLE JUSTICE* (1975).

110. *See generally* Getches, *supra* note 18.

environmental and recreational values. Indeed, the courts of the western states have begun to recognize that protection of environmental values may be required by statutory and constitutional policies calling for "optimum beneficial use" or "maximum beneficial use" of western water.¹¹¹

Thus, the public's new "demand" for environmental amenities combined with the new "supply" of instream flow programs may result in new law interpreting some of the basic water principles of the western states. Given the active participation of groups and individuals in land management and resource planning decisions, it is inevitable that a broad spectrum of the public, as defined in section I of this article, will be involved in making important new water law.

Citizen enforcement has at least four identifiable benefits. First, it serves to ensure the integrity of instream flow programs. These programs generally are creatures of the state legislatures and operate under statutory or administrative provisions to preserve the special resources of the western environment. When an agency fails to enforce its instream flow rights, or chooses not to, citizen enforcement can ensure that the legislature's original intent in recognizing instream flows is carried out.

Second, if citizens enforce instream flow rights when the state agency fails to do so, they can prevent instream flow rights from being abandoned. If the state agency which nominally holds the rights does not oppose water right development which would injure the instream flows, the developer or another user on the stream could argue that the agency had abandoned its rights.¹¹²

Third, citizens can play a critical role in discovering and monitoring violations of state instream flow laws. The states simply lack the resources and personnel to vigorously litigate every case of infringement on instream flows. Moreover, because of a shortage of stream gages, field personnel, and other resources, the states often cannot discover every instance of injury to their instream rights.¹¹³

111. *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 935 (Colo. 1983) (holding: that state's maximum utilization doctrine "can only be achieved with proper regard for all significant factors, including environmental and economic concerns"); *accord*, *R.J.A., Inc. v. Water Users Ass'n of District 6*, 690 P.2d 823, 828 (Colo. 1984); *United Plainsmen v. North Dakota State Water Conserv. Comm'n*, 247 N.W.2d 457, 459 (N.D. 1976) (relying on, *inter alia*, a statutory policy providing that public health and welfare depends on "wise utilization of all the water and related land resources"); *IDAHO CODE ANN.* § 42-1731 (1977) (Idaho required to have state water plan for optimum development and use of the state's water resources); *WASH. REV. CODE ANN.* § 90.54.020(2) (Cum. Supp. 1988) (allocation of waters of the state shall be based on maximum net benefits for the people); *MONT. CONSR. art. IX, § 1(1)* ("the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations").

The western states recognize fish, wildlife, and, in some cases, recreation or other natural values, as beneficial uses. *See Shurts, Federal Water Rights*, 15 *ENV'T L.* 115, 148-49 n.136, n.137, n.138 (1984).

112. The elements of abandonment of a water right are non-use and intent to abandon. *See, e.g., Beaver Park Water Inc. v. City of Victor*, 649 P.2d 300, 302 (Colo. 1982).

113. *See Shupe, The Enforcement of State Instream Flow Rights: Legal, Technical, and Political Challenges*, *WSWC Proceedings*, *supra* note 30, at 53, 53-59.

Fourth, allowing citizen enforcement fosters citizen respect for and understanding of the state water system. By permitting citizens to enforce the instream flow rights that they already perceive as "theirs", the use of more drastic remedies, such as the public trust suit, may be avoided. Enforcement of instream flow rights differs from public trust litigation like that involving Mono Lake¹¹⁴ in two very meaningful respects. Public trust suits can have a retroactive effect.¹¹⁵ It is this potential for upsetting an established stream regime that makes public trust suits anathema to traditional water users. Enforcement of existing instream flows, on the other hand, simply results in proper administration of the non-consumptive water rights on a stream in priority according to the state system. Expectations — including those of affected citizen recreationists — are met, not upset. Further, in citizen enforcement of quantified instream flow rights, there is no occasion for the litigants to define the "public trust." Citizens simply assert the previously-defined right to a number of cubic feet per second of flow to its full extent in priority. This is a task to which our administrative agencies and courts are well-accustomed, and for which the traditional water user should have little apprehension.

CITIZEN ACQUISITION OF INSTREAM FLOWS

There is sparse precedent in the area of the rights of citizens to acquire and hold instream flows. What precedent there is, however, belies the fear that citizen-held instream flows will upset the orderly functioning of western appropriation systems. One state, Alaska, not only clearly permits citizens to do so¹¹⁶ but also takes the position that its law is "forward looking."¹¹⁷

Private citizens and groups have acquired instream flows under the laws of at least two other states, Arizona and Colorado. Arizona's statute permits "any person" to appropriate water for uses which include recreation, fish, and wildlife.¹¹⁸ In one of the first cases under that law, the Arizona Department of Water Resources affirmed that the statute protected the rights of private persons, including the Nature Conservancy, a non-profit corporation, to make appropriations.¹¹⁹

The Nature Conservancy used Arizona's law to appropriate instream flows in two creeks in its Ramsey Canyon and Canelo Hills Cienega Preserves in the high desert of southeastern Arizona. Both Preserves provide habitat for a number of rare plants and animals.¹²⁰ The Ramsey Canyon Preserve attracts thousands of visitors, including naturalists and ornithologists from around the world, primarily to view the rare and exotic

114. See *National Audubon Society*, 658 P.2d at 709.

115. *Id.*

116. ALASKA STAT. § 15.145 (1984).

117. WSWC Proceedings, *supra* note 30, at 177.

118. ARIZ. REV. STAT. ANN. § 45-141A (Supp. 1987).

119. Arizona Nature Conservancy Chapter of the Nature Conservancy, No. 33-78419, 33-78421 (Dept. of Water Resources April 29, 1983) (Decision and Order).

120. *Id.* at 3-4.

species of birds that can be found there.¹²¹ The Department's precedent-setting decision established several important points. The Department held that recreation includes visual and aesthetic enjoyment of natural environments,¹²² that instream flows serve the watering needs of wildlife,¹²³ and that no diversion is required to effectuate an instream flow right.¹²⁴

Responding to arguments made by protestors, the Department of Water Resources also dealt with one of the persistent shibboleths of instream flow programs, the argument that instream appropriations will injure vested rights. The Department concluded that "since there will be neither an actual, physical diversion or storage nor a substantial consumptive use of public waters," no conflict would occur.¹²⁵

Finally, in the Ramsey Canyon case the Department of Water Resources found that the appropriations would serve the interests and welfare of the public, due to the rich and varied animal and plant life that thrives in the Preserves and that is dependent on maintenance of the riparian habitat.¹²⁶

Conservation groups have made two recent additional applications under Arizona's law. In 1985, the Huachuca Audubon Society, the Sierra Club, and Defenders of Wildlife jointly applied for a permit to appropriate instream flows in the San Pedro River.¹²⁷ Like the Preserves in the Ramsey Canyon case, the San Pedro riparian corridor supports over 150 species of birds and numerous species of reptiles and mammals.¹²⁸ Members of the applicant groups used the area for bird-watching, wildlife viewing, hiking, picnicking, and other recreational activities.¹²⁹ Soon after the groups filed their application, the riparian land-owner, Tenneco West, traded about 44,000 acres of those lands to the federal Bureau of Land Management for preservation and recreational purposes.¹³⁰ The groups subsequently assigned an interest in their application to the Bureau of Land Management (BLM), with the condition that if the BLM dismissed the application or abandoned the water right, the application would revert to the groups.¹³¹

In 1987, the Arizona Center for Law in the Public Interest filed an application for an instream flow in Sabino Creek in Coronado National

121. *Id.*

122. *Id.* at 7.

123. *Id.*

124. *Id.* at 8.

125. *Id.*

126. *Id.*

127. Application of Huachuca Audubon Soc'y, Chiracahua Sierra Club, and Defenders of Wildlife, *In re* Application to Appropriate Public Waters of the State of Arizona, No. 33-90103 (Dept. of Water Resources Aug. 12, 1985).

128. See Response of Huachuca Audubon Society to Protest of Tenneco West on Application to Appropriate No. 33-90103, at 2-3, *In re* Application to Appropriate Public Waters of the State of Arizona, No. 33-90103 (Dept. of Water Resources Dec. 31, 1985).

129. *Id.* at 2.

130. *Id.* at 1, Attachment A (BLM News Release).

131. See Assignment of Application to Appropriate Public Waters No. 33-90103 (filed May 22, 1986 with the Dep't of Water Resources, approved May 28, 1986); see also ARIZ. REV. STAT. ANN. § 45-149 (1987).

Forest.¹³² In this case as well, the federal agency that manages the forest through which the stream flows expressed an interest in joining the application, a position that it worked out in negotiations with the Center for Law in the Public Interest.¹³³

In Colorado, a group of ranchers and citizens of Gunnison County, the Vader Group, appropriated instream flows in several mountain streams as early as 1975, just two years after the state's instream flow law was enacted.¹³⁴ The Vader Group obtained rights to significant instream flows for stockwater, recreation, wildlife, fish, and heritage preservation in the Taylor River and eight of its tributaries.¹³⁵

In 1986 and 1987, three other Colorado entities filed applications for instream waters, evidencing the growing interest in instream flows for a variety of preservation purposes of the part of various interest groups. One application, described above, sought flows for pollution dilution and for recreation in the City of Fort Collins.¹³⁶ Another, filed by the Citizens Committee for the Protection of Middle Park Water, claimed instream flows in the Colorado and Blue Rivers for fishery and recreational purposes.¹³⁷ The water court entered summary judgment denying the application by the Citizens Committee on the ground that the instream flow law authorized appropriations only by the CWCB.¹³⁸

The third application was made by the South Platte River Greenway Foundation, a non-profit organization that improves, maintains, and promotes the Greenway, a system of trails, parks, and boatable stretches of the Platte River in urban areas of Denver.¹³⁹ The Foundation sought both water storage rights in a reservoir upstream of the Greenway and direct flow appropriative rights for use in a boat chute to enable boating to take place in low flow periods.¹⁴⁰

When the Foundation's initial application was protested on the ground that only the Colorado Water Conservation Board could appropriate instream flows, the Foundation moved to amend its application to clarify that it intended not to maintain stream flows for preservation of the

132. Application of Sierra Club for a Permit to Appropriate Public Water of the State of Arizona, No. 33-93232 (Dept. of Water Resources July 28, 1987).

133. See letter of David S. Baron to Lawrence Ramsey, Arizona Dept. of Water Resources (Dec. 4, 1987).

134. Amended Ruling of Water Referee, *In re the Application for Water Rights of R.I. Vader & Sons*, No. W-1991 (Colo. Water Ct., Div. No. 4 Jan. 21, 1975).

135. *Id.*

136. See *supra* note 13.

137. Application for Water Rights (Surface), *In re the Application for Water Rights of Citizens Comm. for the Protection of Middle Park Water in Grand County*, No. 87CW040 (Colo. Water Ct., Div. No. 5 March 4, 1987).

138. Order, *In re the Application for Water Rights of Citizens Comm. for the Protection of Middle Park Water in Grand County*, No. 87CW040 (Colo. Water Ct., Div. No. 5 Feb. 7, 1988).

139. Memorandum in Support of Motion to Amend Application at 1, *In re the Application of South Platte River Greenway Found., Inc. for Determination of Water Rights in the South Platte River*, No. 83CW327 (Colo. Water Ct., Div. No. 1 Aug. 4, 1987).

140. *Id.* at 2.

environment, which is the Colorado statutory standard.¹⁴¹ Instead, the Foundation sought "merely the right to store water for later diversion, and the non-consumptive right to divert water for recreational purposes through a specially built structure."¹⁴²

In response to these applications, the Colorado legislature in 1987 amended the instream flow statute to provide that the Colorado Water Conservation Board "is hereby vested with the *exclusive* authority" to appropriate instream flows, and that "[i]n the adjudication of water rights pursuant to this article and other applicable law, no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows . . . for any purpose whatsoever."¹⁴³

Several issues regarding this amendment remain open, and may be litigated along with the applications mentioned above. First, there is the question of whether the legislation had retroactive effect, so as to invalidate any applications for instream flows pending on the date of passage.

Second, it is unclear whether the amendment will vitiate applications such as the Greenway Foundation's, which is styled as something other than an instream flow application, or that of Fort Collins, to the extent that it seeks flows for purposes such as dilution of pollution, which technically do not come within the present statutory instream flow scheme.

Finally, the amendment may meet with a constitutional challenge on the ground that it denies citizens the right to appropriate.¹⁴⁴

While these and other issues need to be decided, it is clear that pressure from citizens and groups to acquire and enforce instream flow rights will only increase as conflicting demands for water arise in the future. The resolution of all of these questions presents one of the challenges of the twenty-first century for the western states, their citizens, their visitors, and their citizens and visitors yet to be.

141. See generally COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.).

142. See Memorandum, *supra* note 139, at 3.

143. COLO. REV. STAT. § 37-92-102(3) (1987 Cum. Supp.) (emphasis added).

144. Colorado's constitution provides that "[T]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." COLO. CONST. art. XVI, sec. 6. The water court decision dismissing the instream flow application by the Citizens Committee for the Protection of Middle Park Water for fishery purposes (*supra* note 138) touched upon a slightly different constitutional question. In that case, the applicant argued that limiting the authority to appropriate instream flows to the CWCB represented unconstitutional special legislation. The court rejected that argument, however, reasoning that special classifications are permissible if "based upon substantial differences having a reasonable relation to the objects or purposes dealt with and to the public purpose sought to be achieved by the legislation involved." *McCarty v. Goldstein*, 151 Colo. 154, 376 P.2d 691, 693 (1962); *McClanahan v. American Gilsonite*, 494 F.Supp. 1334, 1344 (D.Colo. 1980). Because the State of Colorado alleged a special interest in the protection of fish, which are the property of the state, the court found constitutional the limitation to the CWCB of the right to appropriate stream flows for fishery purposes. See Order, *In re the Application for Water Rights of Citizens Comm. for the Protection of Middle Park Water in Grand County*, No. 87-CW-040 (Colo. Water Ct., Div. No. 5 March 4, 1987).

The court's ruling did not reach the question of whether the CWCB has sole authority to appropriate stream flows for the purpose of protecting the natural environment, nor did it analyze the separate constitutional provision relevant to denial of the right to appropriate. *Id.*

RECOMMENDATIONS AND CONCLUSIONS

Several recommendations for instream flow program management emerge from the preceding discussion:

(1) The western states should allow the people and interested organizations to appropriate and hold instream flows, as do Alaska and Arizona, and as Colorado has done in the past. Barring this, the states should establish a process by which citizens can petition the relevant state entity to acquire and manage flows on behalf of the people, as does Idaho.¹⁴⁵ There should be standards and time limits for ruling on citizen petitions, so that the agency is truly responsive and accountable to its citizen petitioners.

(2) The states should allow the people and concerned organizations to enforce instream flows held by any government entity or held privately. The right to initiate such private enforcement action may be conditioned upon giving 60 days notice of intent to take the appropriate action, in order that the water user whose application threatens instream rights might have an opportunity to amend or withdraw his application.

(3) The states should also put instream flow programs under the auspices of a separate, independent agency which has acquisition and protection of instream flows as its sole mission. Wisconsin's public intervenor for natural resource protection provides a good model for such an agency.¹⁴⁶

(4) Where instream flows are acquired or enforced by a state agency, the agency should make opportunities for citizen notice and participation in decision-making mandatory. Citizens should receive timely notice not only of the agency's initial plan to claim instream flows but also of any action or water right application which would have the effect of diminishing or injuring instream flows.

(5) The states should appoint individuals and representatives of groups who use instream flows to the boards or to special oversight committees for the agencies that acquire or enforce instream flows. In some states, the legislature would have to create such an entity. The oversight committee could be patterned after the advisory committee of the Wisconsin public intervenor, which requires members to have demonstrated experience relating to environmental protection.¹⁴⁷

(6) By legislation or citizen referendum, the western states should make the acquisition and maintenance of instream flows a part of their policies for "optimum utilization" or "maximum beneficial utilization" of water.

145. IDAHO CODE ANN. § 42-1504 (1987).

146. WIS. STAT. ANN. § 165.07, -.075 (1987 Cum. Supp.).

147. WIS. STAT. ANN. § 165.076 (1987 Cum. Supp.).