REPORT TO THE
WESTERN STATES WATER COUNCIL

on the

WORKSHOP ON
WESTERN WATER LAW
and
PROTECTION of WATER QUALITY

Vancouver, Washington
September 6-8, 2000

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INTRODUCTION AND OVERVIEW

On September 6-8, 2000, the Western States Water Council (WSWC) held a workshop in Vancouver, Washington on "Western Water Law and Protection of Water Quality." The workshop was organized pursuant to the WSWC work plan which contemplated that participants would identify issues associated with protection of water quality under state water law, identifying in the process both obstacles and vehicles for such protection. Subsequently, they would discuss existing and potential innovations and mechanisms for consideration by member states to strengthen capacity to protect water quality, within the framework of state water law and institutions.

The workshop began with a welcome and remarks by Mike Brophy, WSWC Chair. Following Mr. Brophy's remarks, Tom Fitzsimmons, Washington Department of Ecology Director and Paul Cleary, Director of the Oregon Department of Water Resources, serving as cohosts for the workshop, offered their perspectives on the objectives of the workshop. These two speakers urged that participants share what they knew about the convergence of issues associated with water rights and water quality protection, better articulate how to more effectively manage conflicts where opportunities are available, and to propose solutions which are effective and proactive, and which will provide certainty over time. Their challenges were echoed in the course of the ensuing discussions.

Following their remarks, attendees at the workshop heard from two experts in the field. The first speaker was Chuck DuMars, a professor of law at the University of New Mexico and a practicing attorney with Law and Resources Planning Associates in Albuquerque. He shared his perspectives on existing tensions between traditional appropriations under state water right regimes and the regulation for protection of water quality. He discussed sections of the Clean Water Act that attempted to achieve some accommodation and the implications of the *Jefferson County* case involving state authority under Section 401 of the Clean Water Act, as well as other cases. Professor DuMars offered the view that if states did not seize opportunities to deal with the interrelationships between water rights and water quality regulation, then the federal government will address those problems instead. He believed that federal courts would uphold state decisions regarding such issues, where a reasonable effort has been made to reach resolution of what are obviously complex factual and legal issues.

Jay Manning is an attorney for Marten and Brown and a former Assistant Attorney General for the State of Washington who helped present the *Jefferson County* case before the United States Supreme Court. He described three situations where conflicts appear between traditional appropriation law and water quality regulation. The first is in the context of a traditional water rights decision where he described the potential for consideration of quality issues. He noted particularly the potential of the public interest as a tool for addressing quality impacts. Another area was in establishing minimum flow standards. Mr. Manning advocated consideration of quality and habitat in establishing and maintaining such flows. Another context was Section 401 of the Clean Water Act, where the state had exclusive

authority to condition proposed federally permitted activities to protect water quality. He also mentioned the TMDL program as another opportunity for accommodation.

In conclusion, he raised two basic approaches to improve water quality protection under state law. The first would involve revising existing water codes to deal with inadequacies regarding water quality protection. The other would be to rewrite the entire prior appropriation doctrine so that it addresses current societal values and protection of the resource. On balance, he thought by far the most practical solution would be to work within the existing system to improve it.

Following these keynote addresses, discussions began to identify issues associated with various aspects of water quality protection under state water law. Several issues were identified for each of the topics set forth in the agenda. A copy of the agenda is included along with a listing of the issues identified by the attendees during the course of these discussions. These discussions ensued for the remaining afternoon on Wednesday and Thursday morning. Beginning on Thursday afternoon, the listing of the issues was disseminated to each of the attendees, who were divided up into four groups, each of which was assigned three issue areas on which to focus. They were asked to formulate recommendations to deal with the issues identified in the discussion, as well as others associated with the assigned topics. These recommendations would be primarily designed to be forwarded to member states as options for their consideration to improve state capacity to deal with water quality protection under their respective state water law and institutional arrangements.

Each of the working groups took most of Thursday afternoon. The resulting recommendations are included as the major work product of the workshop. A list of attendees is also included, as well as a draft introduction to the "issues" addressed during the workshop, together with the tables describing the public interest provisions and instream flow laws and programs in the WSWC member states respectively.

In conclusion, it should be noted that many remarked on the benefit of the discussions themselves among those responsible for water rights administration and water quality administration at the state level, as well as other interested attendees. There was a sense that discussions over these matters should continue within the Council and other contexts. While the issues are difficult and complex, such discussions can be fruitful in identifying and formulating solutions.

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WESTERN STATES WATER COUNCIL

Workshop on Western Water Law and Protection of Water Quality

Red Lion Inn at the Quay
Vancouver, Washington
September 6-8, 2000

INTRODUCTION TO ISSUES

The following is designed to serve as a brief introduction to the issues to be discussed at the workshop.

Utilizing Instream Flow Laws and Criteria

Most western states have laws whereby instream flows may be protected. Some enable state agencies to appropriate rights to flows; some allow for a water rights owner to apply for a change of use to an instream right; others prohibit the granting or recognition of water rights on a stream if it will unacceptably interfere with habitat or other values. Still other states reserve water from private appropriation in order to maintain flows.

State law usually prescribes the purposes or standards for setting a minimum instream flow. Typically the flow is based on the amount of water necessary to sustain fish life or for recreation; an incidental effect is that the quality of water needed for other purposes is protected. In some instances, flows needed for fish or recreation may be inadequate to safeguard water quality, unless the state statute permits consideration of water quality in setting the flows to be protected. Many state instream flow laws do not specifically refer to water quality as one of their purposes or benefits, and it is thus uncertain to what extent they could be used for this purpose.

Applying Public Interest/Welfare Standards

Nearly all western states now consider the public interest in issuing a permit to use water. In a few states, statutes or case law expressly mention that water quality effects must be examined in determining the public interest. Even in the absence of such express criteria, water quality is a logical choice for consideration.

However, because many statutes do not define the factors that are within the "public interest," state water agency officials may have difficulty determining the "public interest" without specific guidance. Technically trained individuals charged with making water decisions are accustomed to basing findings about water quantity or quality on engineering factors or quantifiable standards. Some have raised concerns that they may be less equipped to determine other aspects of the public interest, such as recreational impacts or social and economic factors, and further that water allocation officials may be uncomfortable dealing with water quality effects if another agency has primary water quality authority. Conditioning the issuance of

permits on satisfaction of water quality standards set by the water quality agency has been offered as an option.

Addressing TMDL Flow Impaired Waters

Waters not meeting water quality standards for their respective designated uses solely through technology-based regulations are termed "water quality limited segments" (WQLS) and are subject to additional reductions in pollutants under the CWA's TMDL program. Meeting water quality standards necessary to meet the designated use of a waterbody may require specific water levels (i.e.: fish habitat). Thus, implementing TMDLs within the regulated community may affect water use, and particularly instream flows.

Water Right Conditioning Through Section 401 of the CWA

Applicants for a federal license or permit to undertake an activity that will discharge pollutants are required under the Clean Water Act to obtain a certification from the state that the discharge will meet state water quality requirements. Under the holding of the U.S. Supreme Court in P.U.D. No. 1 of Jefferson County and City of Tacoma v. Washington Dept. of Ecology, this certification may also include the requirement that the applicant maintain a certain instream flow when necessary to allow a waterbody to achieve water quality standards and meet designated uses.

Dealing With Water Quantity Implications of CWA Antidegradation Requirements

State water quality standards must conform with an "antidegradation" policy that assures that certain existing uses, and water quality necessary to protect them, will be maintained. Certain high quality waters that exceed standards necessary to protect existing uses also must be maintained unless it is determined through a public process that lowering the quality is necessary to accommodate important economic or social development.

All water-related activities involving state or federal permission arguably could be subject to antidegradation review. In fact, review could conceivably be triggered by new appropriations and requests for changes of existing water rights. It is uncertain whether all water quality-impairing effects of a water use could be considered or only those related to the addition of pollutants.

Addressing Conjunctive Use Impacts

A number of states have established special management areas to preserve and equitably allocate water supplies, usually groundwater. Typically, groundwater withdrawals exceed recharge in these areas, which may lead to water quality impairment. Further, impairment may result to hydrologically connected surface water. Management may consist of limiting pumping to control depletions, as well as water quality protection. Several states have

authorized establishment of water management areas specifically to respond to water quality problems.

Utilizing CWA Authority to Stop Illegal Water Use

The State of Washington is exploring the possibility of using CWA authority to curb illegal water use within the state.

Addressing Stormwater Implications

Relationships between stormwater management required by the Clean Water Act and existing and prospective water uses and users will become increasingly important as urban populations continue to grow. Stormwater collection, detention, treatment, and retention all relate differently to receiving waters. Hydrograph alteration, stream channel formation and maintenance, aquatic resource robustness, and water quality can affect both existing water right holders and the prospects for future users to obtain water rights.

Impacts of Non-point Source Pollution Management/Regulation

There is general recognition that progress in water quality protection has stemmed largely from control of point source pollution. The emphasis has now shifted to non-point sources. Congress has long deferred to states to implement programs to deal with non point sources. Indeed, States are required to develop programs to address non-point source pollution. Among the reasons for this deference is that non-point pollution tends to be diffuse, stemming from a multitude of sources, and technically difficult to identify, analyze and regulate. Voluntary site specific best management practices have generally been relied upon. However, critics note that little progress has been made under this approach. All agree that the states have not been adequately funded for non-point source programs.

Another reason for deference to states for non-point source programs is the concern about the water right implications that could stem from federally driven regulation. In adopting 319, Congress took note of a report recognizing that return flows resulting from irrigated agriculture can contribute substantial quantities of sediment, salts and agricultural chemicals to streams. The implications of a federal program resulting in modification of the location of the discharge of return flows or by regulating water use were likely clear. However, despite the congressional policy of deference to states, many warn against less than a concerted effort by states to deal with non-point source pollution, given other implicit authority within the Clean Water Act to impose federal solutions, noting in particular the TMDL program. As two commentators put it: *"The challenge, therefore, is how to properly implement the Federal Clean Water Act and expand state law mechanisms to address water quality concerns within the framework of the doctrine of prior appropriation." (Gregory J. Hobbs, Jr. and Bennett W. Raley, Davis, Graham & Stubbs)*

Using Opportunities Available Under Riparian Rules

In at least one state, the question has been litigated--but is not yet settled--as to whether a riparian landowner is entitled to an instream flow. While virtually all states that employ the riparian doctrine have adopted some form of "regulated riparianism," the doctrine could possibly offer some authority for mandating the maintenance of minimum stream flows for ecological as well as aesthetic reasons. It is employed in cases involving pollution of watercourses because the doctrine has always had a qualitative component in addition to its better known quantitative component. Each riparian has two contradictory rights. First, he is entitled to natural flow, that is, to have the water flow down to him in its natural quantity and quality. And second, he and all other riparians on the watercourse have equal rights to make reasonable uses of the water, including consumptive uses, even if that causes some alteration in quantity, quality, or flow pattern.

Diversion of water for irrigation, manufacturing, public water supply, and other lawful riparian purposes can reduce the flow to an amount less than the minimum required to maintain the oxygen supply for natural waste assimilative processes. In such cases, for example, the minimum streamflow question could be based on comparative reasonableness. The issue would be whether the riparian waste discharge unreasonably interferes with the right of other riparians to use or divert reasonable amounts of water. On the other hand, to the extent that a waste discharge does not unreasonably interfere with other uses of water, the waste assimilative capacity required by riparian waste dischargers could be protected from unreasonable diversions.

Reconciling Existing Water Rights and Water Quality Obligations

Water quality problems can be exacerbated due to depletion of assimilating stream flows. Further, methods of diversion and usage of water can directly result in water quality degradation. Existing water rights holders are generally reluctant to forego use of even a portion of the allocated quantity associated with their right, a constitutionally protected property right. There is often also a reluctance to change traditional use practices. Therefore, reconciliation of existing rights and water quality problems can be very difficult and contentious. Establishment of instream flows may be ineffective, due to the relatively late priority date granted to rights established today. The purchase of existing rights and their conversion to instream uses appears to offer one possible solution to this problem.

The prior appropriation system itself can be used to deal with pollution under certain circumstances. This system requires that water be used for a beneficial purpose. Water use applications that cause pollution presumably could be regulated under the notion that the term "beneficial use" applies both to the appropriator and to the public. In other words, water rights do not grant the user a license to pollute. Case law from the state of Colorado holds that a senior appropriator appropriates only the water diverted, but cannot impair the quality of the water in the stream, because that amounts to an unlawful appropriation of water that ought to be available for junior users. The user was therefore required to improve his water treatment methods so that his discharge did not cause water quality violations.

Besides an obligation to avoid injury to others, other aspects of the appropriation doctrine that prohibit waste and impose a duty of water appropriate to beneficial use also may be used to address water quality problems.

Another legal theory which has been urged to remedy this situation is the public trust doctrine. It argues that since the sovereign has an obligation to protect the public rights of navigation and fishery, and since these obligations antedate private water use and bed title rights, its exercise may preempt and/or condition any private diversion rights. The Nevada Supreme Court has recently been asked to employ the public trust doctrine to create minimum instream flows into Walker Lake.

Addressing Institutional Arrangements For Coordination of Quality and Quantity

Some critics argue that state agencies with water-related responsibilities that operate independent of each other without consultation are dealing with crucial problems in a fragmented, burdensome way. Many urge that improving coordination of quality and quantity responsibilities at the state level is essential. Formal linkages are recommended to ensure effective coordination which would be benefitted by legislative directives that clearly establish water quality protection as part of the mission of every state agency whose actions potentially affect water quality and that provides guidance on how to weigh various factors bearing on agency decisions.

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WORKGROUP-IDENTIFIED ISSUES

Instream Flows

Tools--how can their use be increased?

Is more funding needed?

Must instream flow laws be made more user friendly?

Is there a need to reduce transaction cost?

How do we protect flows once they are established?

How do we deal with violation of instream standards where water quality is a concern--under CWA or through instream flow laws?

How do we overcome equity concerns of using public funds to buy property rights?

How do we increase efficiency for flows?

Should instream flow laws recognize water quality as a purpose or beneficial use?

Who should be entitled to hold instream flow rights?

Can application of instream flow laws be used for TMDL implementation plan purposes?

Public Interest

How do you determine the public interest re: water quality?

Are specific regulations/legislation regarding criteria desirable?

Should public interest standards apply to transfer applications or changes in place/type of use or diversion? If so, how?

What mechanisms should exist for notification of public when determining the public interest?

What should legal standing requirements be to pursue a public interest objection?

Should there be a geographical component to public interest determinations?

How do you establish a record sufficient for public interest determinations?

How can the public interest be used other than with prospective projects/applications?

TMDLs

How do you deal with TMDL flow impaired waters where water quality standards cannot be met, i.e. temperature:

-under existing rights regime;
-by implementing use-attainability analysis;
-by changing the water right regime;

How do you provide for "reasonable assurances" when the efforts without flow augmentation still don't meet water quality standards?

How can water rights agencies accommodate changes to augment flows for TMDLs?

What mechanisms should exist for TMDL development for interstate basins?

What role does/should ESA play in flow augmentation for water quality purposes and is equity among users possible?

Section 401 Conditioning

To what extent can/should states--under water quality laws--require bypass flows affecting existing water rights?

Do we need standards for dam removal?

How do you deal with dams that violate water quality standards for temperature or dissolved oxygen and can't be fixed?

Is the FERC alternative process adequate and how should it be improved, i.e. adaptive management?

How do we deal with potential waiver of 401 certification?

How do we protect bypass flows relative to downstream water rights?

Antidegradation

How do we deal with non-point regarding water quantity?

Should antidegradation reach beyond NPDES activities--what about water diversions?

Does antidegradation apply to state water permit decisions? Should it?

Must/should all impairing effects be subject to antidegradation reviews?

How should a water rights agency be involved, i.e.: public interest?

Conjunctive Use

How do we deal with pollution effects of groundwater use to other uses?

Is it a water quality standards violation or a water rights matter?

Surface water assimilative capacity reduced by groundwater withdrawals?

Using CWA Authority to Stop Illegal Water Use

What are the advantages?

What CWA authorities are most appropriate/effective?

What is the appropriate definition of illegal use?

What about the political ramifications for rights and/or quality reliance on federal authority?

Addressing Stormwater Implications

How do we deal with water quantity effects?

What tools should be considered: stormwater BMPs; protection of water quality standards, including beneficial uses; bonding requirements for dischargers; land use implications?

Non-point Source Pollution Management/Regulation

How do we properly craft a state program/policy regarding implementation (incentive to avoid federal intervention)?

What are the potential tools available?

How do we gain political support?

How do we enhance chances of judicial approval?

How can pollutant trading be integrated into NPS management/regulation?

Using Opportunities Available Under Riparian Rules

What should the relationship be between "reasonable use" and water quality?

How do you define "reasonable use?" Leave it to courts, legislative action, agency rulemaking?

How do we respond to "environmental flow" demands?

How do we identify riparian uses?

Water rights for wetland areas and activities?

Reconciling Existing Water Rights and Water Quality Obligations

How do we deal with excessive use?

What should be protected as part of private property rights?

How do we incorporate water quality protection within the framework of appropriative water laws?

A. Condition appropriations to protect water quality through public interest tests? (transfers, as well?)

B. Recognize that a water right does not include right to pollute.

C. Using localized enforcement?

D. Legislatively recognize assimilative flows as a beneficial use under appropriation law to allow/promote water marketing to convert water to instream uses and thereby improve water quality?

E. Provide for conversion of saved water to instream uses.

F. Incentives for changes: funding for purchases; tax credits; trading pollution credits.

G. Water banking--can be used long-term

H. Dry year temporary transfers (expedited--can be done in one day).

What are 3rd party impacts of transfers/conveyances?

Who should bear the transaction costs?

Addressing Institutional Arrangements for Coordination of Quality and Quantity

How do we improve coordination/consultation between water rights and water quality agencies?

Incentives: avoid turf battles; avoid federal intervention.

Relative merits of options:

MOU--process

MOU--substantive issues

Organizational consolidation

How do we address issues such as:

New appropriations;

Existing rights;

Innovations.

How can we maximize potential of watershed groups?

How can we utilize planning agency/projects to help identify potential solutions?

RECOMMENDATIONS

Group 1

PUBLIC INTEREST

- CLEARLY DEFINE NECESSARY ELEMENTS OF MEANINGFUL PUBLIC INTEREST TEST
  - -WHEN SHOULD IT BE APPLIED? (NEW APPLICATIONS ONLY, OR TO TRANSFERS AS WELL?)
    - -ALWAYS IF IT IS TO BE TRULY EFFECTIVE
    - -SCALE OF ITS APPLICATION WILL VARY BY PERMIT
  - -CLEARLY DEFINED CRITERIA/PRIORITIES
  - -HAVE ADEQUATE STAFFING AND FUNDING TO DO IT
- DEVELOP CHECKLIST/FACTORS TO TRIGGER THINKING, CONSIDERATIONS, AND NEXT STEPS
- PROVIDE GENERAL NOTICE TO THE PUBLIC (RATHER THAN REQUIRING SPECIAL STANDING TO PARTICIPATE)
- MAKE USE OF NUMEROUS TOOLS ALREADY EXISTING
  - -LOCAL WATERSHED GROUPS
  - -TRY TO "BATCH" SIMILAR ISSUES

TMDLs

- MAKE USE OF LOCAL PROCESSES FOR TMDLs
- SET INSTREAM FLOW TO PROTECT ASSIMILATIVE CAPACITY (POSSIBLY RELYING ON THE 7Q10 STANDARD AS THE MINIMUM)
- FOCUS ON OPTIONS TO GET MORE WATER
  - -SEASONAL LEASING
  - -WATER BANKS
  - -MARKETS
  - -WATER TRUSTS
  - -PURCHASE
- CONSIDER EFFLUENT TRADING AS SOURCE OF FUNDING FOR TRADING
- REQUIRE A PERCENTAGE OF ANY WATER CONSERVED TO BE DEDICATED TO INSTREAM USES
  - -(CAN BE VERY COMPLICATED)
- WATER RESOURCE AGENCIES SHOULD PLAY GREATER ROLE IN TMDLs
- ESTABLISHMENT OF TMDLs SHOULD INCLUDE LOCAL CONSERVATION DISTRICTS
  - -THEY MAY BE BOTH THE CAUSE AND THE MOST CAPABLE SOLUTION TO THE PROBLEM
- TMDLs SHOULD BE CLEAR ON ASSUMPTIONS FOR FLOWS

NONPOINT SOURCE POLLUTION

- USE 319 FUNDING TO PURCHASE WATER RIGHTS FOR CONVERSION TO INSTREAM USE
  - -MUST DEMONSTRATE A WATER QUALITY BENEFIT
- FORM INTERDISCIPLINARY TEAMS TO ADDRESS NONPOINT SOURCE POLLUTION
  - -TEACHING AIDE FOR LOCALS (USEFUL BOTH ON STATE AND FEDERAL LEVELS)

- CREATION OF CIVIL LIABILITY FOR CONTAMINATION COULD BE A DRIVING FACTOR
  - -CONSIDER IN WATER RIGHTS DECISION
- STATES SHOULD CONSIDER IMPLEMENTING A STATE REGULATORY PROGRAM AS A MEANS TO CURTAIL FEDERAL AGENCY INTERVENTION
- INCENTIVE-BASED, INFORMATION/EDUCATION IS PRIMARY SOLUTION
  - -PARTICULARLY IN RETURNING WATER TO THE STREAM
- USE OF PUBLIC FUNDING SHOULD RESULT IN RETURNING WATER TO STREAMS

Group 2

<u>INSTITUTIONAL</u>

- ESTABLISH ROUTINE MEETINGS BETWEEN WATER QUALITY AND WATER RIGHTS MANAGERS
- ESTABLISH A MEMORANDUM OF UNDERSTANDING ON WATER RIGHTS COORDINATION
- MAKE USE OF TEMPORARY STAFF EXCHANGES
- CREATE CROSS-EDUCATION OPPORTUNITIES
- SECURE STATUTORY AUTHORITY AND DEFINED PROCESS TO CONSIDER PUBLIC INTEREST AND WATER QUALITY IN WATER RIGHT PERMITS
- ESTABLISH WATERSHED PLANNING AND PUBLIC PARTICIPATION THAT ALLOWS INTEGRATION OF WATER RIGHTS AND WATER QUALITY
- AMEND THE CWA--NEED A CLEAR PROCESS TO RESOLVE CONFLICTS BETWEEN JURISDICTION BETWEEN STATES AND DELEGATED TRIBES

<u>401 CERTIFICATION</u>

- PRESERVE STATE AUTHORITY TO CONDITION PERMITS
- UTILIZE 401 TO CONDITION PERMITS WITH APPROPRIATE STATE LAW-BASED CONDITIONS
- ADVOCATE A REOPENER/ADAPTIVE MANAGEMENT AMENDMENT TO CWA/FED. POWER ACT
- ESTABLISH NECESSARY WATER QUALITY STANDARDS AND/OR EXCEPTIONS FOR DAM REMOVAL AND OPERATIONS
- REQUIRE FERC TO REIMBURSE PARTICIPATING AGENCIES

<u>ANTIDEGRADATION</u>

- CONSIDER PROCESS BETWEEN THE WATER RIGHTS AND WATER QUALITY AGENCIES TO DISCUSS THE EFFECT ON ASSIMILATIVE CAPACITY WHEN A SIGNIFICANT NEW DIVERSION IS PROPOSED (PUBLIC INTEREST TEST)
- COORDINATE BETWEEN AGENCIES WHEN ESTABLISHING THE ANTIDEGRADATION POLICY
  - -POLICY COULD ALLOW LIMITED DEGRADATION WITHOUT TRIGGERING AN ANTIDEGRADATION REVIEW
- PROTECT SOME SPARE ASSIMILATIVE CAPACITY BY INCORPORATING IT INTO INSTREAM FLOW PROGRAMS

Group 3

CONJUNCTIVE USE

- **STATES SHOULD SET UP A "SYSTEM" TO INCORPORATE QUANTITY CONSIDERATIONS IN QUALITY ACTIVITIES/DECISIONS AND VICE VERSA**
  - **-KEEP EPA FROM TAKING OVER WATER QUALITY AND TRUMPING WATER QUANTITY DECISIONS**
- **STATES NEED TO DECIDE WHAT THEY WANT EPA'S ROLE TO BE**
- **A STATE'S "SYSTEM" COULD INCLUDE:**
  - **-CROSS-REFERENCING PERMITS BETWEEN PROGRAMS/AGENCIES (I.E., WATER RIGHTS, NPDES, PESTICIDE APPLICATION, ETC.)**
  - **-LEGISLATION TO INCREASE QUANTITY FINES TO BE A GENUINE DETERRENT**
- **EXPLORE WAYS TO PROVDE INCENTIVES TO IMPROVE WATER QUALITY (TAX BREAKS, ETC.) FOR BUFFERS, TIMING OF WITHDRAWALS, ETC.**
  - **-LESS EMPHASIS ON REGULATORY PROCESSES**
  - **-USEFUL PRIMARILY FOR EXISTING USES**
- **NEW PERMITS--CONDITION WITH NEW REQUIREMENTS SUCH AS BUFFERS, ETC.**
- **STATES SHOULD LOOK AT "LOCAL IRRIGATION DISTRICT" ASSISTANCE/INCENTIVES TO FOSTER IMPROVEMENTS TO OLD SYSTEMS**

STORMWATER

- **GIVE ADEQUATE CONSIDERATION TO SIGNIFICANT CHANGES TO HYDROLOGY FROM DEVELOPMENT (IMPERVIOUS SURFACES, ETC.) THAT MAY GREATLY EXCEED IMPACT OF QUANTITY USED**
- **CONSIDER EQUITY IN MAKING STORMWATER DECISIONS--CAN APPLY RETROACTIVELY TO A FARM EASIER THAN A CITY**
- **STATES SHOULD CONSIDER IN STORWATER PERMITS THE WATER QUANTITY IMPLCIATIONS OF DEVELOPMENT**
  - **-NO MORE SURFACE WATER SHOULD LEAVE A PROPERTY AFTER DEVELOPMENT THAN PRE-DEVELOPMENT**
- **CLEARLY IDENTIFY AND EXPLAIN INSTITUTIONAL/JURISDICTIONAL OPTIONS (WHO'S INVOLVED, WHO'S IN CHARGE, ETC.--STATE, COUNTY, CITY, DRAINAGE DISTRICT, ETC.)**

INSTREAM FLOWS

- **PROVIDE INCENTIVES TO WATER USERS TO IMPROVE EFFICIENCY AND FREE UP WATER FOR INSTREAM USES (TAX BREAKS, MONEY FOR CONSERVATION, ETC.)**
- **STATES SHOULD EXERCISE THE PREROGATIVE TO IDENTIFY ANY BENEFICIAL USE THEY CHOOSE FOR INSTREAM FLOW PROTECTION**
- **INSTREAM FLOWS FOR WATER QUALITY SHOULD FOCUS PRIMARILY ON FISH/WILDLIFE HABITAT (NOT DILUTION)**
- **USE WATER RIGHTS LAWS TO PROTECT INSTREAM FLOW QUANTITY VIA PERMIT DATE**
- **STATES SHOULD PURSUE FUNDING TO PURCHASE WATER RIGHTS AS THE MOST EFFECTIVE WAY OF GETTING WATER BACK INTO STREAMS**
- **EQUITY CONCERNS DIMINISH IF THERE IS A CLEAR BENEFIT TO THE WATER AND STREAM THAT ACCRUES FROM THE EXPENDITURE OF $ FOR INSTREAM FLOW**

- **PURSUE DEVELOPMENT OF MODELS OR OTHER DECISIONS**
  - **-SUPPORT TOOLS TO MONITOR AND MANAGE THE EFFECTIVENESS OF RESTORING/MAINTAINING INSTREAM FLOWS**

Group 4

<u>INTEGRATING WATER QUALITY AND WATER RIGHTS</u>

INTEGRATING WATER QUALITY AND WATER RIGHTS PERMITTING IS INEVITABLE. STATES, HOWEVER, ARE VERY CONCERNED ABOUT LOSS OF SOVEREIGNTY.

PLACING WATER QUALITY CONDITIONS IN PERPETUAL WATER RIGHT PERMITS MAY BE UNWORKABLE AND OTHER MEANS TO IMPLEMENT THE CONDITIONS ARE DESIRABLE.

- **ISSUE WATER PERMITS WITH LIMITED TERMS**
- **ESTABLISH CREDIBLE NONPOINT SOURCE CONTROL PROGRAMS**
- **CREATE STANDARDIZED METHODS FOR ESTABLISHING FLOW REQUIREMENTS TO MEET STATE/ESA/CWA REQUIREMENTS**
- **WATER QUALITY IMPROVEMENTS CAN BE MADE BY ALTERING RESERVOIR OPERATIONS AND CONTRACTING STORAGE**
- **EMPLOY MARKET-BASED MEASURES AND INCENTIVES TO IMPLEMENT OBJECTIVES**
  - **-CONSIDER ALL MEDIA**
  - **-USE BROAD MEASURES AND LEAVE LOCAL FLEXIBILITY**
  - **-PROBABLY MOST EFFECTIVE IN FULLY OR OVER-APPROPRIATED AREAS, OR WHERE TMDL IS IN PLACE**
  - **-WATER ACQUISITION SHOULD BE FROM WILLING SELLERS AND FUNDED CONSERVATION**
- **STATES NEED ADEQUATE FUNDING AND INFRASTRUCTURE TO IMPLEMENT WITH REASONABLE ASSURANCE.**
  - **-MEASURING/METERING USE**
  - **-SURFACE AND GROUNDWATER MEASURING NETWORK**
- **RECOGNIZE BENEFITS OF ASSIMILATIVE CAPACITY IN STATUTE**

STATE	PUBLIC INTEREST PROVISIONS
Alaska	ALASKA STAT. §§ 46.15.080(a) (2000). The commissioner shall issue a permit if the commissioner finds that (1) rights of a prior appropriator will not be unduly affected; (2) the proposed means of diversion or construction are adequate; (3) the proposed use of water is beneficial; and (4) the proposed appropriation is in the public interest. In determining the public interest, the 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; (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.
Arizona	ARIZ. REV. STAT. ANN. §§ 45-153 (2000). The director shall approve applications made in proper form for the appropriation of water for a beneficial use, but when the application or the proposed use conflicts with vested rights, is a menace to public safety, or is against the interests and welfare of the public, the application shall be rejected. An administrative hearing may be held before the director's decision on the application if the director deems a hearing necessary.
California	CAL. WATER CODE §§ 1255 (2000). The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest. The California Supreme Court has found that the California Water Resources Control Board has "been granted broad authority to control and condition water use, insuring utilization consistent with public interest. . . .The [board's] powers extend to regulation of water quality and prevention of waste." Environmental Defense Fund, et al. v. East Bay Municipal Utility District, et al., 605 P.2d 1 (1980).
Colorado	Although Colorado has no statutory provision for review of "public interest" impacts, liberal provisions on standing in its system of water courts may provide substantial opportunity for many of the same issues to be addressed.
Idaho	IDAHO CODE § 42-203A(5) (2000). In all applications whether protested or not protested, where the proposed use is such. . .(e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. The Idaho Supreme Court, in Shokal v. Dunn, 707 P.2d 441 (19985), has recognized that water quality concerns may be considered when determining what elements of the public interest might be impacted by a proposed project.
Kansas	KAN. STAT. ANN. § 82A-711 (2000). If a proposed use neither impairs a use under an existing water right nor prejudicially and unreasonably affects the public interest, the chief engineer shall approve all applications for such use made in good faith in proper form which contemplate the utilization of water for beneficial purpose, ...Otherwise, the chief engineer shall make an order rejecting such application or requiring its modification to conform to the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water. (b) In ascertaining whether a proposed use will prejudicially and unreasonably affect the public interest, the chief engineer shall take into consideration: (1) Established minimum desirable streamflow requirements; (2) the area, safe yield and recharge rate of the appropriate water supply; (3) the priority of existing claims of all persons to use the water of the appropriate water supply; (4) the amount of each claim to use water from the appropriate water supply; and (5) all other matters pertaining to such question....
Montana	MONT. CODE ANN. §§ 85-2-311(2) (2000). Montana's statutory language states that a permit to appropriate more than a certain quantity of water can issue only if the proposed use is a "reasonable use," but it then defines "reasonable use" in terms of usual public interest criteria such as projected water needs for other beneficial purposes, including municipal supplies and minimum streamflows to protect aquatic life.
Nebraska	NEB. REV. STAT. §§ 46-234 (2000). An application may also be refused....(2) when denial is demanded by the public interest. § 2,116 (2000). In determining whether an application for an instream appropriation is in the public interest, the director shall consider the following factors: (1) The economic, social, and environmental value of the instream use or uses including, but not limited to, recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance; and (2) The economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted.
Nevada	NEV. REV. STAT. §§ 533.370(3), (2000). Except as otherwise provided...where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the requested permit.
New Mexico	N.M. STAT. ANN. §§ 72-5 -7, 72-12-3(E) (2000) The state engineer..."may also refuse to consider or approve any application or notice of intention to make application or to order the publication of notice of any application if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state."
North Dakota	N.D. CENT. CODE §§ 61-04-02, -06 (2000). The state engineer shall issue a permit if the state engineer finds all of the following:...4. The proposed appropriation is in the public interest. In determining the public interest, the state engineer shall consider all of the following: a. The benefit to the applicant resulting from the proposed appropriation. b. The effect of the economic activity resulting from the proposed appropriation. c. The effect on fish and game resources and public recreational opportunities. d. 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.

STATE	PUBLIC INTEREST PROVISIONS
Oklahoma	Although early Oklahoma appropriation law required the State Engineer to consider whether a proposed appropriation was in the "public interest," such a mandate is not found in current Oklohama statutes.
Oregon	OR. REV. STAT. §§ 530 .170(6) (2000). If, after the contested case hearing or, if a hearing is not held, after the close of the period allowed to file a protest, the director determines that the proposed use does not comply with the standards set forth in ORS 543.017 or rules adopted by the Water Resources Commission under ORS 543.017 or would otherwise impair or be detrimental to the public interest, the director shall issue a final order rejecting the application or modifying the proposed final order to conform to the public interest. If, after the contested case hearing or, if a hearing is not held, after the close of the period allowed to file a protest, the director determines that the proposed use would not impair or be detrimental to the public interest, the director shall issue a final order approving the application or otherwise modifying the proposed final order. A final order may set forth any of the provisions or restrictions to be included in the permit concerning the use, control and management of the water to be appropriated for the project, including, but not limited to, a specification of reservoir operation and minimum releases to protect the public interest.
South Dakota	S.D. CODIFIED LAWS ANN. §§ 46 -2A-9, (2000). A permit to appropriate water may be issued only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.
Texas	TEX. WATER CODE ANN. §§ 11.121, .134(b)(3) (2000). The commission shall grant the application only if:...(3) the proposed appropriation:...(C) is not detrimental to the public welfare;....
Utah	UTAH CODE ANN. §§ 73-3-8(1) (2000). It shall be the duty of the state engineer to approve an application if:...(c) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare;....If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water...will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.
Washington	WASH. REV. CODE ANN. § 90.03.005(2000). It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights. WASH. REV. CODE ANN. §§ 90.03.290 (2000) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied:....But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.... The Washington Supreme Court rejected the argument that water quality effects of a proposed appropriation need not be considered by the permitting agency because(1) other state agencies had authority to regulate pollution, and (2) the statutory public welfare criterion for water permits dated back to 1917 and, in historical context, was unrelated to pollution concerns. The Court reasoned that Washington's State Environmental Policy Act of 1971 required every state agency to consider the environmental impact of major actions significantly affecting the quality of the environment. Additionally, the Court found that the state's Water Resources Act of 1971 declared a policy of protecting and enhancing the environment. Therefore, the environmental and ecological effects of proposed appropriations had to be considered.
Wyoming	Wyo. Stat. §§ 41-4-503 (2000). All applications which shall comply with the provisions of this chapter, and with the regulations of the engineer's office, shall be recorded in a suitable book kept for that purpose; and it shall be the duty of the state engineer to approve all applications made in proper form, which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for.

STATE	INSTREAM FLOW PROVISIONS
Alaska	ALASKA STAT. § 46.15.145(a) (1997). Authorized in 1980, this broad statute allows "[t]he state, an agency or political subdivision of the state, an agency of the United States or a person" to apply for the right "to reserve sufficient water to maintain a specified instream flow or level of water at a specified part of a stream, throughout the year or for specified times" for a variety of instream flow uses: the protection of fish and wildlife habitat, migration purposes, propagation purposes, recreational and park purposes, navigation and transportation purposes, and sanitary and water quality purposes. In order to obtain a permit reserving an instream flow, there must be unappropriated water sufficient for the reservation, the rights of prior appropriators may not be affected by the reservation, and the applicant must demonstrate a need for the reservation. The instream flow reservation is subject to review every ten years to verify that the purpose for the reservation continues to be valid, that the need for the reservation continues to exist, that there remains unappropriated water sufficient to fulfill the reservation, and that the rights of prior appropriators continue to be unaffected.[1]
Arizona	ARIZ. REV. STAT. ANN. § 45-151.A (1997). Allows instream flow appropriations to be made in the same manner as other water rights appropriations. The AZ Surface Water Code states that "[a]ny person, the State of Arizona or a political subdivision thereof may appropriate unappropriated water for. . .stock watering. . .recreation, wildlife, including fish. . . ." Properly submitted applications must be approved unless the application for the proposed use "conflicts with vested rights, is a menace to the public safety, or is against the interest and welfare of the public." The statute also provides a hierarchy of uses as between two or more pending conflicting applications if the water supply is not sufficient for all applications. In the hierarchy of values, recreation and wildlife rank fourth out of five uses, and are preceded by domestic and municipal uses, irrigation and stock watering uses, and power and mining uses. The Arizona statutes neither expressly authorize nor expressly exclude instream appropriations. However, the Arizona Court of Appeals determined that "in 1941 when 'wildlife, including fish' and in 1962 when 'recreation' were added to the purposes for appropriation, the concept of *in situ* appropriation of water was introduced it appearing to us that these purposes could be enjoyed without a diversion" McClellan v. Janzten, 547 P.2d 494 (Ariz. Ct. App. 1976). Without statutory guidelines, the Arizona Department of Water Resources (ADWR) needed to determine how to evaluate instream flow applications. An instream flow task force, organized in 1986, developed information that enabled the ADWR to issue a guide to filing applications for instream flow water rights, thereby providing useful assistance to those seeking to appropriate instream flows.
California	CAL. WATER CODE § 1707 (1998). In 1991, California enacted legislation which allowed an existing appropriator to dedicate to instream flow purposes water rights that were previously appropriated for other uses. The statute allows "[a]ny person entitled to the use of water, whether based on an appropriative, a riparian, or other right" to petition for a change of the water right "for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water." The California statute requires that the proposed change meet certain requirements: it must not increase the amount of water available under the original appropriation, and it must "not unreasonably affect any legal use of water." § 1257.5. The board, in acting on applications to appropriate water, shall consider streamflow requirements proposed for fish and wildlife purposes pursuant to Sections 10001 and 10002 of the Public Resources Code. The board may establish such streamflow requirements as it deems necessary to protect fish and wildlife as conditions in permits and licenses in accordance with this division.
Colorado	COLO. REV. STAT. § 37-92-102 (1997). Colorado's instream flow program was created by statute in 1973 in response to concerns that the aquatic habitat required some legislative protection. It has been broadened slightly over time, but continues to provide that instream flow rights may only be appropriated or held by the Colorado Water Conservation Board (CWCB). The CWCB may appropriate "such water of natural streams and lakes as the board determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree." The CWCB, in order to initiate an appropriation, must determine that the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made: that there is a natural environment that can be preserved to a reasonable degree with the Board's water right, if granted; and that such environment can exist without material injury to water rights. The Colorado instream flow right is subject to both senior decreed water rights and to undecreed water uses, exchanges or "water practices" in existence when the instream flow appropriation is made. A 1986 amendment to the statute permits the CWCB to acquire water rights for instream flow purposes by "grant, purchase, bequest, devise, lease, exchange or contractual agreement."
Idaho	IDAHO CODE § 42-1501, et seq. (1997). In Idaho, the first minimum stream flows and lake levels were appropriated by legislative enactment as early as 1925. By 1978, a statutory instream flow program was established. Under the current statutory scheme, it is the exclusive responsibility of the Idaho Water Resources Board to file applications for minimum flows, although other interested parties may petition the Board to do so as well. Flows may be appropriated "for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values and water quality." If an application is approved by the Department of Water Resources, the permit is sent to the legislature for approval. Those appropriations that are granted are limited to the minimum flow required to sustain the resource for which the flow is requested.
Kansas	KAN. STATE. ANN. § 82A-703, et seq. (1997). In 1980, Kansas enacted minimum stream flow legislation, and provided a method for legislative reservation of instream flows. The statute required the state identify "minimum desirable stream flows to preserve, maintain, or enhance base flows for in-stream water uses relative to water quality, fish, wildlife, aquatic life, recreation, general aesthetics, and domestic uses and for the protection of existing water rights. . . ." The Kansas legislature was to approve a minimum desirable stream flow, and the state's Chief Engineer was authorized to "withhold from appropriation that amount of water deemed necessary to establish and maintain for the identified water course the desired minimum stream flow." The amount of water to be reserved in any particular stream system was negotiated by key water agencies for the State of Kansas, and was based on the needs of the stream ecosystem and the actual availability of water. Appropriative rights applied for after April 12, 1984, the statute's effective date, are subject to the minimum desirable stream flow requirements, although a junior water right for domestic purposes can take priority over an instream flow reservation.

[1]Portions of this table reprinted with permission of the University of Denver Water Law Review from *A Survey of State Instream Flow Programs in the Western United States* by Cynthia F. Covell, 1 U. Denv. Water L. Rev. 177 (1998).

STATE	INSTREAM FLOW PROVISIONS
Montana	MONT. CODE ANN. § 85-2-316 (1997). Montana first initiated efforts to protect instream flows in 1969 with legislation allowing the Fish and Game Commission to appropriate instream flows to preserve fish and wildlife habitat on a number of the state's blue ribbon trout streams. This legislation was replaced by Montana's present statutory system allowing reservation of instream flows. Now both federal and state agencies may request a reservation on any stream for consumptive uses (which may include future irrigation, storage and municipal needs) as well as instream flows. Instream flow reservations by the state are limited to fifty percent of the average annual flow of the stream for which the application is submitted, as shown by stream gauge records. Procedurally, applications for instream flows are processed in the same manner as applications for water permits for consumptive uses: the applicant must establish the purpose of the reservation, the need for the reservation, the amount of water necessary for the purpose of the reservation, and that the reservation is in the public interest. Under certain circumstances, the Montana Department of Natural Resources and Conservation (MDNRC) may order that a state water reservation permit be subordinated to permits or certificates for groundwater development. Moreover, instream flow reservations, unlike conventional appropriations, are subject to mandatory review every ten years subsequent to their issuance. Upon review, instream flow reservations may be modified or eliminated if the MDNRC decides their original purpose is no longer being met. Additionally, if the MDNRC finds that the original reservation is no longer required by the original purposes, and that the need for reallocation outweighs the need of the original reservant, an instream flow may be modified to allocate the reservation or a portion thereof to another qualified reservant. In other words, since state reservations may be made for consumptive uses, an instream flow could theoretically be reallocated to future municipal needs. Reallocation of any particular reservation may occur once every five years. Conversely, because a state water reservation may be transferred from one authorized reservant to another, a reservation originally made for consumptive purposes could perhaps be transferred to instream flow uses.
Nebraska	NEB. REV. STAT. § 46-2, 108, -2,116 (1997). Nebraska's instream flow legislation was first passed in 1984, and authorized the Nebraska Natural Resources Commission to obtain instream appropriations. An "instream appropriation" is defined as the "undiverted application of the waters in a natural stream within or bordering upon the state for recreation or fish and wildlife purposes." The amount of the instream flow may be only that necessary for recreation or fish and wildlife. Before approving an instream appropriation, the Director of the Division of Water Resources must find that there is unappropriated water available for appropriation, that the requested instream appropriation is necessary to maintain the instream use or uses for which the appropriation has bee requested, that the appropriation will not interfere with any senior surface water appropriation, that the rate and timing of the flow is the minimum necessary to maintain the instream use for which the appropriation has been requested, and that the instream appropriation is in the public interest. In making the public interest determination, the Director must consider the following factors: 1) The economic, social, and environmental value of the instream use or uses, including but not limited to, recreation fish and wildlife, induced recharge from municipal water systems, and water quality maintenance; and 2) The economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted. Instream flows in Nebraska are identified by stream reaches and times of the year, and are limited to the amount of water "necessary to provide adequate instream flows." The Director of Water Resources must modify existing instream appropriations or pending applications to avoid interference with other water right applications that have been deemed by the legislature to be more important. A recent amendment to the statute requires the Director to hold a hearing every fifteen years from the date of granting a permit to appropriate water for instream flows. The purpose of the hearing is to receive evidence regarding whether the water appropriated under the permit still provides the beneficial uses for which the permit was granted and whether the permit is still in the public interest. The hearing is to proceed under the rebuttable presumption that the appropriation continues to provide the beneficial uses for which the permit was granted and that the appropriation is in the public interest. After the hearing, the Director may, by order, modify or cancel, in whole or in part, the instream appropriation. In addition, the 1997 amendments changed the approval standards for instream flow applications by requiring the Director of Water Resources to find, with regard to applications pending or filed after January 1, 1997, that there is unappropriated water available to provide the approved instream flow rate at least twenty percent of the time during the period requested. The Director must also find that the appropriation is necessary to maintain the existing recreational uses or needs of existing fish and wildlife species. Finally, the statute makes clear that the application may be granted for a rate of flow that is less than that requested by the applicant or for a shorter period of time than requested by the application.
Nevada	NEV. REV. STAT. § 533.030 (1995). Nevada's appropriation statute contains a general statement that "[s]ubject to existing rights, and except as otherwise provided in this section, all water may be appropriated for beneficial use as provided in this chapter and not otherwise." The use of water for any recreational purpose is specifically declared to be a beneficial use. In 1988, the Nevada Supreme Court recognized that the recreational use of water mandates recognition of an *in situ* water appropriation for recreation, and that wildlife watering is encompassed in the definition of recreation as a beneficial use of water, holding that Nevada law recognizes the recreational value of wildlife and the need to provide wildlife with water.
New Mexico	For many years, the New Mexico State Engineer took the position that actual diversion of water was legally required in order to appropriate a water right in New Mexico, so there could be no valid instream water rights. However, the current State Engineer has determined that under appropriate circumstances, an existing water right can be changed to instream uses if statutory criteria for a change are met. In 1998, the New Mexico Attorney General issued an opinion (Opinion) in which he concluded that New Mexico law "permits the State Engineer to afford legal protection to instream flows for recreational, fish or wildlife, or ecological purposes." The Opinion is carefully reasoned, and addresses only changes of water rights from traditional diversionary uses to instream flows, noting that since New Mexico's surface waters are already fully appropriated, the issuance of new appropriations for instream flow uses need not be addressed. The Opinion concludes that New Mexico's Constitution and statutes do not require actual diversion or impoundment in order to validly appropriate a water right, and distinguishes several cases that had been the basis of the previous State Engineer's contrary opinion. Moreover, the Opinion asserts the Attorney General's belief that a court will recognize recreational, fish and wildlife, and "ecological" uses as proper beneficial uses of water. Although the New Mexico statutes governing applications for new appropriations appear to contemplate construction of dams, ditches or other "works," the Opinion determines that this condition would be satisfied by imposition of the State Engineer's announced requirement of "accurate and continuous gauging" of instream flows throughout the permitted stream reach. Since the State Engineer indicated that such gauging would be a requirement of any change to instream flow uses, the Attorney General's Opinion assumes that such measuring devices will be required. It does not address other sorts of "works" that might also meet the statutory requirement.

STATE	INSTREAM FLOW PROVISIONS
North Dakota	North Dakota continues to follow the doctrine that a diversion is required for a water right to exist and has no statutory provision for establishing instream flows. The state engineer, in making permit decisions, may deny a permit on grounds that the appropriation may conflict with public interest criteria, but this creates no right to water. North Dakota's change of use statute may allow for an existing water right to be changed to instream purposes, but such a change has not yet been attempted.
Oklahoma	Oklahoma law does not require diversion to happen as an element of a water right, but it does encourage development of water resources "to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the [Oklahoma] citizens...," which could be construed as prohibiting a right to such an instream flow. "Scenic river areas" can be preserved to protect the diminishing resource of free-flowing streams and rivers. New appropriations cannot interfere with domestic uses and can be conditioned to protect water quality standards, although water quality is not considered a beneficial use and an appropriation for that purpose would not be possible. The question of whether riparian landowners may claim an instream flow use is not yet settled in Oklahoma, as a statute passed to abolish riparian rights was found to be unconstitutional by a state district court.
Oregon	OR. REV. STAT. § 537.332-360. (1997). One of the older state statutory schemes, Oregon's current statute reaffirms its early policy stating that "[t]he maintenance of minimum perennial stream flows sufficient to support aquatic life, to minimize pollution and to maintain recreational values shall be fostered and encouraged if existing rights and priorities under existing laws will permit." Under a 1955 law, these minimum perennial stream flows were established administratively based on applications by state agencies. Additional protection of instream flow values in Oregon is now provided by the In-Stream Water Rights statute enacted in 1987. An instream flow in Oregon is the minimum quantity of water necessary to support the requested use. Instream flow rights may be requested by the Department of Fish and Wildlife for the "conservation, maintenance and enhancement of aquatic and fish life, wildlife and fish and wildlife habitat," by the Department of Environmental Quality to protect and maintain water quality standards, and by the Parks and Recreation Department for recreation and scenic attraction uses. The instream flow rights, when approved, are held by the Water Resources Department as trustee, and have the same status as other water rights. Instream flows may also be created by changing another existing water right. Finally, the 1987 instream flow legislation required conversion of the minimum perennial stream flows to instream flow rights with the priority date of the original minimum perennial stream flow. Like the instream flow rights in many other states, Oregon's originally appropriated instream flow rights can be subordinated. The right to use water for multipurpose storage projects, municipal uses by municipal applicants, or hydroelectric projects can take precedence over instream rights. This subordination does not apply to instream rights obtained by conversion of minimum perennial stream flows or to instream rights obtained by conversion of other rights.
South Dakota	S.D. CODIFIED LAWS ANN. § 46-5-30.4, 46-2A-12 (2000). South Dakota also has no specific statutory provisions for appropriating water for instream use. However, certain existing water rights may be converted to instream uses under South Dakota law. Water rights serving irrigation purposes may not be converted to instream flows, while industrial water rights may.
Texas	TEXAS WATER CODE § 11.023, 11.147, 11.150, 11.152 (2000). The Texas Water Code allows for water to be appropriated for any beneficial purpose, which is defined as "the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water." When making allocation decisions, the Texas Natural Resource Conservation Commission must consider the effects of granting a water right permit on existing uses, instream flow, estuaries, water quality, and fish and wildlife and their habitat.
Utah	UTAH CODE ANN. § 73-3-3(11) (1997). Utah permits its Division of Wildlife Resources or Division of Parks and Recreation to file applications for permanent or temporary changes for the purpose of providing water for instream flows for the propagation of fish, public recreation, or the reasonable preservation or enhancement of the natural stream environment. Instream flow rights may not be appropriated from unappropriated water. The statute makes clear that an actual diversion is not required to implement a change to an instream flow use. Change to an instream flow rights may not allow enlargement of the water right sought to be changed, and the change may not impair any vested water right. The change application must include a legal description of instream flow reach, appropriate studies, reports, or other information as required by the State Engineer to demonstrate the necessity for the instream flow in the reach, and the projected benefits to the public that will result from the change.
Washington	WASH. REV. CODE § 75.20.050, 90.22.010, 90.54.020(3)(A) (1998). Washington began enacting instream flow legislation in 1949. Over time, through a series of legislative acts, instream flow protection broadened in scope. Today, Washington's Department of Ecology may set minimum stream flow levels for the purposes of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values of public waters whenever it appears to be in the public interest to do so. Water quality may also be protected. Under the current legislative scheme, the Department of Ecology prefers to establish instream flows by a rulemaking process, but can, when necessary, deny or condition water rights to preserve instream flows for fish even where rules have not been adopted.
Wyoming	WYO. STAT. § 41-3-1001 (1997). Wyoming's statute allows instream flow appropriations to establish or maintain new or existing fisheries. Appropriations for such instream flow uses may be made from unappropriated waters of the state "if such use does not impair or diminish the rights of any other appropriator in Wyoming." The amount of water that can be appropriated for fisheries is the minimum amount necessary to establish or maintain fisheries, or, in the case of existing fisheries, the minimum amount necessary to maintain or improve such existing fisheries. The statute includes a complicated methodology for determining where and how much water to appropriate for instream flows. The state is the only entity allowed to appropriate instream flows. Applications are filed by the Water Development Commission in the name of the state and are based on recommendations by the State Game and Fish Commission.

Western States Water Council

Workshop on Western Water Law and Protection of Water Quality

September 6-8, 2000
Red Lion Inn at the Quay
Vancouver, Washington

Wednesday, September 6, 2000

10:30 a.m.	Registration
1:00 p.m.	Welcome - Mike Brophy, WSWC Chair
1:10	Discussion of Workshop Objectives,* Tom Fitzsimmons, Washington and Paul Cleary, Oregon**
1:30	Panel - Federal/State Relations in Protecting Water Quality - Current Status and Future Prospects - **Moderator: Ken Slattery** Chuck DuMars, Law and Resources Planning Associates, PC, New Mexico and Jay Manning, Marten and Brown LLP, Washington
2:30	Identification and Discussion of Issues Associated with Protecting/Improving Water Quality under Western State Water Law, including those related to: Utilizing Instream Flow Laws and Criteria *** - Jack Stults and Rich Moy, Montana Applying Public Iinterest/Welfare Standards - Jim Cook, Nebraska Addressing TMDL Flow Impaired Waters - Mike Llewelyn, Oregon Water Right Conditioning Through Section 401 of the CWA - Deborah Mull, Washington
3:30 p.m.	Break
3:45	Resume Discussions
5:30 p.m.	Adjourn for the Day
6:00	Reception

* The WSWC work plan contemplates that participants will identify both obstacles and vehicles for protection of water quality under state water law, and subsequently discuss existing and potential innovations and mechanisms for consideration by member states to strengthen capacity to protect water quality, within the framework of state water law and institutions.

** Washington and Oregon are co-hosting the workshop and representatives will serve as moderators for the various sessions.

*** For each topic, an individual would be invited to set the stage for a discussion by referencing his/her related experience to date.

Thursday, September 7

8:30 a.m.

Reconvene and Continue Identification and Discussion of Issues - **Moderator: Meg Reeves**

Dealing with Water Quantity Implications of CWA Antidegradation Requirements - Don Ostler, Utah

Addressing Conjunctive Use Impacts - Duane Smith, Oklahoma

Utilizing CWA Authority to Stop Illegal Water Use - Bob Barwin, Washington

Addressing Stormwater Implications - Bob Barwin, Washington

Impacts of Non-point Source Pollution Management/Regulation - Dick Wallace, Washington

Using Opportunities Available Under Riparian Rules - John Hofmann, Texas

Reconciling Existing Water Rights and Water Quality Obligations - Karl Dreher, Idaho

Addressing Institutional Arrangements for Coordination of Quality and Quantity - Gary Beach, Wyoming

10:15 Break

Continuation of Discussion of Issues

11:30 a.m. Wrap Up and Summary - Identification and Discussion of Issues Associated With Water Quality Protection under State Water Law

12:00 Lunch (on your own)

1:30 p.m. Mechanisms to Strengthen State Capacity to Protect Water Quality under State Water Law and Institutions - Working Groups

Groups would first decide on three or four major topics on which to focus and then divide into the corresponding number of working groups to discuss ways to strengthen state capacity relative to the chosen topics.

5:00 Adjourn for the day

Friday, September 8

8:30 a.m. Reconvene - **Moderator: Keith Phillips**

8:45 - 10:00 Reports by Working Groups followed by response and discussion

10:00 Break

10:15 Group Discussion and Identification of "low-hanging fruit" (options having the highest feasibility and most potential for improvement) for consideration by member states.

12:00 Adjourn

Western States Water Council
Symposium

Western Water Law & Protection of Water Quality
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