

INSTREAM FLOW POLICY IN MONTANA: A HISTORY AND BLUEPRINT FOR THE FUTURE

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I. INTRODUCTION

The allocation of water in Montana, as throughout the West, has historically focused on satisfying "offstream" uses for domestic and commercial consumption, irrigated agriculture, industry, and mining.¹ Although offstream uses of water remain critical to the economic development of the state, there has been an increasing demand and effort since the 1970's to protect "instream flows"² for fish and wildlife, recreation, aesthetic and scenic values, and water quality.

In Montana, as in other western states, the protection of instream flows has emerged as a major water resource issue for two converging reasons. First, instream values, most notably fisheries, have been threatened by the overappropriation of water³ coupled with periodic

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1. The doctrine of prior appropriation, the basic tenet of western water law and policy, was adopted to facilitate the settlement and development of the West. One of the traditional provisions of the doctrine was the need to direct water out-of-stream and put it to beneficial use, narrowly defined as municipal, agricultural, and industrial. For a history of western water law and policy, see HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES*, U.S. DEP'T OF AGR., 3 VOLS, MISC. PUB. No. 1206, (1971).

2. Instream flows generally refer to water left in a stream or river, unavailable for diversion and offstream use, to satisfy fish, wildlife, recreation, and other purposes.

3. Perhaps the most dramatic example of the threat of overappropriation in Montana occurred in the early 1970's, when the Department of Natural Resources and Conservation (DNRC) received a number of large industrial water use applications for coal-related development in the Yellowstone River Basin (see generally, Fritz, Graham, and Knudsen, *Public Rights in Water—A Montana Perspective*, 3rd Annual Western States Water Council Water Management Symposium, September 11-12, 1986). At the same time, energy companies optioned more than 500,000 acre-feet of water from Yellowtail Reservoir, a large impoundment on the Bighorn River, for coal development. The legislature viewed these large permit applications and water sales as a threat to future agricultural and municipal growth in the basin, as well as to the free-flowing status of the Yellowstone (MONTANA DEP'T OF NATURAL RESOURCES AND CONSERVATION, *YELLOWSTONE RIVER BASIN: FINAL ENVIRONMENTAL IMPACT STATEMENT FOR WATER RESERVATION APPLICATIONS* (February, 1977):5-6).

In response to the perceived threat, the legislature enacted a four year moratorium on Yellowstone permit applications of more than 20 cubic feet per second or 14,000 acre-feet of storage (Mont. Code Ann., Section 85-2-601(1974)). The language of the four-year moratorium emphasized the need to reserve water for future agricultural and municipal needs, as well as for instream flows to protect existing rights, water quality, and aquatic life. *Id.*

droughts.⁴ Second, there is a growing appreciation of instream flows for fish and wildlife, recreation, aesthetics, and water quality.⁵ In addition, there is an increasing recognition of public rights in free-flowing water.⁶ Together, these converging trends have raised the issue of instream flow protection to the top of the state's water management agenda.⁷

In 1967, the Montana legislature responded to the growing public demand to protect instream flows by passing the Water Resources Act.⁸ The act specifies, among other things, that "the water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life."⁹ This statutory declaration of instream flow policy has supported a variety of activities taken to manage instream resources. Nevertheless, Montana's instream flow policy leaves much room for improvement, and was one of the most controversial issues addressed during the 51st legislative session.

The purpose of this article is to review the history of instream flow protection activities in Montana and to outline a blueprint for instream flow policy in the future. Section II examines the social, economic, and environmental value of instream flows to Montana. Section III evaluates the history of instream flow protection in Montana by reviewing state, federal, regional, and Indian efforts to protect and manage instream resources. It also considers the role of the public trust doctrine in protecting instream flows in Montana. Section IV examines the development in 1988 of the controversial instream flow protection section of Montana's new state water plan. Section V then discusses HB 707 of the 51st legislative session, a water leasing study and pilot instream flow program, and one of the major recommendations emerging from the state water plan. Finally, Section VI presents a blueprint for improving instream flow policy in Montana. Hopefully, this article will help stimulate and structure the

4. During the drought of 1988, which was preceded several years of low flows, the natural flow in several famous fly-fishing streams, including the Big Hole, Beaverhead, and Madison rivers, dropped far below the average annual flow, thereby threatening the viability of the fisheries. *Drained Rivers Rouse Montana*, High Country News, Nov. 20, 1989, at 16. After irrigators diverted what little water was available in these rivers, the reduction in flow in the rivers resulted in the death of thousands of fish. The Department of Fish, Wildlife and Parks estimates that it will take between five and eight years of normal precipitation to bring the fisheries back.

5. See MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, 1988 MONTANA STATEWIDE COMPREHENSIVE OUTDOOR RECREATION PLAN, (1988). The 1988 SCORP projects a significant increase in water-based recreational activities.

6. See generally Thorson, Brown, and Desmond, *Forging Public Rights in Montana's Waters*, 6 PUB. LAND L. REV. 1 (1985).

7. The issue of instream flow protection was selected in 1987 by the broad-based State Water Plan Advisory Council as one of the first issues to be addressed by the new state water plan.

8. MONT. CODE ANN., § 85-1-101 (1967).

9. MONT. CODE ANN., § 85-1-101(5) (1967).

debate on instream flow policy in Montana.

II. THE VALUE OF INSTREAM FLOWS

Instream flows provide a variety of social, economic, and environmental values, and are fundamental to the quality of life in Montana. Recently, there has been a growing recognition of the importance of free-flowing water to the economic future of the state. These and other values associated with instream resources are examined below.

A. *Social Values*

Instream flows provide a variety of social values to residents of and visitors to Montana. Free-flowing waters were critical to the exploration and settlement of the state. Consequently, there is a historical and cultural value in maintaining the flows on such transportation routes as the Missouri River that were so important to the Lewis and Clark and other expeditions. Reducing the flows on such streams and rivers to the point where they no longer support recreational activities limits the historical imagination and destroys some of the cultural heritage associated with the waters.

Free-flowing water also supports many recreational values, such as fishing, rafting, boating, hiking, and camping in and around Montana's numerous streams and lakes. These values not only attract visitors to the state, which translates into economic value, but form the core of the Montana "outdoor spirit." To many people, outdoor recreation is synonymous with the "Big Sky" state.

Instream flows also provide life-support value, particularly in maintaining the quality of Montana's waters for both human and non-human uses. Natural water quality is closely related to flow — higher flows tend to carry more dissolved solids. Reducing the amount of flow, therefore, decreases a river's capacity to assimilate pollutants. Instream flows also play a critical role in recharging aquifers that supply a wide variety of consumptive uses, including public drinking water.

Free-flowing waters may also generate a myriad of scientific, aesthetic, genetic diversity, character-building, and religious values.¹⁰

B. *Economic Values*

While instream flows provide numerous social values to residents of and visitors to the state, they also provide several economic benefits to the

10. For an excellent taxonomy of values associated with the natural world, see ROLSTON, *ENVIRONMENTAL ETHICS: VALUES IN AND DUTIES TO THE NATURAL WORLD* (Temple University Press, 1988).

state. According to a recent set of studies, stream fishermen spend over \$52 million per year in Montana, while lake fishermen spend about \$47 million annually.¹¹ The studies also reveal that stream fishermen would be willing to pay another \$122 million for the experience, while lake fishermen would be willing to spend another \$93 million.¹² Thus, while fishermen currently spend nearly \$100 million per year, the potential economic value of instream flows in Montana is over \$200 million annually.¹³ By comparison, the average annual cash receipts for the last ten years from irrigated agriculture is about \$640 million.¹⁴

Although the estimated economic value of instream flows, as determined by the study, is substantial, the figures are conservative; they do not include dollars spent in the pursuit of hiking, picnicking, floating, and other recreational activities in and around streams and rivers throughout the state. In addition, the figures do not include the commercial value of fishing, nor do they include the potentially substantial option, existence, or bequest values associated with natural resource use.¹⁵ Moreover, the economic value of instream flows is likely to increase in the future as the demand for water-based recreational experiences increases.¹⁶

C. *Environmental Values*

In addition to the variety of social and economic values derived from free-flowing water, instream flows also provide benefits to the natural environment. Adequate streamflows are essential to maintain the integrity of Montana's several nationally-acclaimed blue-ribbon trout streams. During the drought of 1988, flows in several streams were reduced to the

11. See Duffield, Loomis, & Brooks, *The Net Economic Value of Fishing in Montana*, MONTANA DEP'T OF FISH, WILDLIFE AND PARKS (1987).

12. *Id.*

13. Another recent study sponsored by the Sport Fishing Institute estimates that nearly \$200 million were spent in Montana for fishing in 1985. The Independent Record, Nov. 21, 1989, at 3B. In addition, the Travel Promotion Bureau of the State of Montana recently estimated that tourists from other states and nations poured \$658 million into Montana in a recent 12-month period, generating a \$1.4 billion impact on the state's economy. The Independent Record, Dec. 13, 1989.

14. MONTANA DEP'T OF AGRICULTURE, MONTANA AGRICULTURAL STATISTICS 1988, (1988).

15. The literature on economic valuation recognizes many different values associated with natural resources. These include "user" values for recreational and commercial hunting and fishing, wildlife sightings, and photography, in addition to "non-user" values. Non-user values are difficult to measure and may be of several types. Those associated with preserving a species and its habitat so that one has the option to enjoy them in the future are termed "option values", willingness to pay for preservation so that one's heirs can benefit is termed "bequest value", and values generated simply by knowing a species or a unique site will continue to exist are termed "existence values." See generally *Valuation of Wildland Resource Benefits*, (Westview Press, 1984). The little empirical evidence that exists suggests non-user values can be sizeable, especially for unique sites and endangered species. See Walsh, Loomis, & Gilman, *Valuing Option, Existence, and Request Demands for Wilderness*, 60 LAND ECON. 14 (1984).

16. *Supra*, note 5.

point where fish died.¹⁷

Another important function of instream flows in the natural environment is to maintain stream channels for a variety of purposes. The U.S. Forest Service has recently argued that instream flow requirements for channel maintenance must be based on fundamental principles of geomorphology.¹⁸ Stream channels are formed and maintained by frequently recurring flows of water and sediment. If such flows are not available on a frequent basis, the Forest Service argues, the natural equilibrium of the stream channel will be changed, with a potential loss in the capacity of the channels to carry subsequent flows of equal or greater magnitude.¹⁹

Legislative and administrative decisionmakers must incorporate instream flow values into water management decisions, or the resulting water use patterns may become inefficient.²⁰ Without reliable information on the demand for instream flow protection, water policy decisions will continue to emphasize offstream diversions for consumptive uses, such as irrigation, manufacturing, and urban growth. Recent evidence on the economic value of water for instream uses suggests that instream benefits can exceed the benefits generated by some offstream uses, and therefore economic development within the state could be enhanced by more attention to instream flow protection for recreation and wildlife.²¹

III. A HISTORY OF INSTREAM FLOW PROTECTION²²

Several efforts to manage instream resources in Montana have been taken and are under way. Most of these efforts have been initiated at the state level by the legislature and administrative agencies. However, several efforts by federal, regional, and Indian entities have also led to the protection of instream flows in Montana. Additionally, the public trust doctrine may provide an opportunity to protect instream flows.

A. State Efforts

1. *Murphy Rights*

The first state effort to protect instream flows in Montana was the

17. *Supra*, note 4.

18. *United States v. Jesse*, 744 P.2d 491 (Colo. 1987).

19. *Id.*

20. See COLBY, *INSTREAM FLOWS: ECONOMIC VALUES AND POLICY ALTERNATIVES*, (Department of Agricultural Economics, University of Arizona, 1988).

21. *Id.*

22. This section is adapted from a paper prepared by the author for the *Instream Flow Protection in the Western United States: A Practical Symposium* (University of Colorado School of Law, March 31-April 1, 1988), and appears in *INSTREAM FLOW PROTECTION IN THE WEST*, (Natural Resources Law Center, University of Colorado School of Law, 1989).

legislature's enactment in 1969 of a law allowing the state Fish and Game Commission to file for water rights on the unappropriated waters of 12 "blue ribbon" trout streams to maintain streamflows necessary for the preservation of fish and wildlife habitat.²³ The resulting appropriations, known as "Murphy rights" after the principal sponsor of the bill, set a priority over other uses only until the district court in which the streams are located determines that such waters are needed for a more beneficial use.²⁴ Under this statutory authority, the Montana Department of Fish, Wildlife, and Parks (DFWP) filed for appropriations on 12 "blue ribbon" trout streams in Montana, including Big Spring Creek, Blackfoot River, Flathead River, Gallatin River, Madison River, Missouri River, Rock Creek (Clark Fork), Smith River, Yellowstone River, and the Middle, South, and North Forks of the Flathead River.²⁵

While the Murphy rights legislation was repealed in 1973, the claimed appropriations remain valid. As of September, 1989, temporary preliminary decrees have been issued on Big Spring Creek, the Gallatin River, the Madison River, Rock Creek, the Yellowstone River, the Middle Fork of the Flathead River, and the South Fork of the Flathead River.²⁶ Temporary or preliminary decrees have not been issued on the Blackfoot River, the Missouri River, the Flathead River, the Smith River, or the North Fork of the Flathead River.²⁷ To date, the appropriations have not been challenged in court by other water users.

Murphy rights are prospective in that they protect instream values from future consumptive appropriations. However, given their relatively junior status, they may be ineffective in maintaining stream flows when there is not enough water to satisfy all water uses. In addition, since the statutory authority for Murphy rights is no longer applicable, and never was intended to be applicable to all streams within the state, it is a very limited strategy for protecting instream values. Nevertheless, Murphy rights are currently the most senior water rights for instream flow purposes

23. MONT. CODE ANN., § 89-801(2). The concept of the "blue-ribbon" fisheries originated in the late 1950's with a concern over the potential incremental loss of Montana's 20,000 to 30,000 miles of well-stocked fishing streams. The concern led to an inventory and assessment of the state's fishing streams on the basis of accessibility, aesthetics, use, and productivity. Streams were placed in one of five classes, with Class I streams considered "outstanding." In 1959, the Stream Fishery Classification Map for Montana was printed, and the color blue—the traditional color of county fair "1st prize" ribbons—was used to identify Class I fishing streams. Over 400 miles of stream received a Class I rating in 1959. The stream classification system was slightly modified in 1980. See Holtzen, *Color Them Blue*, MONTANA OUTDOORS, (May/June, 1984).

24. MONT. CODE ANN., § 89-801(2).

25. *Id.*

26. Personal communication, Bob Arrington, Water Rights Adjudication Program Manager, Montana Department of Natural Resources and Conservation (September 8, 1989).

27. *Id.*

in Montana, and therefore represent one of the most effective present strategies for protecting instream values.

2. *Water Reservations*

In 1973, the state expanded efforts to protect instream resources by enacting the Montana Water Use Act which sets forth a systematic and comprehensive mechanism for the protection of instream values.²⁸ The law provides an opportunity to reserve water for future diversionary and consumptive uses as well as for maintaining stream flows for the protection of existing water rights, aquatic life, and water quality.²⁹

Under the reservation statute, the state or any political subdivision of the state, including federal agencies, may apply to the Board of Natural Resources and Conservation (BNRC) to reserve water for both offstream uses as well as instream uses, including future irrigation, municipal growth, multipurpose storage, recreation, fish and wildlife, and maintenance of water quality.³⁰ Applications must include a discussion of the purpose and an analysis of the need for the reservation, a quantification of the amount of water requested as well as the amount available, an analysis that the reservation is in the public interest, and a management plan.³¹

Upon receiving a reservation application, the DNRC processes it through the procedures outlined in MCA §§ 85-2-307 through 85-2-309. In general, the DNRC must publish the facts of the application in a newspaper of general circulation in the area affected by the proposed reservation. In addition, it must notify any water user, including federal agencies, that may be affected by or interested in the proposed reservation. The DNRC may also notify other state departments and interest groups with an interest in the reservation.

After this notification process, the DNRC must accept objections, if any, to the proposed reservation.³² Those objecting to the reservation must specify how it would adversely affect their water rights or other interests. If the DNRC determines that an objection is valid, it must then hold a public hearing.³³

Once the objections have been resolved to the satisfaction of the BNRC, it may then adopt an order reserving water, provided that the applicant has shown that:

1. there is a need for the reservation;

28. MONT. CODE ANN., § 85-2-316.

29. MONT. CODE ANN., § 85-2-316(1).

30. ADMIN. RULES OF MONT., § 36.16.102(3).

31. ADMIN. RULES OF MONT. § 36-16.104.

32. MONT. CODE ANN., § 85-2-308.

33. MONT. CODE ANN., § 85-2-309.

2. the amount of water requested is necessary for the stated purpose of the reservation;
3. the reservation is in the public interest;
4. special criteria are met if the use is to be out of state.³⁴

Unless otherwise specified by the legislature, a water reservation has a priority of appropriation dating from the filing, with the DNRC, of a notice of intent to apply for a water reservation in a basin in which no other notice of intent is pending.³⁵

Reservations are to be reviewed at least once every ten years, and if the objectives of the reservation are not being met, the BNRC may extend, revoke, or modify the reservation.³⁶ In addition to the ten-year review, the BNRC may also modify an instream flow reservation every five years. If the total amount of an instream flow reservation is not needed to fulfill its purpose, *and* an applicant can show that its need outweighs the need of the original reservant, the BNRC is allowed to reallocate the excess to another qualified reservant.³⁷ Reallocation may only take place once every five years, and the reallocation amount retains the original reservation priority date.

In addition to these provisions for reallocating instream flow reservations, the BNRC recently adopted a rule to allow the voluntary transfer of a reservation from one qualified applicant to another.³⁸ Under certain conditions, this rule could be used to increase the amount of water reserved for instream flow purposes.

To date, instream flows have been reserved on approximately 69 stream segments in the Yellowstone River Basin.³⁹ The 69 stream segments constitute a total of about 2,078 stream miles, or approximately 12.5 percent of the total stream miles in the state. Approximately 70 percent of the average annual flow in the upper basin of the Yellowstone River has been reserved for instream flows, while between 58 and 66 percent of the average annual flow in the lower basin of the Yellowstone River has been reserved for instream flows.⁴⁰

In addition to the instream flows that have been reserved in the Yellowstone River Basin, applications are pending on about 25 stream segments in the Clark Fork River Basin in western Montana.⁴¹ If approved,

34. MONT. CODE ANN., §§ 85-2-316(7) and (8).

35. MONT. CODE ANN., § 85-2-316(9).

36. MONT. CODE ANN., § 85-2-316(10).

37. MONT. CODE ANN., § 85-2-315(11).

38. Minutes of the Board of Natural Resources and Conservation, Nov. 20, 1989.

39. Order of the Board of Natural Resources Establishing Water Reservations, December 15, 1978, at 39-72.

40. *Id.*

41. MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, *Application for Reservations of Water in*

these 25 segments will constitute a total of about 400 stream miles, or approximately 2.5 percent of the total stream miles in the state. Approximately 43 percent of the average annual flow in the Clark Fork River Basin would be reserved for instream flows. A basin-wide reservation process is also underway in the Missouri River watershed upstream from Fort Peck Dam. This process may result in a significant amount of water reserved for instream flow purposes.⁴²

While the reservation process provides a systematic mechanism to evaluate the instream flow needs of a stream or watershed, to balance instream with future consumptive uses, and to legally protect needed instream flows, there are several problems that limit its effectiveness for protecting instream resources. First, the reservation process is time-consuming, cumbersome, and costly. Consequently, it is most efficiently applied to entire basins, while it is a relatively inefficient process for protecting instream flows on single streams. Second, a reservation for an instream flow cannot exceed 50 percent of the average annual flow on gauged streams,⁴³ which may not be sufficient to protect instream resources in all cases.

A third limitation of the reservation process is that, until 1989, priority dates for reservations were not established until the applications had been approved, which can often take years from the time the application is submitted. Meanwhile, consumptive water users have been allowed to continue acquiring water use permits, thereby incrementally degrading instream values before they can be protected. (An exception to this statutory provision is the 1984 priority date established by the legislature for reservations in the Missouri River Basin, even though the reservation process is not expected to be completed until 1993.)⁴⁴ Although the priority date for all reservations was changed by the 51st legislature to the time a reservation application is received by the DNRC, the original provision may nevertheless limit the effectiveness of instream flow reservations in the Yellowstone and Clark Fork river basins.

Another limitation of the reservation process is that all reservations, including instream flow reservations, must be reviewed at least once every ten years and may be modified at that time,⁴⁵ thereby rendering them less secure than appropriations received under the water permitting process. The BNRC may also reallocate water reserved for instream flows once

the Upper Clark Fork River Basin (November, 1986).

42. MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, *Application for Reservation of Water in the Missouri River Basin and Fort Peck Dam: Summary, Purpose, Need, Amount, Public Interest, Management Plan and Appendices* (June, 1989).

43. MONT. CODE ANN., § 85-2-316(6).

44. MONT. CODE ANN., § 85-2-331.

45. MONT. CODE ANN., § 85-2-316(10).

every five years if a competing applicant can show that the total amount of an instream flow reservation is not needed to fulfill its purpose *and* that his need outweighs the need of the instream flow reservant.⁴⁶

In addition to these limitations of the reservation process, only a few public entities are using the reservation process to protect instream flows, including the DFWP, the Montana Department of Health and Environmental Sciences, the U.S. Bureau of Land Management, and the North Custer Conservation District. The U.S. Forest Service, the National Park Service, and the U.S. Fish and Wildlife Service, all managers of public lands possessing significant instream values, have not shown an interest in using the reservation process to protect instream flows on public lands.

Finally, the reservation process, like other prospective mechanisms to protect instream flows, is not capable of addressing situations where the primary threat to instream values is severe dewatering from senior consumptive water users or during a drought. What is needed in these cases is a mechanism to effectively put water back in the stream, rather than simply maintaining the status quo.

3. *Public Interest Criteria*

Another mechanism potentially available to protect instream values in Montana is the application of "public interest" criteria for initial permit applications and for changes or transfers in appropriative rights.⁴⁷ Where a person wishes to appropriate more than 4,000 acre-feet per year and 5.5 cubic feet per second, the applicant must show the projected uses to be reasonable, based on a consideration of:

1. The existing and future demands on the state water supply, including needs to preserve instream flows for aquatic life;
2. The benefits to the applicant and the state;
3. The effects on the quantity and quality of water for existing uses in the source of supply;
4. The availability and feasibility of using low-quality water for the purposes outlined;
5. The effects on private property rights by the creation or contribution to saline seep;
6. The probable significant adverse environmental impacts of the proposed water use.⁴⁸

In addition to outlining these criteria, the public interest statute clarifies the DNRC's authority to issue permits subject to terms, condi-

46. MONT. CODE ANN., § 85-2-331.

47. MONT. CODE ANN., § 85-2-311(2)(c).

48. MONT. CODE ANN., § 85-2-311(2)(c).

tions, restrictions, and limitations considered necessary to satisfy these criteria.⁴⁹ The statute also allows the state to condition appropriations for transport out of specified basins and all out-of-state transport of water.⁵⁰ The public interest criteria can thus be used to condition certain appropriations to protect instream values.

While these public interest criteria are potentially useful in protecting instream flows, their effectiveness is limited since they apply only to applications for very large amounts of water, and consequently they have not yet been applied to protect instream flows. Not only are there few water permit applications large enough to trigger these public interest criteria, but there may be cases where even a small new use can cause an unacceptable impact to instream values. In addition, the criteria do not take into consideration the cumulative impacts of consumptive uses on instream values in a given river. That is, several appropriations on a river, each less than the 4,000 acre-feet threshold, together may significantly reduce the flow in the river and thereby threaten instream values. However, since the permits fall below the 4,000 acre-feet threshold, they are issued with few, if any, conditions to protect instream values.

Another limitation of the public interest criteria is that they do not relate the size of the application to the amount of water in the stream — i.e., an application for less than 4,000 acre-feet may be acceptable on a large stream but devastating to a small one. In addition, the criteria do not apply to all changes or transfers of water rights. Finally, even if the public interest criteria were applicable to more situations and considered the cumulative impacts of all water permits, they do not result in the acquisition of an instream water right per se. Moreover, there is some question as to whether the conditions are enforceable against any future appropriators.

4. *Adjudication Proceedings*

Instream flows may also be protected in Montana during adjudication proceedings. The DFWP may represent the public in adjudication proceedings for purposes of establishing public recreational uses of water prior to 1973.⁵¹ To date, the DFWP has claimed water rights for instream flow purposes on 12 streams⁵² and approximately 76 ponds, lakes, and reservoirs.⁵³

49. MONT. CODE ANN., § 85-2-311(1).

50. MONT. CODE ANN., § 85-2-311(3)(b).

51. MONT. CODE ANN., § 85-2-223.

52. Memorandum on S.B. 76 Instream Flow Claims from Fred Nelson to Steve Brown and Stan Bradshaw, Montana Department of Fish, Wildlife and Parks (Sept. 16, 1985).

53. Memorandum on S.B. 76 Fish, Wildlife, and Recreation Claims for Ponds, Lakes,

In general, the courts have supported instream flow claims when a diversion has been present.⁵⁴ However, the courts have not been so kind to instream flow claims made when a diversion is not present. The landmark case on this point is *Bean Lake*.⁵⁵ The DFWP filed a claim in 1982 for an existing water right in Bean Lake, claiming recreational and fish and wildlife uses, with a priority date of 1951. In a decision on August 27, 1987, the Water Court ruled that the claim was invalid because the DFWP never diverted or impounded the lake water, and never demonstrated an intent to claim the water right or gave notice to other water users of that intent.⁵⁶

On appeal, the Montana Supreme Court supported the Water Court's findings and conclusions.⁵⁷ While MCA § 85-2-223, states that the statute "shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use," both the Water Court and the Supreme Court found that recreation and fish and wildlife uses are beneficial uses.⁵⁸ The Supreme Court, however, stated that

"under Montana law before 1973, no appropriation right was recognized for recreation, fish, and wildlife, except through a Murphy Right statute. The prevailing legal theory was that some form of diversion or capture was necessary for an appropriation even though some forms of non-diversionary water rights were given appropriation status. In this case, the Water Court denied the appropriation water right claim because of the lack of diversion, intent, and notice. Whatever the merits of the lack of diversion argument, the DFWP and the public could not have intended an appropriation where none was recognized by law, and for the same reason, adverse appropriators could not have had notice of such a claim. We therefore uphold the Water Court's decision. . .".⁵⁹

The DFWP argued that the natural lake constituted an impoundment and therefore served as a diversion. In addition, they argued that the

Reservoirs, and Swamps from Fred Nelson to Bob Lane, Montana Department of Fish, Wildlife and Parks (October 30, 1986).

54. See, e.g., In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Kootenai Tributaries of the Kootenai River in Flathead and Lincoln Counties, Montana (In the Water Courts of the State of Montana, Clark Fork Division - Kootenai River Basin, Case No. 76D-48 and Case No. 76D-49, July 23, 1986) ruling that claims made by the Department of Fish, Wildlife and Parks for instream flow purposes on Young Creek and Tobacco River are valid appropriations.

55. Case 41u-7, Yellowstone Division of the Montana Water Courts, August 27, 1987.

56. *Id.*

57. No.88-093 in the Supreme Court of the State of Montana (1988).

58. *Id.* at 11.

59. *Id.* at 16-17.

history of recreational use and stocking served as notice and intent to appropriate water to lakes with fish. The implication of the Supreme Court's decision is that instream flow claims made under MCA § 85-2-223, without some type of artificial diversion are not valid appropriations. This will have a significant impact on the adjudication of other instream flow claims made by the DFWP, many of which are not associated with diversion structures.⁶⁰

5. Reservoir Management

Although the construction, operation, and maintenance of reservoirs for hydroelectric power production and water storage may threaten instream values in many cases, such activities also provide opportunities for protecting instream resources by decreasing the uncertainty of stream flows and providing a relatively constant flow regime throughout the year. Several opportunities have been pursued in Montana to manage reservoir flows for fish and other instream uses. While some of these activities require the consideration of fish and wildlife values in projects constructed by the federal government, as well as in those licensed by it, others are pursued and established at the discretion of an administrative agency.

(a) Federal Statutes

Two federal statutes have been used in Montana to condition the construction and operation of reservoirs on behalf of instream flow protection. First, pursuant to the Federal Power Act,⁶¹ Montana has imposed conditions on hydropower licenses requiring release of a certain amount of flow at specified times to protect valuable fisheries. The 1986 Electric Consumers Protection Act amendments⁶² to the Federal Power Act, along with the regulations adopted pursuant to this act, require the Federal Energy Regulatory Commission (FERC) to find that a proposed project is best adapted to a comprehensive plan for a waterway, including navigation, water power, and other beneficial public uses, such as recreation, fish and wildlife.⁶³ To facilitate this objective, each license issued by FERC shall include conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the development, operation, and management of the project.⁶⁴ The conditions are to be based on recommendations received under the Fish and Wildlife Coordination Act from the U.S. Fish and Wildlife Service and state fish and wildlife agencies. If

60. See generally, *supra*, notes 52 and 53.

61. 16 U.S.C. § 291.

62. P.L. 99-495.

63. 16 U.S.C. § 791(a).

64. 16 U.S.C. § 803(j).

FERC believes that any recommendation is inconsistent with the purposes of the license, it must publish findings to that effect as well as specify conditions that satisfy the requirement outlined above. The DFWP has submitted several recommendations to FERC for conditioning hydro-power licenses to protect fish and wildlife resources.⁶⁵ FERC generally incorporates these recommendations into the conditions for their hydro-power licenses.⁶⁶

Second, the Pacific Northwest Electric Power Planning and Conservation Act⁶⁷ contains significant requirements for preserving and restoring anadromous fish as well as resident fisheries. A regional council created by the act is directed to develop a plan for the protection, mitigation, and enhancement of fish and wildlife, and managers of federal power facilities are required to afford "equitable treatment" to fish and wildlife, insuring that their operations do not subordinate fish and wildlife to other project objectives. This strategy has been used by the DFWP to maintain resident fisheries on both the South Fork and the mainstem of the Flathead River below the Hungry Horse Dam by requiring a minimum flow release from the reservoir.⁶⁸

(b) Agreements for Voluntary Releases

In addition to conditioning hydropower and other water projects, the state has also negotiated with reservoir operators, including the U.S. Army Corps of Engineers, the U.S. Bureau of Reclamation, Montana Power Company, Washington Water Power Company, and state operators, for voluntary releases of water at several reservoirs to protect instream values. Many of these agreements are usually written, and all are informal. To date, agreements or management plans have been developed at six reservoirs, including Canyon Ferry,⁶⁹ Yellowtail,⁷⁰ Hebgen,⁷¹ Hauser,⁷² Holter,⁷³ and Tiber⁷⁴ reservoirs. Agreements are currently being negoti-

65. Personal communication with Larry Peterman and Litter Spence, Montana Department of Fish, Wildlife and Parks (September 7, 1989).

66. See, e.g. Pine Creek Project, Federal Energy Regulatory Commission Hydropower License 8546-011.

67. 16 U.S.C. § 839.

68. *Supra*, note 65.

69. MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, UPPER MISSOURI RIVER RESERVOIR OPERATING GUIDELINES FOR FISH, WILDLIFE AND RECREATION (April, 1985).

70. MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, UPPER BIGHORN RIVER FISHERIES MANAGEMENT PLAN (August, 1987).

71. *Supra*, note 65. No formal written contract has been developed for this agreement.

72. *Supra*, note 65. No formal written contract has been developed for this agreement.

73. *Supra* note 65. No formal written contract has been developed for this agreement.

74. MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, TIBER RESERVOIR MARIAS RIVER RECOMMENDED OPERATING GUIDELINES FOR FISH, WILDLIFE AND RECREATION (February 24, 1988).

ated at several other reservoirs.

In general, when the state enters into negotiations with reservoir operators, the operator typically maintains control of the flow releases but attempts to provide streamflows that will satisfy instream flow needs. The reservoir operator may also exercise options, such as buying power from other sources to insure minimum stream flows can be provided (this approach was employed by the U.S. Bureau of Reclamation at Canyon Ferry Reservoir during the drought of 1987). In some cases, the DFWP may prioritize its requests for streamflows in the event of inadequate water. For example, a lower summer flow than desired may be prescribed in order to save water for spawning fish in the fall. The outflow and reservoir levels may be discussed annually or more often if necessary. Advisory committees, such as the Canyon Ferry coordinating committee, together with other water users and interested parties, are often consulted to convey information about present and future conditions affecting a reservoir operation and to reevaluate priorities.

One of the more successful negotiated agreements has focused on the instream values of the Madison River.⁷⁵ The Madison River is one of Montana's best known trout streams. Located at the headwaters of the basin is Hebgen Dam, a privately-owned facility that partially regulates the river and is largely used for storage to enhance hydropower generation downstream. Although the project provides a variety of important benefits to the state, releases of water from the reservoir have historically had a deleterious impact on river fishery production.

In search of a solution to this ongoing problem, the DFWP worked with the Montana Power Company, owner of the facility, to design a voluntary release pattern from the dam that substantially improved fishery habitat conditions in the river and, at the same time, preserved much of the owner's hydropower generation prerogative. The willingness of MPC to cooperate, as well as the broad public support for enhancing the fishery in the Madison River, was instrumental in the success of these negotiations.

(c) Purchase of Storage Rights

To complement efforts at negotiating voluntary releases from reservoirs to protect instream values, the state has also purchased reservoir storage on several occasions to protect important fisheries and recreational opportunities. This strategy has been used on the Bitterroot River, a major trout and recreation stream that winds through the mountains of western Montana.⁷⁶

75. *Supra*, note 65.

76. Montana Department of Natural Resources and Conservation Painted Rocks Reservoir

Over time, irrigation diversions along the Bitterroot River have increased to the point where they often seriously deplete the river and diminish fish habitat and recreational floating opportunities. In the interests of developing a long-term solution to this recurring problem, the DFWP has focused its attention on stored water in the state-owned Painted Rocks Reservoir.

Located in a headwaters tributary of the Bitterroot River, the reservoir was originally built for irrigation use that has not fully materialized. In the 1950s, the DFWP purchased 5,000 acre-feet of water,⁷⁷ with an additional 10,000 acre-feet purchased in 1987, to augment flows in the Bitterroot River. During the summers of 1985 and 1986, water purchased by the DFWP and released from Painted Rocks Reservoir for instream use was depleted by downstream irrigation users.⁷⁸ As a result, several sections of the river were nearly dried up. After negotiations between the DFWP and the irrigation companies, a petition was jointly submitted to the District Court. The Court, in turn, appointed a water commissioner in 1987 and 1988 to help ensure delivery of the purchased water.

The DFWP has also purchased water from Newland Creek Reservoir, a privately managed reservoir on a tributary to the Smith River, to protect flows in the Smith River.⁷⁹ Although there is little demand to purchase the water at this time, the operators want to limit the amount of water they sell to DFWP. This has not limited the ability to protect instream flows below the reservoir, however, since the morphology of the stream channel limits the amount of optimum discharge.

6. *State Recreational Waterway Program*

The state's Recreational Waterway Program⁸⁰ provides another mechanism to indirectly protect instream resources. In 1972, the DFWP established a "State Recreational Waterway Program" through administrative rulemaking.⁸¹ The purposes of the program are: (1) to maintain and improve Montana's prime free-flowing and productive streams; (2) to improve other streams so they may be added to the system; and (3) to encourage and obtain multiple recreational attributes of streams in the

Water Purchase Contract with Montana Department of Fish, Wildlife and Parks (June 26, 1987).

77. Water Purchase Contract between the State Water Conservation Board, the Montana Fish and Game Commission, the Ravalli County Fish and Wildlife Association, and the Western Montana Fish and Game Association (March 5, 1958).

78. *Supra*, note 65.

79. Agreement and Water Purchase Contract (between the Montana Department of Fish, Wildlife and Parks and Meagher County Newland Creek Water District, July 24, 1987).

80. ADMIN. RULES OF MONT., § 12-8-401.

81. *Id.*

system, with special emphasis on fishing.⁸²

The program extends the original blue-ribbon fisheries concept and identifies ten criteria for selecting streams, including: blue-ribbon fisheries, recreation potential, historic and scenic qualities, recreational economic opportunities, hunting areas, waterfowl habitat, freedom from pollution, adequate public access, stream protection potential, and popular request and interest.⁸³

To date, several stream segments have been included in the State Recreational Waterway Program, including the Flathead River system above Flathead Lake and above Hungry Horse Reservoir, the Missouri River from Fort Benton to Fort Peck, Rock Creek near Missoula, the Smith River, and the Yellowstone River.⁸⁴ The first two rivers were subsequently included in the National Wild and Scenic River system,⁸⁵ while the Yellowstone River has received an instream flow reservation.⁸⁶

Although this program does not provide a mechanism for legally protecting instream flows, it does provide a framework for identifying and prioritizing streams based on the values cited above. The Northwest Rivers Study,⁸⁷ which encompasses the entire state, could serve as a data base for the program.

B. *Federal Efforts*

1. *Wild and Scenic Rivers*

The federal Wild and Scenic Rivers Act⁸⁸ was designed to preserve in a free-flowing condition certain rivers possessing outstanding scenic, recreational, geologic, fish and wildlife, historic, cultural, and other similar values. It provides a process by which rivers may be recommended for inclusion, studied, and eventually listed under the wild and scenic rivers system. The Act prohibits the Federal Energy Regulatory Commission from licensing water projects on, or directly affecting rivers included in the system, and provides interim protection for rivers under study for inclusion. The Act also contains an express assertion of a federal reserved water right for the amount of water which is reasonably necessary for the preservation and protection of those features for which a river is desig-

82. *Id.*

83. *Id.*

84. *Supra*, note 65.

85. P.L. 94-486 (Oct. 12, 1976).

86. Order of the Board of Natural Resources Establishing Water Reservations (December 15, 1978): pgs. 39-72.

87. MONTANA DEP'T OF FISH, WILDLIFE AND PARKS, PACIFIC NORTHWEST RIVERS STUDY: ASSESSMENT GUIDELINES FOR MONTANA (December, 1986).

88. 16 U.S.C. 1271.

nated.⁸⁹ The Wild and Scenic Rivers Act has been used to protect instream values on four stream reaches in Montana - the North, South, and Middle forks of the Flathead River, and on one reach on the Missouri River.⁹⁰

In addition to the four stream reaches that have already been protected, the U. S. Forest Service is in the process of identifying additional rivers for inclusion in the wild and scenic river system. To date, 76 river segments have been identified as eligible on the nine national forests in Montana.⁹¹ These rivers constitute a total of 946.4 stream miles, with 13 segments or 134.60 miles classified as scenic; 45 segments or 469.70 miles classified as recreational; and 30 segments or 336.30 miles classified as wild.⁹²

The streams identified on the Beaverhead, Flathead, and Lolo National Forests are only tentatively eligible until final decisions are documented as amendments to the respective forest plans. The streams on the other national forests that have been identified as eligible for designation under the wild and scenic rivers program have been documented in the respective forest plans or amendments to the plans. All the forest plans must provide for the protection of eligible river segments until a future decision is made on possible wild and scenic designation. A suitability study will be completed for each eligible river segment some time after the final forest plans are released.

While the national wild and scenic rivers program is a potentially useful strategy for protecting instream resources, it is a politically sensitive program (because it has land use as well as water use implications) that will likely take many years to implement. Consequently, the water rights associated with designated stream reaches become that much more junior in status, and thereby limit the effectiveness of this strategy to protect instream flows.

2. *Public Land Management Opportunities*

Public land management decisions provide other opportunities to protect instream flows. The right-of-way provisions of the Federal Land Policy and Management Act⁹³ grant discretionary authority to allow water works. If a diversion is permitted, public land management agencies have a duty to impose conditions that will protect the environment, including fish

89. See FEDERAL WATER RIGHTS, 86 INTERIOR Dec. 553 (1979).

90. P.L. 94-486 (October 12, 1976).

91. U.S. DEP'T OF AGRICULTURE, FOREST SERVICE, WILD AND SCENIC RIVER RECOMMENDATIONS FOR MONTANA, NORTH DAKOTA, AND IDAHO (September 12, 1989).

92. *Id.*

93. 43 U.S.C. 1762-1771 (1982).

and wildlife habitat.⁹⁴ The U.S. Forest Service in Montana has used this authority to protect instream values by conditioning land use permits for irrigation diversions, hydropower plants, and reservoir developments.⁹⁵

Regulating water diversions in this manner does not protect instream flow values as fully as acquiring a water right for instream flow purposes. Diversions jeopardizing the streamflow level still can be made upstream from the national forests or on private inholdings within the forests; these diversions would be outside of the permitting process. Nevertheless, the Forest Service's authority to deny or condition future water diversions on national forests gives the agency considerable potential for protecting water resources.

In addition to denying or conditioning permits, federal land management agencies may also have the authority to set instream flows in the process of achieving the congressionally defined management purposes of the public lands.⁹⁶ The Forest Service, the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service, managing water much like any other resource pursuant to the agency's authority, could each take action on a particular stream when its planning process showed a need to protect that resource. Delegated administrative authority to set instream flows may be a logical and essential aspect of the agency's authority to manage its lands.

In the process of developing its national forest plans, the U.S. Forest Service articulates specific goals for fish and wildlife enhancement, watershed management, and related instream flow management activities.⁹⁷ While the pursuit of these goals does not result in the acquisition of a formal water right for instream flow protection, the impact of proposed activities on the forest is reviewed in light of the goals. The proposed activities may then be accordingly denied or conditioned during the permitting process.

3. *Federal Reserved Water Rights*

The federal reserved water rights doctrine assures that public lands

94. 43 U.S.C. 1765 (1982). See also 36 C.F.R. 251.56.

95. Personal communication with Ron Russell, U.S. Forest Service (September 8, 1990).

96. See Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 ORE. L. REV. 1 (1985).

97. See, e.g., UNITED STATES DEP'T OF AGRICULTURE, FOREST SERVICE, HELENA NATIONAL FOREST, FOREST PLAN (April, 1986) at 11-22. This section of the forest plan outlines the following standards for the protection of fisheries: "(1) Maintain quality water and habitat for fish by coordinating Forest activities and by direct habitat improvement . . . ; (2) Instream activities should allow for maximum protection of spring and fall spawning habitats; and (3) Structures installed within streams supporting fisheries will be designed to allow upstream fish movement, especially to spawning areas."

set aside or reserved by the United States for a particular purpose have adequate water.⁹⁸ More specifically, the doctrine recognizes rights to a quantity of water sufficient to fulfill the specific purposes for which the land was reserved.⁹⁹ Unlike other water rights, reserved water rights on federal and Indian land have a priority dating back to when the reservations were established, even if the actual use of reserved water begins long after other water users have appropriated water from the stream.

(a) Quantification Under the Doctrine

The federal reserved water rights doctrine provides that when federal reservations are carved out of public land holdings, the amount of water without which the "primary purposes" of the reservations would be defeated is implicitly reserved for use on the federal reservations.¹⁰⁰ However, the quantity of water necessary to satisfy the original purposes of the reservations may not always be sufficient to protect the most valuable instream benefits. This is especially true on lands administered by the U.S. Forest Service and the Bureau of Land Management.

Although there has been a general recognition by the courts that reserved water rights exist on national forest lands,¹⁰¹ the Supreme Court has ruled that such rights do not exist for fish, wildlife, recreational and other so-called "secondary purposes" of the national forests.¹⁰² Consequently, the U.S. Forest Service is trying to acquire reserved water rights by claiming that the national forests cannot secure "favorable conditions of flow" without viable stream channels maintained by instream flows.¹⁰³ A question arises as to whether the location, amount, and timing of the channel maintenance instream flows will be sufficient to maintain the primary instream values—i.e., fish, wildlife, recreation, and so on. If not, then the reserved water rights doctrine may have little value as a mechanism to protect instream flows on national forest lands.

98. The reserved water rights doctrine was initially formulated by the Supreme Court in relation to Indian reservations (*Winters v. United States*, 207 U.S. 568, 1908). It was first extended to public land reservations in 1963 (*Arizona v. California*, 373 U.S. 546, 1963). For a history of federal reserved water rights, including all the landmark cases, see COGGINS AND WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* (2nd ed., 1987) at 369-405. For a history of federal reserved water rights in Montana, see Miller, *Taming the Rapids: Negotiation of Federal Reserved Water Rights in Montana*, 6 PUB. LAND L. REV. 167-182 (1985). For a discussion of reserved water rights on wilderness and Forest Service lands in general, see Johnson, *Reserved Water Rights for Wilderness and Forest Lands: The Interaction of United States v. New Mexico and Sierra Club v. Block*, 9 PUB. LAND L. REV. 127-144 (1988).

99. Johnson, *supra*, note 98.

100. *Arizona v. California*, 373 U.S. 546 (1963).

101. *United States v. New Mexico*, 438 U.S. 696, 98S.Ct.3012, 1978.

102. *Id.*

103. *United States v. Jesse*, 744 P.2d 491, Colo. (1987).

The other major debate on quantifying reserved water rights on the national forests revolves around wilderness areas. In *Sierra Club v. Block*,¹⁰⁴ the federal district court in Colorado held that reservation of national forest lands for wilderness areas created a "double" federal reserved water right. One reserved water right was created when the land was reserved for national forest purposes from the public domain. Another, according to *Block*, was created when the national forest lands were reserved for wilderness purposes. In a formal opinion, the Department of Interior solicitor concluded to the contrary.¹⁰⁵ As a result, the quantification of reserved water rights in wilderness areas remains an open question and has stymied the designation of additional wilderness areas in many states.¹⁰⁶

In contrast to the debate over quantifying federal reserved water rights on national forest lands, one lower court has ruled that no such water rights exist on lands administered by the Bureau of Land Management.¹⁰⁷ Since the public lands under the jurisdiction of the Bureau of Land Management were not withdrawn from the "public domain" when Congress passed the Federal Land Management and Policy Act, the statutory framework for the Bureau, the court ruled that such lands do not fall under the reserved rights doctrine.

While there is some question as to the feasibility of using the federal reserved water rights doctrine to protect instream flows on lands administered by the U.S. Forest Service, the National Park Service and the U.S. Fish and Wildlife Service are in a better position to utilize the reserved rights doctrine to protect instream values given the original purposes of their reservations of land (i.e., national parks and monuments and wildlife refuges). According to a Department of the Interior Solicitor's Opinion, the National Park Service may acquire reserved water rights for scenic, natural, and historic conservation uses, wildlife conservation, and public enjoyment, while the U.S. Fish and Wildlife Service may claim reserved rights for purposes of protecting migratory birds and other wildlife.¹⁰⁸

(b) Efforts to Claim Reserved Water Rights

In addition to the inherent limitations of the federal reserved rights doctrine as a mechanism to protect instream flows on public lands, there have been problems in quantifying and negotiating the flows required to

104. 615 F. Supp. 44 (D.Colo., 1985).

105. U.S. Dep't of Interior, Solicitor's Opinion #M-36914, Supp. III, July 26, 1988.

106. *Interior Water Right May Drown Colorado Wilderness Bills*, High Country News, (September 11, 1989) at 6.

107. *Sierra Club v. Watt*, 659 F.2d 203 D.C.Cir. (1981).

108. See *Federal Water Rights*, 86 INTERIOR Dec. 553 (1979).

protect various uses. Given the large volumes of water requested, along with the seniority of their priority dates, the issue is politically volatile, and final decisions are therefore slow in the making.

To date, only some of the federal land management agencies within Montana have claimed federal reserved water rights for instream flow purposes. The Bureau of Land Management has claimed a federal reserved water right on the Wild and Scenic River stretch of the Missouri River to maintain flows for the paddlefish.¹⁰⁹ The U.S. Fish and Wildlife Service has claimed reserved rights to maintain lake levels and instream flows on five wildlife refuges.¹¹⁰ At one point, the National Park Service submitted claims for instream flow reserved rights in both Glacier and Yellowstone National Parks, but these proposals were later withdrawn.¹¹¹ Finally, although the U.S. Forest Service has yet to submit claims for reserved water rights on the national forests, there is speculation that they may submit a proposal for instream flow reserved rights depending on the outcome of ongoing litigation over this issue in Colorado¹¹² All these claims are currently under negotiation with the state's Reserved Water Rights Compact Commission,¹¹³ and may eventually provide another vehicle for protecting instream flows on public lands.

C. Northwest Power Planning Council Protected Areas

The Northwest Power Planning Act¹¹⁴ directs the Northwest Power Planning Council (NWPPC) to develop a "program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries." In response to this direction, the NWPPC adopted the Pacific Northwest Hydro Assessment Study Work Plan, designed to designate protected areas on the basis of fish and wildlife values and to rank potential hydropower sites on the basis of

109. U.S. BUREAU OF LAND MANAGEMENT, *INSTREAM FLOW REQUIREMENTS FOR THE WILD AND SCENIC MISSOURI RIVER* (1984).

110. Personal communication with Susan Cottingham, Reserved Water Rights Compact Commission, on September 7, 1989. Some documentary information is on file with the Compact Commission.

111. The National Park Service presented a draft proposal to the Reserved Water Rights Compact Commission in April, 1985. Personal communication with Susan Cottingham, Reserved Water Rights Compact Commission, on September 7, 1989.

112. See *Supra* note 103. The U.S. Forest Service presented a proposal to the Reserved Water Rights Compact Commission on November 20, 1986. Personal communication with Susan Cottingham, Reserved Water Rights Compact Commission, on September 7, 1989.

113. The Reserved Water Rights Compact Commission was formed in 1979 for the purpose of negotiating with federal agencies and Indian tribes to quantify reserved rights. Only one compact has been completed to date. The Fort Peck Compact was completed in 1985. See MONT. CODE ANN., § 85-2-201 (1987).

114. 16 U.S.C. § 839b(h)(1)(A).

fish and wildlife impacts.¹¹⁵ During the course of this study, it became apparent that the distinction between “protected areas” and “site ranking” was confusing, and in October, 1987, the staff of the NWPPC distributed an issue paper on “Protected Areas Designation” in which the site ranking language was largely dropped.¹¹⁶

In place of the original site ranking concept, the NWPPC staff proposed the use of only two categories of sites: (1) sites which fall into high value fish and wildlife areas and therefore should be designated as unsuitable for development; and (2) sites which do not fall into the high resource value areas and therefore are potentially developable.¹¹⁷ The staff further recommended that the NWPPC develop rules to designate protected areas according to the following guidelines: (1) protect all areas currently used by anadromous (ocean-migrating) fish or potentially usable by anadromous fish in the Columbia River Basin; (2) protect all areas currently used by anadromous fish outside the Columbia River Basin; (3) protect high quality resident fish and wildlife areas both inside and outside the Columbia River Basin; and (4) provide for reevaluation of protected areas after basinwide planning is completed.¹¹⁸

After considerable public participation, on August 10, 1988 the NWPPC adopted a proposal to designate over 2,000 stream miles, or about 30 percent of the 6,800 stream miles in the Columbia River Basin in western Montana, as “protected areas” because of their importance as critical fish and wildlife habitat.¹¹⁹ According to amendments to the Columbia River Basin Fish and Wildlife Program, no new hydroelectric development should be allowed in designated “protected areas.”¹²⁰ The amendments clarify that this provision applies only to “new” hydropower projects, and that existing hydroelectric projects, relicensing of existing projects, or adding hydropower to existing non-hydropower projects are not subject to the provision.

The NWPPC urges the Federal Energy Regulatory Commission, the Bureau of Reclamation, and the U.S. Army Corps of Engineers to consider the “protected areas” in their decisionmaking processes “to the fullest extent practicable.”¹²¹ In addition, the amendments say that the Bonneville Power Administration should not acquire power from hydroelectric

115. NORTHWEST POWER PLANNING COUNCIL, STAFF ISSUE PAPER PROTECTED AREAS DESIGNATION (1987).

116. *Id.*

117. *Id.*

118. *Id.*

119. NORTHWEST POWER PLANNING COUNCIL, PROTECTED AREAS AMENDMENTS AND RESPONSE TO COMMENTS, (Sept. 14, 1988).

120. *Id.*

121. *Id.*

facilities located in protected areas.¹²² Although the protected areas would not result in water rights for the protection of instream flows, they would indirectly protect instream values by eliminating certain stream segments from hydropower development.

D. *Indian Reserved Water Rights*

Indian reserved water rights¹²³ can also result in the protection of instream flows in Montana, particularly where Indian tribes have treaty fishing rights. Interference with river flows by diversion, impoundment, or pollution of waters so that fish habitat is damaged may reduce the ability of tribes to take a meaningful share of fish as guaranteed in their treaties. A situation recently emerged in Montana where the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation claimed a reserved water right for the protection of fish under their treaty.¹²⁴

In the summer of 1986, the U.S. Bureau of Indian Affairs (BIA) established a minimum streamflow policy for the Flathead Reservation in northwest Montana. One of the effects of the policy was to diminish the water available for non-Indian irrigated agriculture. At the request of the irrigators, a federal district court in Montana granted a preliminary injunction prohibiting the BIA from implementing the policy.¹²⁵

The Ninth Circuit Court of Appeals dismissed the preliminary injunction and remanded the case to the district court on grounds that the district court erred in applying the principle of "just and equal distribution."¹²⁶

"This principle assumes that all who seek a right to the water stand on the same footing, notwithstanding the lack of an adjudicated decree establishing priorities among water right users. The injunction failed to accord the aboriginal fishing rights the protection federal law gives them against the claims and considerations of junior appropriators. Since the priority of the aboriginal fishing rights are dated time immemorial, they obviously predate all competing rights, and the district court erred in holding that water claimed under tribal aboriginal fishing rights

122. *Id.* (Amendments to the Northwest Conservation and Electric Power Plan).

123. *Winters v. United States*, 207 U.S. 564 (1908). For a more complete discussion of Indian reserved water rights in Montana, see MacIntyre, *Quantification of Indian Reserved Water Rights in Montana: State Ex Rel. Greely in the Footsteps of San Carlos Apache Tribe*, 8 PUBLIC LAND LAW REVIEW 33-59 (1987). See also the other articles in this volume.

124. *Treaty of Hell Gate*, 12 Stat. 975 (1859).

125. *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States of America and Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 832 F.2d 1127 (9th Cir. 1987).

126. *Id.*

must be shared with junior appropriators."¹²⁷

Since this case was appealed and has been remanded to the district court to determine the extent to which the tribes are entitled to instream flows under their treaty, it remains to be seen how effective this strategy will be in protecting instream values. The only other Indian tribes that have formally claimed and received a reserved water right for instream flow purposes are those on the Fort Peck Reservation.¹²⁸ Article III, Section L of the Fort Peck-Montana Compact specifies that:

"At any time within five years after the effective date of this Compact, the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation. These instream flows shall be part of the Tribal water right with a priority date of May 1, 1888. Water remaining in a stream to maintain instream flows pursuant to such a schedule shall be counted by the Tribes as a consumptive use of water."¹²⁹

Although no other Indian tribes have proposed to claim a reserved water right for instream flow purposes, it is likely that the tribes on the Flathead Indian Reservation may make such claims following the model of the Fort Peck-Montana Compact.

E. *The Public Trust Doctrine*

Although the public trust doctrine has been applied in Montana, its utility for protecting or enhancing instream flows remains an open question. The Montana Supreme Court applied the public trust doctrine, apparently for the first time, in three related decisions: *Montana Coalition for Stream Access v. Hildreth*,¹³⁰ *Montana Coalition for Stream Access v. Curran*,¹³¹ and *Galt v. State*.¹³² The issue in these cases was the public's right to use water courses for recreational purposes, such as floating and fishing.¹³³

The significance of these cases with respect to using the public trust

127. *Id.*

128. MONT. CODE ANN., § 85-2-201 (1987).

129. *Id.*

130. 684 P.2d 1088 (Mont. 1984).

131. 682 P.2d 163 (Mont. 1984).

132. 731 P.2d 912 (Mont. 1987).

133. For an excellent review of these cases, along with the development of the public trust doctrine in Montana, see Thorson, Brown, and Desmond, *supra*, note 6. See also Josephson, *An Analysis of the Potential Conflict Between the Prior Appropriation and Public Trust Doctrines in Montana Water Law*, 8 PUB. LAND L. REV. 81-114 (1987).

doctrine to protect instream flows in Montana is difficult to assess. The issue before the court — the public's right to use waterways for recreation — does not raise a question regarding the duties or limitations that may be imposed on the state or its permittees in the allocation of water resources. Nevertheless, the application of the public trust doctrine in these cases sets a precedent for the use of the doctrine in Montana.

In addition, given the broad application of the public trust doctrine in other western states,¹³⁴ it is not inconceivable that it could eventually be used to protect instream flows in Montana. Although the traditional public trust doctrine involved the disposition of submerged lands to private or allegedly inappropriate public uses, its application has been significantly extended to a variety of purposes through court decisions and legislation.¹³⁵ First, some states have extended the coverage of doctrine beyond those watercourses navigable for title to all, or nearly all, waters of the state. The leading example is Montana,¹³⁶ where the courts and legislature have applied the public trust to all waters usable for recreational purposes. Second, some cases have extended the doctrine beyond the traditional purposes of commerce, navigation, and fishing, with the most common "new" purposes being various forms of recreation.¹³⁷ Third, various cases have extended the reach of the doctrine beyond watercourses per se,¹³⁸ and have applied it to dry sand beaches,¹³⁹ wildlife,¹⁴⁰ state parks,¹⁴¹ and all

134. For a history of the public trust doctrine, including several recent cases, see THE PUBLIC TRUST AND THE WATERS OF THE AMERICAN WEST: YESTERDAY, TODAY, AND TOMORROW (Lewis and Clark Northwestern School of Law, November 18 and 19, 1988); see also *Natural Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983) (protecting lake levels in Mono Lake from diversions in California); *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 () and *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (198) (protecting recreation, aesthetics, water quality, and a range of wildlife values in Idaho); *Canihti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987) (protecting fishing, boating, swimming, waterskiing, and related purposes in Washington); *United Plainsmen v. North Dakota State Water Conservation Commission*, 247 N.W. 2d 457 (N.D. 1976) (protecting water supply fisheries, and future water needs in North Dakota); and *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982) (protecting all public resources in Hawaii).

135. See Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, ENVTL. L. 465-6.

136. *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).

137. See, e.g., *Marks v. Whitney*, 491 P.2d 374 (1971) (declaring trust purposes are far broader than traditional uses of navigation, commerce, and fishing, and include use as open space and wildlife habitat, and use for scientific purposes, hunting, bathing, and swimming); *Orion Corp. v. Washington*, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996 (1988) (declaring public trust rights include navigation, fishing, swimming, water skiing, and other related recreational purposes); and *Caminiti v. Boyle*, 732 P.2d 989 (1987) (declaring fishing, boating, swimming, water skiing, and related purposes as trust values).

138. For a compilation of these cases, see Reed, *The Public Trust Doctrine: Is It Amphibious?* 107 ENVTL. L. & LITIGATION 116 (1986).

139. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (1984).

“public resources.”¹⁴²

Finally, and the extension most germane to the protection of instream flows, several state courts have extended the public trust doctrine to the appropriation of water. In general, these courts hold or suggest that water rights might be curtailed if such appropriations substantially impair the public trust values at stake. The *Mono Lake*¹⁴³ and *Bay Delta*¹⁴⁴ cases are the most notable opinions on this extension, but similar opinions can be found in Alaska,¹⁴⁵ Idaho,¹⁴⁶ and North Dakota.¹⁴⁷

While the practical affect of the *Mono Lake* case on the use of the public trust doctrine to protect instream flows is still uncertain, Professor Blumm¹⁴⁸ argues that recent cases illustrate at least four different types of public trust remedies: “(1) a public easement guaranteeing access to trust resources; (2) a restrictive servitude insulating public regulation of private activities against constitutional taking claims; (3) a rule of statutory and constitutional construction disfavoring terminations of the trust; and (4) a requirement of reasoned administrative decision making.”¹⁴⁹ While these remedies vary, Blumm argues that they all possess the unifying theme of promoting public access to trust resources or to decision makers with authority to allocate those resources.

IV. INSTREAM FLOW PROTECTION AND THE STATE WATER PLAN

Although Montana has made significant progress in protecting instream flows, the current activities are fragmented, consisting of several policies, programs, and practices, but no comprehensive plan and little coordination among state, federal, regional, and Indian agencies. Moreover, some of the existing mechanisms need refinement if they are to effectively protect instream resources. New legal and institutional mechanisms may also need to be developed to enhance or increase flows in

140. See, e.g., *Wade v. Kraemer*, 459 N.E.2d 1025 (1985).

141. See, e.g., *Gould v. Greylock Reservation Comm'm*, 215 N.E.2d 114 (1966). For a case extending the trust to a national park, see *Sierra Club v. Department of Interior*, 398 F.Supp. 284 (N.D. Cal. 1975).

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

143. See *supra*, note 134. For a complete discussion and evaluation of this case, see Summerville, *The Shadow of the Mono Lake Decision in Montana*, 6 PUB. LAND L. REV. 203-12 (1985).

144. *United States v. State Water Resources Control Board*, 227 Cal. Rptr. 161 (1986).

145. *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988).

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

147. *United Plainsmen v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457, 461-63, (N.D. 1976).

148. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573-604 (1989).

149. *Id.* at 578.

dewatered basins. During 1988, these and many other issues were addressed under the aegis of the state water plan.

A. *The State Water Plan*

In 1967, the Montana legislature passed the Water Resources Act which outlines several water management goals for the state.¹⁵⁰ The legislature also called for the development of a state water plan as the mechanism to accomplish the goals.¹⁵¹ According to statutory guidelines, the state water plan should be comprehensive; coordinated; provide for multiple uses; set out a progressive program for the conservation, development, and utilization of the state's water; and propose the most effective means by which the state's water resources may be used for the benefit of the people with due consideration of alternative uses and combinations of uses.¹⁵²

The DNRC is responsible for developing the state water plan. In the process of formulating the plan, the DNRC is to consult with and solicit the advice of the legislature's Water Policy Committee; hold public meetings prior to plan adoption; adopt the plan with the approval of the BNRC; publish the plan; and submit it to the Water Policy Committee and to each general session of the legislature.¹⁵³

Prior to 1987, efforts to develop the state water plan focused on basin plans.¹⁵⁴ While these plans resulted in volumes of technical information, they never considered the institutional and political feasibility of implementing their recommendations. Consequently, the plans provided little guidance to resource managers in resolving water management problems and ended up as "shelf art."

In 1987, the DNRC embarked on a new approach to developing the state water plan. After reviewing the water planning processes of other western states, the DNRC decided to adopt an approach used by the Kansas Water Office.¹⁵⁵ This approach allows individuals and groups affected by water management decisions to participate directly in the development of policies, programs, and management decisions.

As currently designed, the Montana state water plan is a collaborative, consensus-building process for resolving water policy and manage-

150. MONT. CODE ANN. § 85-1-101.

151. MONT. CODE ANN. § 85-1-101(10).

152. MONT. CODE ANN. § 85-1-203.

153. MONT. CODE ANN. § 85-1-203.

154. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, STATE WATER PLAN DEVELOPMENT: A REVISED APPROACH (REPORT TO THE FIFTIETH SESSION OF THE MONTANA LEGISLATURE, JANUARY, 1987).

155. KAN. STAT. ANN., § 82a-903.

ment issues.¹⁵⁶ It is an issue-oriented plan designed to address the full range of water management issues facing the state. The planning process recognizes that a large number of federal, Indian, state, local, and even regional entities have a role in the management of Montana's water, and that several parties are affected by water management decisions, including irrigators, municipalities, energy and industrial developers, and fish, wildlife, and outdoor enthusiasts. Accordingly, it provides an opportunity for all these parties to be involved in formulating and implementing the plan, thereby promoting coordination and cooperation in resolving water management issues. Finally, the planning process is continuous and adaptable, allowing for changes in social, economic, and environmental objectives and needs.

Although the DNRC is responsible for developing the state water plan, it has realized that the most valuable role it can play is not to determine what decision or outcome is reached, but how decisions are made. The DNRC has decided to facilitate the development of the state water plan by focusing on such concerns as who is involved in the process; how issues are identified, framed, and their consideration bounded; what information is brought to bear; how alternatives are developed and analyzed; how trade-offs are made; and what the procedures are for implementing, monitoring, enforcing, and evaluating the final decisions. The state water planning process provides a forum for the broad set of interests affected by water management decisions to voluntarily sit down together, exchange information, and develop solutions through negotiation, collaboration, and consensus building.

The Montana state water plan focuses on two basic types of issues. First, the planning process is designed to document, evaluate, and revise the legal and institutional framework for resolving statewide water management issues, such as groundwater management and wild and scenic river protection. Second, it addresses basin-specific water management issues. This effort may focus on a single issue at a time, such as water pollution, or consider multiple water uses at the same time. Using the legal and institutional tools developed by addressing statewide water management issues, the long-term objectives of the basin-specific plans are to document available water supplies and existing uses and rights; to project future water resource needs and priorities; and to integrate water, land,

156. The information presented in this section is based on the author's participation in the design and administration of Montana's state water plan. For a more detailed discussion and evaluation of the state water planning process, see McKinney, *Water Resources Planning: A Collaborative, Consensus Building Approach*, 1(4) SOCIETY AND NATURAL RESOURCES 335-49 (1988); and McKinney, *State Water Planning: A Forum for Proactively Resolving Water Policy Disputes*, 26(2) WATER RESOURCES BULLETIN 323-31 (1990).

environmental, social, and economic goals, identify conflicts, and assess tradeoffs in order to optimize water use within the basin.

During 1988, the first year of implementing this new planning approach, the governor appointed a State Water Plan Advisory Council¹⁵⁷ (SWPAC) to oversee development of the plan. The SWPAC consisted of ten members that represented a broad range of interests in water resources, including the directors of the state departments of Natural Resources and Conservation; Fish, Wildlife and Parks; and Health and Environmental Sciences; a representative from the Governor's Office; four legislators (representing a diversity of water user interests); and two representatives of the public (a recognized water law expert and the manager of a large irrigation district).

The SWPAC selected four statewide issues to address during the first planning cycle: including water information management; federal hydro-power licensing and state water rights; instream flow protection; and agricultural water use efficiency.¹⁵⁸ The DNRC then created broad-based Technical Advisory Committees to help analyze each issue and provide alternative solutions and recommendations.

As it was finally adopted, the instream flow protection plan section begins with the following policy statement: "Instream flows are an important use of water, and mechanisms should be developed and refined to protect and enhance instream resources. However, instream flow protection activities must not adversely affect existing water rights and should be weighed and balanced against alternative future uses of water."¹⁵⁹ Within this broad policy framework, the plan section goes addresses four issues: (1) incorporating instream flow concerns into the water use permitting process; (2) evaluating the security of instream flow reservations; (3) increasing instream flows in dewatered streams; and (4) sponsoring research to improve instream resource management and decisionmaking.¹⁶⁰

B. *Incorporate Instream Flows into the Permitting Process*

The first issue addressed is the need to incorporate instream flow concerns into the water use permitting and change of use processes.¹⁶¹ As mentioned in Section III of this article, the state of Montana has public

157. Gov. of Mont. Exec. Order No. 20-86 (December 31, 1986) (creating the State Water Plan Advisory Council).

158. *Id.*

159. WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (February, 1988) at 2.

160. *See generally Id.*

161. *Id.* at 3.

interest criteria that could be used to condition new water use permits and changes in existing water rights.¹⁶² However, the criteria apply only when an applicant wishes to appropriate more than 4,000 acre-feet per year and 5.5 cubic feet per second. To date, the criteria have not been applied to protect instream flows because no application has arisen that would trigger the criteria. In addition, the criteria are not applicable to smaller water projects or change applications that may also threaten instream values. Finally, the criteria do not relate the size of the application to the quantity of water available in a watercourse.

During the state water planning process, several options were considered for incorporating instream flow concerns into the water use permitting process.¹⁶³ The first was to simply eliminate the threshold that triggers the public interest criteria, and apply the criteria to all new water use permits and change applications. The result of this option, in certain cases, would be to deny or condition new water use permits and change applications by requiring a certain amount of water to be left instream. While such conditions would not result in an instream flow water right per se, they would result in de facto reservations of water for instream flow purposes.

Another option was to relate the size of the water right application to the amount of water available in a stream, and apply the public interest criteria when the application exceeds a given percent of the available flow. A third option was to revise the criteria to consider the cumulative impacts of water appropriations on an entire river basin.

The final option was to improve the ability of the reservation process to protect instream flows from threatening water use permits by establishing the priority dates for reservations at the time applications are filed, rather than when the BNRC makes its final decision. Since the reservation process is very time consuming, establishing priority dates at the time of application would protect the pending instream reservations from permits for offstream water uses that are acquired while the reservation applications are being reviewed.

After considerable debate among environmental and agricultural water users, the final recommendation in the state water plan is to promote

162. MONT. CODE ANN. § 85-2-311(2)(c).

163. See WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, INSTREAM FLOW PROTECTION, STATE WATER PLAN ISSUE PAPER No. 2 at 33-5, 44 (April 15, 1988); MONTANA WATER PLAN — INSTREAM FLOW PROTECTION COMPONENT EXECUTIVE SUMMARY (RECOMMENDATIONS FROM THE EXPANDED INSTREAM FLOW PROTECTION TECHNICAL ADVISORY COMMITTEE, at 4-5, 9 (May 16, 1988); WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (PRELIMINARY DRAFT) at 3 and 5 (1988); and WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (REVISED DRAFT), at 3-4 (1988).

more timely acquisition of instream flow reservations by assigning a priority date at the time a qualified applicant submits a notice of intent to reserve water.¹⁶⁴ This recommendation is designed to deter the granting of permits that would threaten instream resources while reservation applications are being reviewed. It also allows the instream flow reservants to object to future water use permits or change applications that may threaten instream flow values.

During the 51st legislative session, Senator William P. Yellowtail and Representative Robert Ream, both members of the SWPAC in 1988, introduced SB 447 to implement this recommendation of the state water plan.¹⁶⁵ The bill, which passed both the Senate and the House without much debate, amended MCA § 85-2-316, the water reservation statute. MCA § 85-2-316(9)(a) now specifies that a water reservation has a priority of appropriation dating from the filing, with the DNRC, of a notice of intention to apply for a water reservation in a basin in which not other notice of intention is pending. The notice of intention to apply must specify the basin in which the applicant is seeking a reservation.

Once the DNRC receives the notice of intent, it must then identify all potential water reservation applicants in the basin and notify them of the opportunity to submit an application for a reservation and receive the base priority date, as defined above.¹⁶⁶ To receive the base priority date, the applicants must submit a correct and complete water reservation application within one year after the filing of the notice of intent to apply.¹⁶⁷ The Board may extend the time for preparing the application upon a showing of good cause.¹⁶⁸

As recommended in the state water plan, the Board may subordinate a water reservation to a water use permit if: (1) the permit application was accepted by the DNRC before the date of the BNRC order granting the reservation; and (2) the effect of subordinating the reservation to one or more permits does not interfere substantially with the purpose of the reservation.¹⁶⁹ The BNRC also establishes the relative priority of all the reservations that have the same base priority date.

Although SB 447 implements one recommendation of the state water plan section on instream flow protection, it only indirectly addresses the problem it was designed to resolve — i.e. how to incorporate instream flow concerns into the water use permitting and change application processes.

164. *Supra*, note 159 at 3.

165. S.B.447, 51st Montana Legislature.

166. MONT. CODE ANN. § 85-2-316(9)(b).

167. MONT. CODE ANN. § 85-2-316(9)(c).

168. *Id.*

169. MONT. CODE ANN. § 85-2-316(9)(d).

Based on this strategy, instream flow concerns may be incorporated into the permitting and change processes only where an instream flow reservation exists. To date, such reservations exist only in the Yellowstone River basin,¹⁷⁰ and thus instream flow values are not being incorporated into the administrative proceedings on a considerable number of high-value streams in the state. More direct and efficient strategies to accomplish this purpose are discussed on Section V.

This mechanism may also have little impact on-the-ground because of the possibility of subordinating an instream flow reservation to an intervening water use permit. Clearly such a provision defeats the entire purpose of incorporating instream flow concerns into the water use permitting and change application processes. However, it presumably maintains the BNRC's discretion to weigh and balance competing water uses within a particular stream or basin.

C. *Evaluate the Security of Instream Reservations*

The second issue addressed in the instream flow section of the state water plan is the security (or lack thereof) of reservations for instream flow purposes. As noted in Section III of this article, reservations are to be reviewed at least once every ten-years, and if the objectives of the reservation are not being met, the BNRC may extend, revoke, or modify the reservation.¹⁷¹ While this periodic review of all water reservations allows the state to reconsider the allocation of water in light of emerging needs and changing priorities, it does not provide much security to either instream or offstream reservations. Moreover, if the BNRC finds that the total amount of an instream flow reservation is not needed to fulfill its purpose, *and* a qualified applicant can show that its need outweighs the need of the instream reservation holder, the excess water may be reallocated to the competing applicant.¹⁷²

Once again, several options were considered in response to this issue during the planning process.¹⁷³ The first was to review only those

170. *Supra*, note 39.

171. MONT. CODE ANN. § 85-2-316(10).

172. MONT. CODE ANN. § 85-2-316(11).

173. See WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, INSTREAM FLOW PROTECTION, STATE WATER PLAN ISSUE PAPER No. 2 at 35-8, 44-5 (April 15, 1988); MONTANA WATER PLAN — INSTREAM FLOW PROTECTION COMPONENT EXECUTIVE SUMMARY (RECOMMENDATIONS FROM THE EXPANDED INSTREAM FLOW PROTECTION TECHNICAL ADVISORY COMMITTEE, at 5-6, 9-10 (May 16, 1988); WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (PRELIMINARY DRAFT) at 3, 5 (1988); and WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (REVISED DRAFT), at 3-4 (1988).

reservations that have not been put to beneficial use, and to consider instream flow reservations perfected upon approval by the BNRC. This option would thus eliminate both the ten-year review and the potential for reallocating instream flow reservations. However, it would also eliminate the BNRC's ability to reallocate reserved water in light of new information and changing social values.

Another option was to delete the ten-year review for all reservations put to beneficial use, and again consider instream reservations perfected upon approval by the BNRC. This option would maintain the BNRC's ability to reallocate water reserved for instream uses once every five years. However, it would clearly place the burden of proof on the entity wishing to reallocate water away from instream flow reservations. This option would also maintain the BNRC's ability to reallocate both reserved water that is not put to beneficial use, as well as water reserved for instream uses. It marginally improves the security of instream reservations by eliminating the ten-year review for instream reservations.

A third option was to evaluate the ten-year review process after the Board completes its review of the Yellowstone River reservations in 1988. The evaluation would identify and assess any problems associated with the security of instream reservations.

While there was once again some disagreement on how to resolve this issue, the state water plan recommends an evaluation of the relative security of instream flow reservations after the BNRC completes its review of the Yellowstone River reservations.¹⁷⁴ The BNRC is currently reviewing the Yellowstone River reservations. This strategy was incorporated into the state water plan based on the argument that it is difficult to evaluate the security of instream reservations, and thus determine what action is needed, without first going through the process of a ten-year review.

Although an evaluation of the ten-year review process after the completion of the Yellowstone River reservation review may be appropriate, it does not adequately address the heart of this issue. The security of instream reservations is threatened less by the ten-year review process than by the possible reallocation of instream reservations once every five years. While all reservations, both instream and offstream, are subject to the ten-year review process, only instream flow reservations may be reallocated on the basis of competing uses. Although no such reallocation has yet taken place, the potential for such a reallocation exists. As a simple matter of fairness, instream and offstream reservations should be treated equally. Either they should both be subject to reallocation once every five years or

174. *Supra*, note 159 at 3.

the reallocation provision should be deleted.

D. *Increasing Flows in Dewatered Streams*

The third, and perhaps most important issue addressed in the state water plan section on instream flow protection is the need for legal and institutional mechanisms to increase flows in dewatered streams.¹⁷⁶ Instream resources are often threatened in streams that are subject to regular or periodic low flow conditions due to overappropriation, drought, or a combination of the two. Since the water reservation process is prospective, acquiring junior rights to protect against future consumptive appropriators is ineffective in dealing with streams that are being seriously dewatered. The issue here is not how to maintain existing flow levels, but how to increase the flows in dewatered streams.

Once again, several options were considered in response to this issue.¹⁷⁶ The first set of options focused on the transfer of senior, offstream water rights to public or private entities for instream flow purposes. Several variations of this option were considered.

In certain circumstances, existing consumptive water rights might be sold voluntarily to either public or private entities, with the water normally depleted from the stream legally accruing to instream flows. As an alternative to the purchase of existing rights, offstream water rights might be leased for instream purposes. According to this strategy, an irrigator, for example, would receive annual lease payments from an instream water use advocate and continue to operate as usual until drought occurs and water for instream purposes becomes critical. During the drought, and in accordance with the lease agreement, the irrigator would cease his normal water use and allow the flows involved to remain instream. Even though the consumptive use would be curtailed, the irrigator would have been compensated for this loss and may be able to use the land involved for a non-irrigated crop.

Yet another transfer-type option that was considered focused on the donation of offstream water rights to instream uses. In addition, the option

175. *Supra*, note 159 at 3.

176. See WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, INSTREAM FLOW PROTECTION, STATE WATER PLAN ISSUE PAPER No. 2 at 38-40, 45 (April 15, 1988); MONTANA WATER PLAN — INSTREAM FLOW PROTECTION COMPONENT EXECUTIVE SUMMARY (RECOMMENDATIONS FROM THE EXPANDED INSTREAM FLOW PROTECTION TECHNICAL ADVISORY COMMITTEE, at 7-8, 10 (May 16, 1988); WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (PRELIMINARY DRAFT) at 4, 6 (1988); and WATER RESOURCES DIVISION, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA WATER PLAN MANAGEMENT SECTION: SUBSECTION ON INSTREAM FLOW PROTECTION (REVISED DRAFT), at 3-5 (1988).

of allowing emergency transfers of water rights, without review for potential adverse affects to existing water users, was also considered.

In addition to simple transfers from senior consumptive water rights to instream uses, water use efficiency might also be encouraged or paid for by an instream flow advocate, with the conserved water being legally appropriated for instream use. However, even if water salvaged from conservation measures could be voluntarily sold or otherwise transferred, there is still the possibility that the right may be considered abandoned.¹⁷⁷ There is little incentive to conserve water if it cannot be sold or otherwise transferred. In order to use this approach, water right abandonment statutes would have to be amended so that permanent or temporary transfers of conserved water would not result in the permanent loss of the right.

As an alternative to the transfer of water rights from offstream to instream uses, the public trust doctrine was also considered as a mechanism to increase instream flows in dewatered streams. While the application of the public trust doctrine in Montana has been very limited,¹⁷⁸ there are important precedents throughout the West that may lead to more specific applications with respect to protecting instream values. While such an approach may disrupt existing water uses and therefore is likely to be controversial, it nevertheless provides a last resort to protecting valuable instream flows and the public's interest in free-flowing water.

Another option considered for increasing flows in dewatered streams was adjudicating water rights and appointing water commissioners. Instream values may be protected in certain cases by the delivery of large quantities of water to downstream users with senior water rights. Thus, by completing the adjudication process and appointing water commissioners where water rights are not voluntarily enforced, instream flow values may be protected in certain cases by the delivery of water to downstream, senior water right holders.

The final option considered in relation to this issue was to provide funding and encourage public entities to purchase or lease water stored in reservoirs above dewatered streams. This option also contemplated revising the operating procedures on reservoirs to coincide with instream flow needs; assessing the feasibility of new storage projects to enhance instream flows; and promoting cooperative solutions at the local level. Finally, this option suggested that public entities should pursue inter-basin transfers and groundwater sources as alternative ways to increase flows in dewatered streams.

177. MONT. CODE ANN. § 85-2-404.

178. See generally, text accompanying notes 126-149.

After considerable debate and much disagreement, the state water plan recommended that the DFWP be allowed to lease water rights from offstream or consumptive uses for purposes of protecting instream flows in important streams.¹⁷⁹ As explained in the state water plan, this opportunity is entirely voluntary and would not jeopardize existing offstream water rights. It would result in the temporary transfer of an offstream water right to increase instream flows during critical low flow periods. Under the lease agreement, the offstream water user would still hold the water right and be compensated for leaving water in the stream during certain years. This strategy would also allow for the temporary emergency leasing of offstream or stored water rights to protect instream resources during critical low flow periods. Leases for instream flow purposes could not occur if they would result in adverse effects to existing water users.

This recommendation, more than any other in the state water plan, created a considerable amount of controversy among a variety of water users. It was also the focus of much misunderstanding and misinformation. Nevertheless, the leasing concept is embodied in HB 707 of the 51st legislative session,¹⁸⁰ and is discussed at length below.

A second recommendation in the state water plan to address the enhancement of instream flows is to support public entities in purchasing or leasing water stored in reservoirs above dewatered streams and in revising the operating procedures on such reservoirs.¹⁸¹ In addition, the state water plan recommends that the feasibility of new storage projects to enhance instream resources should be assessed. Finally, cooperative solutions at the local level, such as irrigation scheduling, are supported by the state water plan. The two recommendations on water storage are being considered in the 1989-90 state water planning cycle, which focuses, among other issues, on water storage.

E. *Sponsor Research to Support Instream Resource Management*

In addition to policy and program recommendations, the state water plan section on instream flow protection also addresses the need for additional research and information on which to make instream resource management decisions.¹⁸² Three specific areas of research were identified in the final plan section.

First, the effect of return flows on the maintenance and enhancement of instream resources should be studied. Second, instream flow quantification methods should be evaluated to determine if existing methods result in

179. *Supra*, note 159 at 3.

180. H.B. 707, 51st Montana Legislature., codified as MONT. CODE ANN. §§ 85-2-436 and 437.

181. *Supra*, note 159 at 4.

182. *Supra*, note 159 at 4.

an appropriate amount of water for instream resources. Finally, the state water plan recommends an assessment of the physical availability of water to meet the demands for instream resource protection. In addition to these three research and information needs, the need to develop methods to quantify or at least better justify instream flows for recreation, aesthetic, and other "intangible" benefits was considered early on in the planning process, but was later deleted.

As may be apparent, the state water plan's first look at the issue of instream flow protection has largely been a learning process. The planning process provided a forum for diverse interests to come together and discuss issues of mutual concern. Although the substantive recommendations on instream flow protection may leave room for improvement, the process of bringing all the affected interests together to discuss the issue has resulted in opening new communication channels and educating all water users on the many values associated with water in Montana.

V. HB 707: AN INCREMENTAL STEP

Without question the most controversial, and perhaps the most far-reaching spin-off of the state water plan section on instream flow protection is HB 707. After the original bill was modified significantly by agricultural interests, it appeared to be dead in March, 1989.¹⁸³ It was resurrected, however, after lengthy debate, amendments, and procedural maneuvering. Eventually, the amended bill proved acceptable to enough parties and was passed by the Montana legislature. It was signed by the Governor on May 11, 1989. This section reviews the specific provisions of the legislation and offers a critique of the bill.

A. *The Water Leasing Study and Pilot Program*

HB 707 calls for a thorough study of water leasing for purposes of instream flow protection.¹⁸⁴ It also includes a pilot program that authorizes the DFWP to lease water rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries.¹⁸⁵

The water leasing study and pilot program begins when the DFWP, with the consent of the Fish and Game Commission, submits a list of

183. For the legislative history of H.B. 707, see History and Final Status of Bills and Resolutions of the Senate and House of Representatives of the State of Montana, Fifty-First Legislature at 478 (Regular Session, January 2, 1989 to April 21, 1989).

184. Statement of Intent, H.B. 707, 51st Montana Legislature. The strategy incorporated into H.B. 707 is generally referred to as a "dry-year" option. The basic idea is that one party, such as the DFWP, may acquire an option to lease water from another party, such as an irrigator, during dry years.

185. MONT. CODE ANN. §§ 85-2-436 and 437.

potential stream reaches for the study to the BNRC.¹⁸⁶ The BNRC may declare a stream reach eligible for leasing only if it finds that water leasing is “necessary” to maintain or enhance streamflows for fisheries.¹⁸⁷ The BNRC may designate no more than five stream reaches in the state where water leasing pursuant to HB 707 may occur.¹⁸⁸

Once the BNRC designates no more than five stream reaches on which leasing may occur, the DFWP then prepares and submits an application for a lease agreement. The application for a lease authorization must include specific information on the length and location of the stream reach in which the streamflow must be maintained or enhanced.¹⁸⁹ The application must also provide a detailed streamflow measuring plan that describes the points where and the manner in which the streamflow will be measured.¹⁹⁰ The DFWP must pay all the costs associated with installing measuring devices and/or providing personnel to measure streamflows.¹⁹¹

Although not required by HB 707, the application will also presumably include the lessors and the amount and timing of water to be leased. The maximum quantity of water that may be leased is the amount historically diverted by the lessor.¹⁹² However, only the amount historically consumed, or a smaller amount if specified by the DNRC in the lease authorization, may be used to maintain or enhance streamflows below the lessor’s point of diversion.¹⁹³

Upon receipt of an application for a lease authorization, the DNRC must publish a notice of the application consistent with MCA § 85-2-307.¹⁹⁴ Parties who believe they may be adversely affected by the proposed lease may file an objection as provided in MCA § 85-2-308.¹⁹⁵ A lease may not be approved until all objections are resolved.¹⁹⁶ After resolving all the objections, the DNRC may authorize a lease of an existing right to maintain or enhance streamflows for the benefit of fisheries.¹⁹⁷ The priority date for a lease authorization is the same as the priority date of the water right leased.¹⁹⁸

A lease may not be issued for a term of more than four years, but may

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186. MONT. CODE ANN. § 85-2-437(1).
 187. MONT. CODE ANN. § 85-2-437(2).
 188. MONT. CODE ANN. § 85-2-437(3).
 189. MONT. CODE ANN. § 85-2-436(2).
 190. MONT. CODE ANN. § 85-2-436(2)(C).
 191. MONT. CODE ANN. § 85-2-436(2)(j).
 192. MONT. CODE ANN. § 85-2-436(2)(d).
 193. MONT. CODE ANN. § 85-2-436(2)(d).
 194. MONT. CODE ANN. § 85-2-436(2)(b).
 195. MONT. CODE ANN. § 85-2-436(2)(b).
 196. MONT. CODE ANN. § 85-2-436(2)(b).
 197. MONT. CODE ANN. § 85-2-436(2)(b).
 198. MONT. CODE ANN. § 85-2-436(2)(g).

be renewed for up to ten years per renewal.¹⁹⁹ The DFWP must notify the DNRC of their interest to renew a lease authorization.²⁰⁰ Upon receiving notice of a lease renewal, the DNRC must notify other appropriators potentially affected by the lease and allow 30 days for submission of new evidence of adverse effects.²⁰¹ A lease authorization is not required for a renewal unless an appropriator other than an appropriator involved in the initial change of use proceeding submits evidence of adverse effects to his rights that has not been considered previously.²⁰² If new evidence is submitted, a new lease authorization must be obtained according to the requirements outlined above.²⁰³ Neither a change in an appropriation right nor any other authorization is required for the reversion of the leased water right to the lessor's previous use.²⁰⁴

During the term of the original lease, the DNRC may modify or revoke the lease authorization if an appropriator, other than an appropriator involved in the initial change of use proceeding, proves by substantial credible evidence that his water right is adversely affected.²⁰⁵ A person issued a water use permit with a priority date after the date of filing an application for a lease authorization may not object to the exercise of the lease, the renewal of the lease, or the reversion of the water right to the lessor.²⁰⁶

In addition to the pilot leasing program, the DFWP and the DNRC, in consultation with the legislative Water Policy Committee, must prepare a study report on the pilot program.²⁰⁷ The study report must be adopted by the BNRC and the Fish and Game Commission and then submitted to the Water Policy Committee, which shall complete a final report by December 1, 1990.²⁰⁸

The study report must, at a minimum, provide the following data for each designated stream reach and each pilot lease entered into: (1) the length of the stream reach and how it was determined;²⁰⁹ (2) the technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;²¹⁰ (3) the legal standards and technical data used to determine and substantiate the amount of water available for instream

199. MONT. CODE ANN. § 85-2-436(2)(e).

200. MONT. CODE ANN. § 85-2-436(2)(e).

201. MONT. CODE ANN. § 85-2-436(2)(e).

202. MONT. CODE ANN. § 85-2-436(2)(e).

203. MONT. CODE ANN. § 185-2-436(2)(e).

204. MONT. CODE ANN. § 85-2-436(2)(h).

205. MONT. CODE ANN. § 85-2-436(2)(f).

206. MONT. CODE ANN. § 85-2-436(2)(i).

207. MONT. CODE ANN. § 85-2-436(1).

208. MONT. CODE ANN. § 85-2-436(3).

209. MONT. CODE ANN. § 85-2-436(1)(a)(i).

210. MONT. CODE ANN. § 85-2-436(1)(a)(ii).

flows through leasing of existing rights;²¹¹ (4) the contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering;²¹² (5) the methods and technical means used to monitor use of water under each lease;²¹³ and (6) based on the data provided by items 1-5, develop a complete model of a water lease and lease authorization that includes a step-by-step explanation of the process from initiation to completion.²¹⁴ The DFWP may expend up to \$60,000 of federal special revenue to undertake the water leasing study.²¹⁵

Although the DFWP is the only entity allowed to lease water for instream flow purposes, it may accept contributions from public or private entities for such purposes.²¹⁶ The Nature Conservancy has recently signed an agreement with the DFWP to help raise money for the Montana Water Leasing Trust Fund.²¹⁷ The fund will serve as a repository for contributions from private individuals, foundations, and corporations who wish to help implement HB 707 by providing funds to lease water rights for instream flow purposes.

B. *A Critical Review*

HB 707 represents an incremental step in the right direction. It provides an opportunity to explore the costs and benefits of transferring existing water rights to instream flow uses. It allows instream flows to be increased in dewatered streams while protecting existing water rights.

Although HB 707 provides an additional tool for managing instream resources in Montana, it has several limitations. First, it is an administratively cumbersome process. It requires the DFWP to receive approval for an instream flow lease from both the Fish and Game Commission and the BNRC — in addition to going through the change of use process. While such checks and balances may be politically expedient, they indirectly increase the costs of instream flow leases by increasing the amount of time to process such a lease. Moreover, they create a process where the decision on which streams to lease is more likely to be made on political grounds than for biological and technical reasons.

If instream flow leasing is supposed to represent a free market approach to resource management, it would make more sense to eliminate

211. MONT. CODE ANN. § 85-2-436(1)(a)(iii).

212. MONT. CODE ANN. § 85-2-436(1)(a)(iv).

213. MONT. CODE ANN. § 85-2-436(1)(a)(v).

214. MONT. CODE ANN. § 85-2-436(1)(b).

215. Section 7, Chapter 658, Laws of Montana, 1989.

216. MONT. CODE ANN. § 87-1-60(1).

217. Draft Agreement establishing the Montana Water Leasing Trust Fund, signed Nov. 10, 1989 by The Nature Conservancy and Nov. 16, 1989 by the Department of Fish, Wildlife and Parks.

the roles of the Fish and Game Commission and BNRC; allow the DFWP to identify the streams on which leasing may be needed; negotiate with existing water rights holders on the feasibility and terms of a lease; and resolve any potential adverse impacts to third parties through the change of use process, as is done with other water rights transfers and changes. Such an approach would let the market dictate where and when instream flow leases might occur. It would also protect existing water right holders through the change of use process.

A second limitation of HB 707 is the limited number of years for the pilot program. Given the politically charged nature of the issue, it is questionable whether the DFWP can negotiate a lease arrangement with an existing water right holder and then resolve all the objections from water right holders on the stream in question within four years — even on supposedly non-controversial streams.²¹⁸

Even if the DFWP is able to complete a lease arrangement within the four-year time frame, it is not certain that they will be able to exercise the lease within that time frame. Assuming that the DFWP would lease water only during critical low flow periods, as provided by law, it may not have the opportunity to exercise an instream flow lease if the water level in the stream in question does not fall below some specified “critical” level. While this is good from a resource management perspective, it may plant the idea in some people’s mind that the leasing program is not needed. Moreover, it would not provide an opportunity to evaluate the leasing program as it is implemented “on-the-ground.”

Another limitation of HB 707 is that it allows the DFWP to lease water for instream flow purposes on only five stream reaches. While this is once again politically expedient and appropriate for a pilot program, it severely limits the DFWP’s ability to enhance instream flows in many dewatered streams. Although the department may not have the funds to lease water on all the streams that need it, other public and private entities, such as the U.S. Forest Service and Trout Unlimited, may be willing to contribute funds for instream flow leasing, as provided by law. In any case, limiting instream flow leasing to no more than five stream reaches is an

218. According to a memo from Larry Holman, Chief of the Water Rights Bureau in the Montana Department of Natural Resources and Conservation, to Gary Fritz, Administrator of the Water Resources Division in the Montana Department of Natural Resources and Conservation (dated February 28, 1989), the average time for processing a change of use application for all such applications without any objections during 1987 and 1988 (a total of 295 authorizations) was 125 days. By contrast, the average time to process change of use applications when there are objections but no hearings (a total of 21 cases) was 325 days. Finally, the time to process change of use applications with both objections and hearings (a total of 10 cases) was 1,334 days (or about 3 ½ years). Given the controversial nature of instream flow leasing, it is likely that changing the use of a water right from an offstream to an instream use will fall into the last category, in which case no leases would be authorized prior to the sunset of HB707.

arbitrary decision that limits the ability of the market to dictate an efficient allocation of resources.

A fourth limitation of HB 707 is that it allows leasing only for fisheries. While maintaining instream flows for fisheries may be sufficient in certain cases to protect other instream flow benefits, such as water quality and recreational activities, it is not likely to be sufficient in all cases. In addition, there may be a demand to increase instream flows on certain streams for reasons other than fisheries, such as recreational and health benefits. To limit the purposes for which leasing may occur is to limit the opportunities to manage an important natural resource.

Another limitation of HB 707 is that only the DFWP is allowed to lease water for instream flow uses. Clearly it is not the only entity interested in managing instream resources. Fishing resorts, rafting companies, outfitters, and associated tourism-related businesses, not to mention conservation groups and other resource management agencies, may all be interested in enhancing instream flows on certain streams and rivers. Several economists have argued that both public and private parties should be allowed to lease water on the grounds that it provides them an equal opportunity to compete in water markets and in the water rights appropriation process with municipal, industrial, and agricultural interests for scarce water rights.²¹⁹

Although there are several persuasive arguments to allow all public and private entities to lease water rights, there are also several arguments against the idea.²²⁰ Opponents to the idea seem to rely on three different arguments. First, they argue that if private parties were allowed to lease water for instream flow purposes, all of the waters in a particular basin would eventually end up as instream water rights, and this would adversely affect the local economy and lifestyle. Second, opponents argue that allowing private parties to lease water for instream flows would create a market for the speculation of water rights, and traditional water users, such as agricultural irrigators, could not afford to participate in the market. Finally, opponents believe that private entities could not ade-

219. COLBY, *INSTREAM FLOWS-ECONOMIC VALUES AND POLICY ALTERNATIVES* (1988). Colby generally argues that markets could do a better job of reflecting instream flow values if state laws permitted appropriation, purchase, and seasonal leasing of rights for instream maintenance by both public and private organizations. See also ANDERSON, *WATER CRISIS: ENDING THE POLICY DROUGHT* at 91 (Cato Institute, 1983). Anderson argues that "state laws that prohibit the private ownership of water for instream use inhibit market solutions to instream use conflicts". With these prohibitions removed, Anderson suggests, we could move a long way toward efficient allocation and use.

220. The argument for private instream water rights is forcefully made by Gray, *A Reconsideration of Instream Appropriation Water Rights in California*, in *INSTREAM FLOW PROTECTION IN THE WEST*, (MacDonnell, Rice, & Shupe, eds. Natural Resources Law Center, University of Colorado School of Law, 1989). The argument against private instream water rights is summarized by De Young, *Instream Flow Protection in a Water Market State: The Case of New Mexico*. *id.*

quately represent the so-called "public good" nature of instream flow benefits. While all of these arguments raise important points, they do not reflect the financial, economic, or environmental realities of the situation. Moreover, these type of concerns could be addressed in the allocation and administration of an instream flow water right.²²¹

A final limitation of HB 707 is that it is limited to leasing and does not allow for the gift or purchase of existing water rights for instream flow uses. While allowing a more permanent transfer of a water right from an offstream to an instream use may limit the ability to modify the right in the event of adverse effects to third parties, it provides for more secure protection of the instream resource. Moreover, it may reduce transaction costs by reducing the number of times affected parties are required to participate in the change of use process. Several western states are currently experimenting with a variety of mechanisms that provide for more permanent transfer of water rights from offstream to instream uses.²²²

VI. A BLUEPRINT FOR THE FUTURE

Although a variety of actions have been taken to manage instream resources in Montana, the efforts are piecemeal and focus primarily on acquiring existing flows and protecting them from future offstream diversions. Moreover, there is rarely any coordination among different entities responsible for or interested in instream resource management. In light of these limitations, this section outlines a blueprint for the future of instream flow policy in Montana. The basic assumption of this blueprint is that the state should take a proactive approach to managing instream resources while protecting existing water rights.

The blueprint provides a strategy for developing a comprehensive, statewide instream flow program. It is designed to bring all affected parties together to identify the need for instream flow protection throughout the state, regardless of jurisdictional boundaries. It is also designed to evaluate existing instream flow management strategies and to develop additional strategies where necessary.

221. *Id.*, Gray at 206-211.

222. Recent legislation in Colorado (COLO. REV. STAT. § 37-92-102(9)(a)), Utah (UTAH CODE ANN. § 73-3-3), and Wyoming (WYO. STAT. § 41-3-1007) has specifically sanctioned the transfer of water rights for instream flow enhancement. In 1987, the Oregon legislature provided an innovative twist to the transfer of water rights for instream purposes. The new law allows irrigators who conserve water to sell or use the historically retrievable losses, provided that 25 percent of the salvaged water is dedicated to the state for maintaining instream flows, if needed (OR. REV. STAT. § 537.348).

A. *Create an Instream Resource Coordinating Committee*

Given the variety of state, federal, regional, Indian, and private entities involved in managing instream resources, in addition to the many individuals and groups affected by instream flow management activities, the first step to improve the management of instream resources in Montana should be to create a broad-based committee to coordinate instream flow activities across the state. This committee should consist of at least one representative from each interest affected by instream resource management activities, including both instream and offstream water user groups. It should also include those entities that have formal responsibility for implementing actions on the ground, such as state and federal government agencies and perhaps state legislators. Individual members on the committee should possess not only the technical skills required to analyze instream flow needs and alternative management strategies, but also the ability to make decisions and commitments on behalf of the organizations they represent.

The fundamental purpose of the Coordinating Committee should be to facilitate communication, cooperation, and coordination among all the parties affected by instream resources management. More specifically, the tasks of the committee should include: (1) evaluating and developing instream flow management strategies; (2) identifying priority stream reaches and instream values throughout the state based on ecological boundaries, rather than arbitrary political boundaries; (3) select and apply appropriate strategies to protect and enhance instream resources; and (4) monitor, enforce, and evaluate instream flow protection activities. Each of these tasks is outlined in detail below.

B. *Evaluate and Develop Instream Flow Management Strategies*

One of the first tasks of the Coordinating Committee should be to evaluate existing instream flow management strategies and determine if additional strategies are necessary. In general, two different types of strategies are necessary for a successful instream resource management program.²²³ First, there should be a way to maintain existing (unappropriated) flows, thereby deterring future offstream diversions that may threaten instream resources. Second, the program should include mechanisms to increase flows in dewatered streams. While both types of strategies are currently available in Montana, they may need to be refined to be more effective.

223. See generally, McKinney, *Letting the Rivers Run: Toward a Model Instream Flow Program*, in SYMPOSIUM PROCEEDINGS ON HEADWATERS HYDROLOGY (American Water Resources Association, Missoula, MT, June, 1989).

1. *Maintaining Unappropriated Flows*

In Montana, as throughout the West, there are two basic ways to maintain existing (unappropriated) flows.²²⁴ The first is to provide a mechanism that requires new water use permits and changes in existing water rights to be reviewed on the basis of "public interest" criteria, including the protection of instream resources. These criteria would deny or condition new water use permits, changes, and/or transfers in the use of existing water rights if they adversely affected instream resources. They would provide for a specified level of natural flow to be left in the stream and require the permittee to discontinue diverting water when the natural stream flow falls below that level.

Although Montana has a set of public interest criteria, it has been argued that they are generally ineffective in protecting instream resources.²²⁵ Assuming that the state is interested in managing and protecting instream resources, the public interest criteria should be applied to all new water use permits and all proposed changes and transfers of water rights. In addition, the existing criteria in Montana should be reviewed in light of the public interest criteria of other western states.²²⁶ Although public interest criteria vary by state, they all include one or more of the following: (1) the benefit to the applicant; (2) the economic impact; (3) the effect on fish and game resources and public recreational resources; (4) the effect on public health;²²⁷ (5) the loss of alternative uses of water; (6) potential harm to other persons; and (7) the effect upon access to navigable or public waters. Alaska²²⁸ and Idaho²²⁹ have the most comprehensive and precise list of public interest criteria, and may provide useful models for revising Montana's public interest criteria.

The second basic strategy needed to help maintain existing flows is the ability to appropriate unappropriated water for instream uses. The primary mechanism for accomplishing this objective in Montana is the

224. *Id.* See also, Shupe, *Keeping the Waters Flowing: Stream Flow Protection Programs, Strategies and Issues*, in *INSTREAM FLOW PROTECTION IN THE WEST*, *supra* note 220.

225. See text accompanying notes 47-50.

226. Several western states have incorporated public interest criteria into their water use permitting and change processes, including Alaska (ALASKA STAT. § 46.15.080), Arizona (ARIZ. REV. STAT. ANN. § 45-143A), California (CAL. WATER. CODE §§ 1243, 1253, 1255-58), Idaho (Shokal v. Dunn, 707 P.2d 441 (1985)), Nevada (NEV. REV. STAT. § 533.370(3)), New Mexico (N.M. STAT. ANN. § 72-12-1), Utah (UTAH CODE ANN. § 73-3-8.1), and Washington (WASH. REV. CODE Title 75). Colorado and Oregon have yet to incorporate public interest criteria for reviewing new water use permits and changes in water rights.

227. This criteria might include a provision that allows water quality discharge permit holders to object to new permits and change applications so that they can maintain water instream for water quality purposes.

228. ALASKA STAT. § 46.15.080.

229. See *Shokal v. Dunn*, 707 P.2d 441 (Idaho, 1985).

reservation process.²³⁰ In general, this is a reasonable strategy for maintaining existing flows for instream purposes. However, as explained in Sections III and IV of this article, it suffers from several limitations and could be improved. As documented during the state water planning process, perhaps the most serious limitation of the reservation process is the potential reallocation of instream flow reservations.²³¹

In addition to public interest criteria and the reservation process, there are a variety of other mechanisms that could be employed to maintain existing flows for instream uses.²³² These strategies include federal regulatory and permit conditions,²³³ private instream appropriations,²³⁴ the contribution of water rights to instream flow programs,²³⁵ and prohibiting new diversions via wild and scenic river programs and similar programs.²³⁶ In addition, the state should evaluate the costs and benefits of

230. MONT. CODE ANN., § 85-2-316.

231. For suggestions on how to improve this and other provisions of the reservation process as it applies to instream flows, see generally text accompanying notes 171-74.

232. See generally McKinney, *supra* note 223.

233. Several federal regulatory programs and permit conditions may be used to maintain existing flows, including Section 404 of the Clean Water Act (33 U.S.C. 1251 - 1387, the Endangered Species Act (16 U.S.C. 1531 - 1544), Federal Energy Regulatory Commission permits (see *California v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965) and 16 U.S.C. 791(a)), and the Federal Land Management and Policy Act (43 U.S.C. 1761-1771, 1982). For an explanation of how each of these strategies might be used to maintain existing flows, see generally McKinney, *supra* note 223.

234. Most western state instream flow programs allow only public entities, and typically only one state agency, to acquire and hold a water right for instream flow purposes (see generally, McKinney & Taylor, *Western State Instream Flow Programs: A Comparative Assessment*, INSTREAM FLOW INFO. PAPER NO. 18, U.S. FISH AND WILDLIFE SERVICE BIOL. REP. 89(2)(1988)). Montana's reservation process is unique in that it allows any public entity, broadly defined to include state and federal government agencies, conservation districts, and municipalities, to acquire and hold a water reservation for a variety of purposes, including instream flows. Several states, however, also allow private parties to acquire and hold water rights for instream flow purposes, including Alaska (ALASKA STAT. § 46.16.450), Arizona (see Dishlip, *Instream Flow Water Rights: Arizona's Approach*, in INSTREAM FLOW PROTECTION IN THE WEST, (MacDonnell, Rice, and Shupe, eds. Natural Resources Law Center, University of Colorado School of Law, 1989)), and Nevada (see *State of Nevada v. Morros*, No. 18105, Dec. 21, 1988). In Oregon, 25 percent of water conserved by offstream water rights must be allocated to instream flows, and private parties are allowed to retain ownership of the instream flow portion of the water right (OR. REV. STAT. § 537.348).

235. Where only one or a limited number of public entities are authorized to appropriate unappropriated water for instream flows, private parties and other public entities may acquire offstream water rights and then donate them to the state's instream flow program. The Nature Conservancy has used this approach to maintain instream flows in Colorado, while the Water Heritage Trust, located in California, is expected to pursue this approach (see generally McKinney, *supra* note 223).

236. A final set of strategies to help maintain existing instream flows are those that prohibit new diversions from specified stream reaches. This may be accomplished by declaring a moratorium on new appropriations and depletions, as in Montana (MONT. CODE ANN. § 85-2-319), Idaho (IDAHO CODE § 42-1736), Oregon (OR. REV. STAT. § 536.410), and Washington (WASH. REV. CODE §§ 90.54 and 75.20.050). Another strategy to prohibit new diversions is to designate wild and scenic rivers, as authorized in California (CAL. PUB. RES. CODE § 5093.50-69), New Mexico (N. M. STAT. § 242), and Oregon (OR. REV. STAT. § 390.805-925). While these type of programs do not always result in the

allowing public and/or private entities to acquire unappropriated water for instream flow uses through the permitting process.²³⁷ All potentially available strategies to maintain existing instream flows should be identified and evaluated in terms of their applicability to resource management situations in Montana.

2. *Increasing Flows in Dewatered Basins*

In addition to providing a variety of mechanisms to maintain existing (unappropriated) flows, Montana's instream flow program should also include several strategies for increasing flows in dewatered streams. While HB 707 is designed to address this issue, its effectiveness is uncertain.²³⁸ At a minimum, it suffers from several limitations in design.²³⁹

To date, the primary strategy employed in Montana to increase flows in dewatered streams has been to schedule the timing and amount of reservoir releases to coincide with instream flow needs.²⁴⁰ This strategy, in addition to other local, cooperative solutions, such as irrigation scheduling, is supported by the state water plan.²⁴¹ Furthermore, the state water plan recommends evaluating the feasibility of new water storage projects as a way to increase flows in some dewatered streams.

In addition to the limited number of strategies currently available in Montana to enhance flows in dewatered streams, several other strategies should also be considered. Purchasing existing water rights for instream flow purposes is allowed in several western states²⁴² and has been practiced with some success.²⁴³ Allowing senior water rights to be gifted or donated

acquisition of formal water rights, they almost always prohibit new diversions and other developments that would threaten the instream resources at the time of designation. A similar program is the Northwest Power Planning Council's Protected Areas Program (*see generally* text accompanying notes 109-119).

237. *See generally* Gray and De Young, *supra* note 220.

238. *See generally*, text accompanying notes 217-22.

239. *Id.*

240. *See* text accompanying notes 61-79.

241. *See generally* text accompanying notes 175-181.

242. *See e.g.*, COLO. REV. STAT. § 37-92-102(9)(a), UTAH CODE ANN. § 73-3-3, and WYO. STAT. § 41-3-1007.

243. For example, The Nature Conservancy is pursuing the acquisition of several senior water rights in the Yampa River basin to help maintain flows for endangered fish (Water Market Update, Oct. 1988 at 10); In 1989, a fishing club in Colorado leased 18 acre-feet of water to augment evaporative losses in a highly valued lake (Water Market Update, 1989); In Idaho, The Nature Conservancy recently purchased about 100 acres of wetland area and 6 cubic feet per second of water to maintain habitat for waterfowl (Water Market Update, April, 1989 at 4); Finally, the Nevada Wildlife Federation recently purchased 35 acre-feet of water to maintain instream flows for waterfowl (Water Market Update, March, 1989 at 3). For a recent update on the acquisition of water rights for instream uses via the market, see Wigington, *Update on Market Strategies for the Protection of Western Instream Flows and Wetlands*, PROCEEDINGS OF A CONFERENCE ON MOVING THE WEST'S WATER TO NEW USES: WINNERS AND LOSERS (Natural Resources Law Center, University of Colorado School of

to appropriate entities for instream uses is also allowed in some states.²⁴⁴

Another promising strategy for enhancing instream flows is to improve the efficiency of water use and allow the salvaged water to be transferred to an instream use. In 1987, the Oregon legislature provided an innovative twist on this strategy by allowing irrigators who conserve water to sell or use the historically retrievable losses, provided that 25 percent of the salvaged water is dedicated to the state for maintaining instream flows, if needed.²⁴⁵ Finally, several western states allow for some type of temporary or conditional transfer of water to a variety of uses, including instream flow protection, to allow quick responses to emergency situations.²⁴⁶

Several other transfer-type mechanisms could also be used to increase flows in dewatered streams, but to date have been used primarily by municipalities in search of water supplies during the drought season.²⁴⁷ For example, "lease-back" arrangements refer to transactions where land and water rights are purchased and then leased back to the original owner for a certain period of time.²⁴⁸ This strategy increases the long-term security and control of the water rights over dry-year options or simple leases.

Exchanging the priority among water right holders is another potentially effective way to increase or maintain flows in dewatered basins depending on their location and timing.²⁴⁹ In such arrangements, senior water right holders would defer their seniority for some type of compensation, allowing the water to remain instream through critical stream reaches and drought periods. This approach was recently implemented in Montana on the Blackfoot River.²⁵⁰ The DFWP holds an instream flow right on the Blackfoot. During 1988, when flows in the river diminished to the point of threatening the survival of fish populations, the DFWP approached an irrigator who holds water rights that are both junior and senior to the instream flow right. The DFWP, attempting to enforce its instream flow

Law, June 6-8, 1990).

244. In what is considered the first major donation of water rights for instream flow purposes, the Chevron Corporation recently donated to The Nature Conservancy a 300 cubic feet per second water right on a 26 mile stretch of the Gunnison River in southwestern Colorado (U.S. Water News, 1988). The water right will protect the spectacular Black Canyon of the Gunnison, preserve one of the best gold medal trout fisheries in the nation, and may lead to Wild and Scenic Rivers designation.

245. See OR. REV. STAT. § 537.348.

246. See, e.g. COL. REV. STAT. § 37-92-103; UTAH CODE ANN. § 73-3-3; and Washington S.B. 5196 (1989).

247. See Colby, McGinnis, Rait, & Wahl, TRANSFERRING WATER RIGHTS IN THE WESTERN STATES—A COMPARISON OF POLICIES AND PROCEDURES (Natural Resources Law Center, University of Colorado School of Law, February, 1989).

248. *Id.* at 70.

249. *Id.*

250. Personal communication with Liter Spence, Montana Department of Fish, Wildlife and Parks, on September 7, 1989.

right, requested the irrigator to cease diverting his junior water right. The irrigator, however, suggested that the DFWP could utilize his senior water right to help maintain instream flows if he could continue diverting the junior right to water crops. The DFWP agreed to this proposal since it would increase flows in the critical stream reach as effectively as the junior water rights.

Exchanging or alternating water sources may also prove to be a useful instream flow management tool.²⁵¹ In Colorado,²⁵² Wyoming,²⁵³ New Mexico,²⁵⁴ and Utah²⁵⁵ it is very common to exchange native streamflow for reservoir storage in order to ensure water availability in the late summer season. It is also common to exchange surface water for groundwater. Such arrangements could be used in certain cases in Montana to maintain or increase flows for instream resources.

Finally, water banks may also prove useful at some point as a way to maintain or increase flows in dewatered streams.²⁵⁶ Water banking involves storing excess water available during high flow years in reservoirs or underground and maintaining savings accounts to keep track of stored water. In dry years, withdrawals can be made from stored supplies and the accounts debited accordingly. This approach was used in 1988 by The Nature Conservancy and others who purchased 3,200 acre-feet of water from the Upper Snake River Water Bank to aid trumpeter swans in eastern Idaho.²⁵⁷

As this brief overview reveals, many different types of water transfer arrangements are available that can increase instream flows in dewatered streams. These innovative transfers are attractive not only because they can improve instream resource management, but also because, if appropriately designed and implemented, they pose less of a threat to existing water right holders than three other potentially useful mechanisms for increasing instream flows in dewatered streams — reserved water rights, the public trust doctrine, and a constitutional amendment.²⁵⁸ While these latter

251. *Supra*, note 247 at 70-71.

252. COLO. REV. STAT. §§ 37-83-101 through 104 (1973).

253. WYO. STAT. § 41-3-106 (1986).

254. N.M. STAT. ANN. § 72-12-24 (1978).

255. UTAH CODE ANN. § 73-3-20 (1953).

256. *Supra*, note 247 at 71-72.

257. Water Market Update, March, 1989 at 3.

258. Two constitutional initiatives were discussed during the 51st legislative session. For a summary of both initiatives, see generally, *Water-Rights Initiative Broader Than Failed Bill*, Independent Record (April 5, 1989). During the debate on H.B. 707 in the 51st Montana legislature, there was a rumor that if something like H.B. 707 did not pass, certain interest groups were going to petition the state for a constitutional amendment that would require a minimum stream flow in all rivers and streams throughout the state. Such an amendment, if ever instituted, could radically upset the existing allocation and use of water in Montana. The overriding issue here is whether the state has

strategies may be used to increase instream flows in dewatered streams, they are likely to disrupt the existing allocation and pattern of water use in Montana, and therefore are less preferred than voluntary, transfer-type strategies.

C. *Identify Priority Stream Reaches and Instream Values*

After evaluating, revising, and developing instream flow management strategies, the Coordinating Committee should identify stream reaches needing protection. Streams should be classified in terms of whether the primary resource management issue is one of maintaining existing flows or increasing flows in dewatered streams. Specific instream resource values should be identified and the quantity of flow needed to protect the values estimated. Priorities should be established and available water supplies and existing uses and rights documented. The State Recreational Waterway Program²⁵⁹ and the Northwest Rivers Study²⁶⁰ may provide an appropriate data base and framework to accomplish this systematic inventory of instream values and management needs.

In addition to identifying instream flow needs for streams and rivers throughout the state, the Coordinating Committee should also evaluate the need to establish minimum lake levels. Moreover, the committee should evaluate the potential for improving the structure and stability of stream channels before selecting an appropriate instream flow management strategy.²⁶¹

Once this basic information is assembled, future water resource needs and priorities should be projected on a basin-specific basis. Water, land, environmental, social, and economic goals should then be integrated. Conflicts should be identified and trade-offs assessed in order to optimize water use within each basin. Ideally, this effort should take place within the context of a multiple-use, basin-specific water planning process.

the legal authority to take a usufructory right to water away from someone who is beneficially using the water and to reallocate the water in light of changing social values. For a comprehensive discussion of this and other issues related to the public trust doctrine, see 19 ENVTL. L. 3 (1989). The entire issue is devoted to this topic.

259. See text accompanying notes 84-6.

260. *Supra*, note 87.

261. See generally, Rosgen, *A Stream Classification System*, in RIPARIAN ECOSYSTEMS AND THEIR MANAGEMENT: RECONCILING CONFLICTING USES (U.S. FOREST SERVICE, ROCKY MOUNTAIN FOREST AND RANGE EXPERIMENT STATION, FIRST NORTH AMERICAN CONFERENCE, April 16-18, 1985, Tuscon, Arizona, Gen. Tech. Report RM-20); Kondolf & Sale, *Application of Historical Channel Stability Analysis to Instream Flow Studies*, in PROCEEDINGS ON THE SYMPOSIUM ON SMALL HYDROPOWER AND FISHERIES (AMERICAN FISHERIES SOCIETY, May 1-3, 1985, Aurora, Colorado); and Orsborn & Anderson, *Stream Improvements and Fish Response: A Bio-Engineering Assessment*, 22 WATER RES. BULL. 3 (1986).

D. *Select and Apply Appropriate Strategies*

Once instream resource values have been inventoried and streams needing protection prioritized, specific strategies for managing instream resources should be selected and applied.²⁶² This decision should be based on whether the primary resource problem is one of maintaining existing flows or increasing flows in dewatered basins. A variety of institutional and political factors must also be considered, such as the availability of appropriate institutional resources and the likelihood of controversy over the proposed action.

E. *Monitor, Enforce, and Evaluate Instream Flow Protection Activities*

The final component of the blueprint is to effectively monitor, enforce, and evaluate the implementation of the various management efforts, particularly the status of instream water rights. Without adequate monitoring and enforcement, instream resource management efforts may be doomed to failure.

In general, there are two approaches to monitoring and enforcing instream water rights. The first approach, used in Washington,²⁶³ is to make a call on the river when junior users threaten to injure instream water rights. This approach requires gaging stations to measure when the streamflow drops below the specified level, as well as personnel to monitor the gages. In Montana, very few streams currently have enough gages to make this approach effective. The second approach, used in Colorado,²⁶⁴ is to prevent changes or transfers in senior water rights that may potentially injure instream water rights. This approach does not require the installation of costly stream gages or the commitment of personnel to monitor the gages. Rather, it monitors "paper rights," and is most useful where very few junior appropriative rights are being established and there is an active water market.

In addition to monitoring and enforcing instream water rights, an on-the-ground evaluation should be conducted to determine if instream resources are being adequately protected by current management efforts

262. For example, the U.S. Forest Service's current effort to identify and study river segments for inclusion in the national wild and scenic river program should be considered one management tool among several that could be applied to protect and manage instream resources (see text accompanying notes 88-92).

263. See Barwin & Slattery, *Protecting Instream Resources in Washington State*, in *INSTREAM FLOW PROTECTION IN THE WEST*, (MacDonnell, Rice, and Shupe, eds., Natural Resources Law Center, University of Colorado School of Law, 1989).

264. See Shupe, *Colorado's Instream Flow Program: Protecting Free-Flowing Streams in a Water Consumptive State*, in *INSTREAM FLOW PROTECTION IN THE WEST*, (MacDonnell, Rice, and Shupe, eds. Natural Resources Law Center, University of Colorado School of Law, 1989).

and if third parties are being adversely affected. The evaluation should focus on the resource and determine if too much or too little water has been set aside for protecting the instream values in question.

VII. CONCLUSION

Although Montana has made significant progress in managing instream resources, much remains to be done to protect this valuable natural resource. If the state is serious about protecting instream values and integrating them into the existing water policy and management framework, the blueprint outlined above may provide a useful roadmap.

While the state's current approach to instream resource management could be improved in a variety of ways, three recommendations stand out. First, instream flows should be protected on the basis of ecological boundaries, not artificial jurisdictional and property rights boundaries. Second, a variety of effective mechanisms need to be developed and employed to increase the flows in dewatered streams. Finally, existing instream flow water rights need to be vigorously enforced to ensure that instream resources are being appropriately protected.²⁶⁵

The protection of instream values in Montana, as throughout the West, is inevitable given the changing values and demands of the public. Although it is imperative to protect the traditional uses of water, Montana's laws and institutions governing the allocation and use of water resources must be, and will be adapted to these new values and demands. The only outstanding question is whether the changes in these laws and institutions will result in destructive or constructive relationships among water users, resource managers, and policymakers. While there are obvious differences among all these players, let us hope that their common commitment to the land, water, and quality of life in Montana will provide the foundation for developing innovative instream flow policies.

265. For an excellent discussion on enforcing water rights "at the headgate," see Shupe, *Water Rights Decisions in the Western States: Upgrading the System for the 21st Century*, WESTERN WATER POLICY PROJECT, DISCUSSION SERIES PAPER NO. 4 (Natural Resources Law Center, University of Colorado School of Law, 1990). Shupe's basic observation and argument is that enforcing water rights "at the headgate" is based more on local cooperation and traditional water use patterns than simple adherence to the prior appropriation doctrine. The question is, how will instream flow water rights be incorporated and treated in this system of local, traditional enforcement of water rights?