Governor's Commission
To Review California Water Rights Law

LEGAL ASPECTS
OF INSTREAM WATER USES
IN CALIFORNIA

Background And Issues

By Anne J. Schneider

Staff Paper No. 6

January 1978

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TO REVIEW CALIFORNIA WATER RIGHTS LAW

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This paper is part of a series of background and issue papers prepared by the staff of the Governor's Commission to Review California Water Rights Law. The background material is intended to assist persons who may lack detailed knowledge of California's water rights law and procedures. The issues have been listed as a basis for discussion by the public and for the Commission when it considers various legislative options. Initial papers in the series are as follows:

Staff Paper No. 1:	Appropriative Water Rights in California
Staff Paper No. 2:	Groundwater Rights in California
Staff Paper No. 3:	Legal Aspects of Water Conservation in California
Staff Paper No. 4:	Riparian Water Rights in California
Staff Paper No. 5:	The Transfer of Water Rights in California
Staff Paper No. 6:	Legal Aspects of Instream Water Uses in California

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LEGAL ASPECTS OF INSTREAM WATER USES IN CALIFORNIA

I. Introduction

Some uses of water are best served by leaving water in a watercourse.[1] Many beneficial uses can be satisfied in this way: Navigation, hydroelectric power generation, fish spawning and migration, recreation, groundwater recharge, scenic and aesthetic enjoyment, preservation of rare and endangered species, maintenance of freshwater habitat, and preservation of the free-flowing condition or natural character of certain streams.[2]

Flow needs for different instream uses can perhaps be most accurately described in terms of "flow regimes" that take into account patterns of stream flow.[3] A flow regime may require more than mere year-round "minimum flows" in order to maintain stream characteristics required for certain uses.[4] Periodic "peak flows", for example, can be critically important to the health of a stream:

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[1] Although the term "instream" will be used, "instream" concepts may apply to rivers, streams, lakes, bays, estuaries, wetlands, marshes and lagoons.

[2] See e.g., the list of present and potential beneficial uses compiled in California State Water Resources Control Board, Central Valley Region (5), Water Quality Control Plan Report, Sacramento River Basin, Sacramento-San Joaquin Delta Basin, San Joaquin Basin, I-2-2 (1975).

[3] A stream flow "regime" is defined by one source as: "A regular pattern of occurrence or action; the condition of a river with respect to the rate of its flow as measured by the volume of water passing different cross sections in a given time." A "regimen" refers to the "system or order characteristic of a stream in regard to velocity, volume, sediment transport and channel morphology changes." U.S. Dept. of Interior, Fish and Wildlife Service, Nomenclature for Instream Assessments 5 (1975).

[4] Fishery resources provide a good example of the complex physical requirements of an instream use and the numerous physical stream factors which affect a use. Fishery requirements include spawning, incubation, rearing, cover, migration and transportation, and food supply needs. These involve complex interactions of factors in the stream environment such as the velocity of the current, turbulence, stream bottom materials, aquatic vegetation, water temperature, and water chemistry. J. Orsborn and F. Deane, Investigation into Methods for Developing a Physical Analysis for Evaluating Instream Flow Needs 27-37 (1976).

> [I]f peak winter and spring flows are reduced ... the physical habitat will alter and probably be greatly reduced in value for salmonids, because it is these peak flows that annually flush sediments and other debris from the system. Significant reductions in peak flow usually result in greater proportions of fine sediment in spawning gravels, less development of pools and undercut banks and vegetation encroachment all of which will reduce the habitats now measured for minimum IFR [instream flow reservation] purposes. [5]

There is concern in California, as in most other western states, that instream uses are not being adequately protected.[6] One recent study indicates that there have been dramatic declines in California's fishery resources: From about 1940 to 1970, steelhead declined by approximately 80 percent, silver salmon by approximately 65 percent, and king salmon by

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[5] United States Fish and Wildlife Service, C. Hazel, Jones and Stokes, Inc., Assessment of Altered Stream Flow Characteristics on Fish and Wildlife, Part B: California, Executive Summary at xvi (December 1976). This report notes that "instream flow reservations" are flows sought by the United States Fish and Wildlife Service and the California Department of Fish and Game as mitigation measures for water projects. The objective has been to maintain principal pre-project fisheries by providing for certain minimum instream flow reservations or requirements. "Peak flow" can be variously defined. The recurrence interval, for instance, can be different for different streams.

[6] The tenor of the proceedings of the 1976 American Fisheries Society Conference on Instream Flow Needs reflects an urgency regarding instream use protection and enhancement in western states:

> Throughout this western country the construction of water conservation works have [sic] not kept pace with needs. Now that we have hopefully developed an ecological conscience, we are presently torn between the alternative of preventing localized, ecological disaster by sacrificing some monetary gain and that of doing business as usual with the eventual destruction of not only the fishery resource but the entire aquatic system associated with water environments. We have talked and written water conservation for the last 60 years, and we have finally reached our moment of truth - will we respond with vision and insight of the inter-dependency of man and his environment or will we again narcotize ourselves into believing that somehow we will maintain aquatic life systems without addressing ourselves to the fact that total development will have to be modified in favor of environmental requirements. Eiserman, "Introductory Remarks", 1 Proceedings, Instream Flow Needs, 3 (1976).

approximately 64 percent.[7] These declines are partly due to diversions and impoundments of water and partly due to changes in physical habitat, such as conversion of marshes and wetlands to agricultural uses and logging and urbanization of watersheds.[8]

The physical problems of instream use protection and enhancement appear to exist at three levels: The stream environment itself is extraordinarily complex; there have already been substantial declines in important instream resources; and there are a vast number of factors which affect instream uses. Several projects are underway to study these problems. The United States Fish and Wildlife Service established a multi-agency Cooperative Instream Flow Service Group in 1976. Its purpose is to develop and disseminate instream information and to "advance the state-of-the-art and become the center of activity related to instream flow assessments."[9] In 1975, the Department of Water Resources created an Instream Use Study Group to assess the opportunities available to California for preserving and enhancing the value of instream resources in selected streams.

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[7] United States Fish and Wildlife Service, C. Hazel, Jones and Stokes, Inc., The Effects of Altered Streamflows on Fish and Wildlife in California 1 (1976). This study assesses the effects of altered streamflow characteristics on fish and wildlife for 47 water projects in California.

[8] Id.

[9] United States Fish and Wildlife Service, Cooperative Instream Flow Service Group, The First Year 1 (1977).

These and similar groups have the monumental problem of acquiring, synthesizing, and coordinating instream data and of developing a uniform terminology and methodology.[10]

California recognizes the public interest in protecting and enhancing instream water uses. But like other western states, California's approaches to maintaining and enhancing instream uses are often uncoordinated and ineffective. Furthermore, several serious challenges confront California: The federal government claims that it does not have to comply with water right permit terms and conditions set by the State Water Resources Control Board; there are efforts to repeal the California Wild and Scenic Rivers Act; and both a private organization and the Department of Fish and Game claim that under existing law the State Water Resources Control Board should accept and process applications for instream appropriations for fish and wildlife purposes.

Instream use protection and enhancement is not an isolated water rights problem. For example, surface water and groundwater are often physically interconnected, and streamflow can decrease because of percolation to a surrounding groundwater basin. Instream protection measures can be

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[10] There is considerable inconsistency in the use of instream flow terminology. Terms such as "minimum flow", "base flow", "natural flow", and "acceptable flow" are not distinctly defined. The same inconsistency occurs with terms used to describe various levels of stream system management, such as "protection", "mitigation", "maintenance", "rehabilitation", "development", and "enhancement." "Protection" and "enhancement" will generally be the terms used in this discussion. Enhancement of an undeveloped stream would result in improvement over the unimpaired natural condition of the stream, if that is possible; protection would result in some level of flow or flow regime less than or equal to the unimpaired natural condition. Enhancement of a developed stream (one with diversions or impoundments) may occur where there are improvements over previous reduced conditions. (Conversation with Mr. Charles Fisher, Associate Fishery Biologist, Department of Fish and Game, November 8, 1977. Mr. Fisher used the term "mitigation" rather than the term "protection.").

undermined by such losses. Relationships between instream protection and other water rights topics will not be analyzed in this discussion, although these relationships raise important issues. Other important, related topics that are also beyond the scope of this analysis include access to water, riparian vegetation and habitat, seeps and springs, and special problems of urban creeks. The instream uses that will be considered most extensively are fishery, wildlife, recreation, and aesthetic uses. The focus will be on the methods of providing protection rather than on the particular use being protected.

This paper will initially review the nature of property rights in water, particularly the "public trust" doctrine, which concerns public property rights in natural resources such as water. The "police power" to regulate in regard to instream uses, notably the authority of the State Water Resources Control Board, will then be discussed, and methods of protecting instream uses in the other western states will be noted. In conclusion, issues of importance today for instream uses in California will be stated.

II. The Nature of Property Rights in Water and the Public Trust Doctrine

A. Water Rights as Private Property

From the beginning, California courts have emphasized that water rights are an important form of private property. As early as 1855, the California Supreme Court held that a water right is real property, and not "mere personalty."[11] The right to the flow and use of water, the right to take water and convey it to a tract of land, the right to have water flow from a river into a ditch, and the right to have water flow in a pipe from a reservoir to a tract of land are all rights of real property.[12]

Like other real property rights, water rights may be conveyed[13] or taxed.[14] Conveyances are subject to the Statute of Frauds as it applies to transfers of real property and to recording statutes; the statute of limitations concerning property applies to water rights; water rights may be sold on execution as real property; and actions to settle water rights are ones to quiet title to realty.[15]

Whether the water right is riparian, appropriative or prescriptive in nature, it is a property interest the courts will protect. When these property rights are "taken" for public use within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution, or "taken or damaged" within the meaning of Article 1, Section 14 of the California Constitution, just compensation must be paid.[16]

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[11] Hill v. Newman, 5 Cal. 445, 446 (1855); Huffner v. Sawday, 153 Cal. 86, 91, 94 P. 424 (1908); Thayer v. California Development Co., 164 Cal. 117, 125, 128 P. 21 (1912).

[12] Waterford Irr. Dist. v. County of Stanislaus, 102 Cal. App.2d 839, 844-45, 228 P.2d 341 (1951).

[13] Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858 (1908).

[14] Waterford Irr. Dist. v. County of Stanislaus, 102 Cal. App.2d 839, 847, 228 P.2d 341 (1951).

[15] Id. at 844-45.

[16] Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645 (1890); Collier v. Merced Irr. Dist., 213 Cal. 553, 2 P.2d 790 (1931); Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886). See n. 424, infra.

The concept of property in water in American jurisprudence traces its development from its source in Roman law, through the European civil law, to the English common law.[17] According to Roman law, running water, like the air, the sea, the shore, and wild animals, could not be privately owned where in a state of nature. No property could exist in these common resources except upon capture and reduction to possession.[18]

This "negative community" of interest,[19] "things common to all and property of none",[20] reflected three related attitudes toward certain resources and toward running water in particular: That because of its fugitive and fluctuating nature, water is not physically amenable to the precise and static demarcations which characterize private property in land and chattels;[21] that water and its uses are of common benefit and necessity; and that providence bestows the right to, and blessing of water upon all people as a matter of natural law.[22]

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[17] 1 S. Wiel, Water Rights in the Western States, 1-21 (3d ed., 1911); see also Geer v. Connecticut, 161 U.S. 519, 523-26 (1895).

[18] 1 S. Wiel, Water Rights in the Western States 2-8 (3d ed., 1911).

[19] The "negative community" is the term ascribed by the French civil law commentator Pothier to the equivalent Roman law concepts of res nullius and res communes. Pothier's Treatise on Property, No. 21 is translated and quoted in Geer v. Connecticut, 161 U.S. 519, 525: "'This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each have their particular portion. It was a community which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all belonged no more to one than to the others, and hence no one could prevent another from taking of these common things that portion which he judged necessary in order to subserve his wants.'"

[20] Institutes of Justinian, lib. 2, tit. 1, sec. 1, in 1 S. Wiel, Water Rights in the Western States, supra at 2.

[21] A chattel is an article of personal property. Black's Law Dictionary 229 (rev'd 4th ed., 1968).

[22] 1 S. Wiel, Water Rights in the Western States, supra, at 7, 9; 2 Blackstone's Commentaries 394, 410; Geer v. Connecticut, 161 U.S. 519, 527 (1895); J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 Mich. L. Rev. 473, 484-85 (1970). T. Lauer, "The Riparian Right as Property", in Water Resources and the Law 133. 154 (1958).

Because running water has been viewed as one of the "things common to all and property of none", in its natural state it has been viewed as incapable of private ownership. The private property rights which have been recognized in water are "usufructs" or use rights.[23] California courts have consistently affirmed that neither riparian nor appropriator "owns" the corpus of the water in a stream, but has only a private right to use the flow of a stream and to divert it for beneficial purposes.[24]

B. The Public Trust: Origins and Development

Water resources are subject to public as well as private property rights. Under the common law, as developed and expanded in California and other states, the public has paramount rights of use in certain important natural resources.[25] These resources, including navigable waters, tidelands, and fish, are all said to be subject to a "public trust."

The public trust finds its origin in the same Roman law concepts which led to the modern notions regarding the existence and scope of private rights in water. From the Roman law concept of the negative community, or property in no one, the common law introduced a variation that certain resources were publicly owned.[26] The air, the sea, and rainfall remained in the classic negative community. But under the common law variation,

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[23] See 1 S. Wiel, Water Rights in the Western States, supra, at 14-21.

[24] Id. at 21; Gould v. Eaton, 117 Cal. 539, 49 P. 577 (1897); Seneca Consolidated Gold Mines v. Great Western Power Co.; 207 Cal. 206, 287 P. 93 (1930); Nevada County & Sacramento Canal Co. v. Kidd, 37 Cal. 282 (1869). While Blackstone's assertion that the usufructuary right continues only so long as use is being made (2 B 1. Com. 395) generally comports with the California law of prior appropriation, riparian rights are not lost by nonuse. This is not, however, because riparian rights are anything more than "use" rights, but because the right to use water arises from the ownership of land and exists so long as riparian land is owned.

[25] Although the public trust is a common law doctrine, it has also found expression in legislative enactments and constitutional provisions.

[26] "One variation is in changing the expression from 'things in common' to 'things public.'" 1 S. Wiel, Water Rights in the Western States, supra at 10.

flowing waters, shorelands, and wild animals (including fish) were segregated under the new rubric of publici juris or "public rights."

This change, in turn, found expression as a positive property concept, the "public trust." One noted authority explained: "...as an outgrowth of this variation of the idea of 'negative community' --the change from 'common' to 'public' --there is quite generally to-day a tendency to substitute the positive expression that running water belongs to the State in trust for the people or the public, in analogy to a similar change in the way of stating the law regarding wild game, and the law of the beds of navigable rivers."[27]

The public trust concept today involves a tri-partite relationship among the state, the public, and private right holders. In general, the doctrine holds that the State is the guardian or trustee of certain natural resources, in which private rights may exist, for the protection of public rights of use.[28] The relationships implicit in the public trust doctrine have often been cast in terms of state or public property

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[27] Id at 11-12.

[28] People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); People v. Stafford Packing Co., 193 Cal. 719, 727 (1924); Marks v. Whitney, 6 Cal.3d 251, 259-60, 491 P.2d 374, 98 Cal. Rptr. 790 (1971)7

rights.[29] Although the public trust appears to involve only an approximation of traditional property relations,[30] the following may be said: The public have rights of use in certain resources which, by virtue of their recognition in the common law and in constitutional

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[29] Public rights of use in navigable waters have consistently been called "easements" or "servitudes." Bohn v. Albertson, 107 Cal. App.2d 738, 238 P.2d 128 (1951); Marks v. Whitney, 6 Cal.3d 241, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). The State has been referred to as a "trustee" People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913). Fish and water have been said to be "owned" by the people or by the State. People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897); People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 298 (1925); Ivanhoe Irr. Dist. v. All Parties, 47 Cal.2d 597, 306 P.2d 824 (1957). And the federal navigation servitude, deriving from the commerce power, has been said to have a "proprietary" nature. L. Leighty, "The Course and Scope of Public and Private Rights in Navigable Waters —Part I", 5 Land and Water L. R. 391, 430 (1970); J. Munro, "The Navigation Servitude and the Severance Doctrine", 6 Land and Water L. R. 491, 503 (1971); and see E. Morreale, "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation", 3 Nat, Res. J. 1, 10 (1963). The "property" approach is useful insofar as it describes rights in the public, which burden the exercise of private property rights, and power in the state which is different from general police power regulation.

However, confusion has also been the result of the use of property terminology, mainly because "property" generally connotes private rights. Property "in the public" may therefore be analogous to private property, or may be defined in terms of private property. But the term public or state "property" fails to convey the important aspect of sovereignty which is involved. It makes little difference whether a state "grants" to the public (who, in their collective sovereignty, are the state) property rights in resources which it "owns", or declares through its laws that all private rights which it recognizes as sovereign will be limited from the outset in favor of public rights of use.

The confusion in this area has arisen also through the use of different approaches and the lack of consistency within a single approach. Thus, some authorities define the public trust in terms of the imperium and dominium, or authority and dominion, of the state. L. Leighty, "Public Rights in Navigable State Waters—Some Statutory Approaches", 56 Land and Water L. R. 459, 460 (1971). Others regard the public trust in terms of jus privatum and jus publicum of a resource, or its private and public aspects. People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); Shively v. Bowlby, 152 U.S. 1 (1893); T. Ziemann, "California's Tidelands Trust for the Modifiable Public Purposes", 6 Loy, L. R. 485 (1973), And others have approached the public trust as a division of legal and equitable titles. Ivanhoe Irr. Dist. v. All Parties, 47 Cal.2d 597, 306 P.2d 824 (1957); T. Ziemann, supra.

[30] See F. Trelease, "Government Ownership and Trusteeship of Water", 45 Cal. L. R. 638 (1957); and J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 Mich. L. R. 473 (1970).

provisions of the State, are paramount to private rights; the private rights are burdened both by public use "easements" and by the potential exercise of the State's power to administer the public trust; and the State has special or "fiduciary" duties to advance and respect the purposes of the trust, which limit its general powers of government to alienate or deal with the trust resource.[31]

The main body of public trust doctrine has concerned the protection of public rights in navigable waters. In England, waters were legally navigable if they were influenced by the ebb and flow of the tide.[32] As early as the 17th century, it was concluded that the King had title to the navigable waters of the realm and the lands underlying them, to the ordinary high-water mark, both as private owner and as guardian of the public rights of navigation and fishery.[33] The King was forbidden to grant his private interest in land free of the public interest. Termination of the public right was viewed to be within the exclusive province of Parliament.[34] When the American colonies gained independence, they succeeded in their

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[31] Colberg, Inc. v. State of California ex rel Dept. of Public Works, 67 Cal.2d 408, 419, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).This tri-partite relationship can be viewed as a matrix of correlative rights, powers, and obligations. Public rights are often expressed as a servitude or easement vis-a'-vis the private right holder. Legal Issues in Public Interest Enforcement (National Association of Attorneys General, 1977). It has been held that the "trust powers" of the State vis-a'-vis the private right holder are commensurate with this servitude. Colberg, Inc. v. State of California ex rel Dept. of Public Works, 67 Cal.2d 408, 420, 432 P.2d 3, 62 Cal. Rptr. 401 (1967). It has also been declared that the duties imposed upon the State vis-a'-vis the public are commensurate with the State's trust powers. City of Long Beach v. Mansell, 3 Cal.3d 462, 482, 476 P.2d 923, 91 Cal. Rptr. 23 (1970).

[32] Shively v. Bowlby, 152 U.S. 1, 11 (1893),

[33] this double aspect of the royal prerogative was described in De Jure Maris et Brachiorum Ejusden by Lord Hale in 1670, See 1 Clark, ed., _Waters and Water Rights. 181-82; T. Ziemann, "California's Tidelands Trust for" Modifiable Public Purposes", 6 Loy. L, R. 485, 488 n. 25 (1973); E. Morreale, "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation", 3 Nat. Res. J. 1, 26 (1963).

[34] J. Sax, supra, at 46-77.

representative capacity to the interests and sovereignty of the crown.[35] Common law public rights in navigable waters were recognized, both as positive rights in the public and as "trust" powers and obligations in the several states.[36] New states acceded to the same rights and powers as the original thirteen by virtue of the "equal footing" doctrine.[37] California was among these.[38]

In California, a second area of public trust doctrine has developed with respect to fish. In England, public fishing rights were not viewed as incidents of the right of navigation,[39] but as distinct rights arising from the royal trust in the beds underlying tidal waters.[40] In American jurisdictions, however, fishing has been generally viewed as an incident of the public right of navigation. California takes this view but also recognizes a separate public trust in fish themselves as a natural resource.[41]

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[35] Except for the rights and powers surrendered to the federal government under the Constitution.

[36] R. Dewsnup, Public Access Rights in Waters and Shorelands 8-9 (National Water Commission Legal Study 8-B, 1971); Shively v. Bowlby, 152 U.S. 1, 16 (1893).

[37] J. Gould, Law of Waters 94 (3d ed., 1900); Pollard's Lessee v. Haggan, 44 U.S. (3 How.) 212, 223 (1845).

[38] There exists a concurrent "trusteeship" in the federal government regarding navigable waters, although trust language is rarely used to describe it. Under the Commerce Clause, the United States exercises paramount and plenary authority over all navigable waters. Through the Commerce Clause, the historical common law prerogative of absolute control over navigation is expressed as the "federal navigation servitude." E. Morreale, "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation", 3 Nat. Res. J. 1, 10, 30 (1963). The federal navigation servitude, which burdens all private rights in navigable waters, is considered in more detail, infra, p. 22.

[39] 1 Clark, ed., Waters and Water Rights 182 (1967).

[40] T. Lauer, "The Riparian Right as Property", in Water Resources and the Law 133, 217 (1958). Thus, while navigation rights were extended to some freshwater streams, fishing rights were not recognized in waters over privately owned beds.

[41] Id. at 218-21; 1 S. Wiel, Water Rights in the Western States, supra, at 947. Derivation of the concept of public fishery rights is found in the Court's opinion in Geer v. Connecticut, 161 U.S. 519, 523-36 (1895). See also nn. 102-113.

Public rights in fish are not coextensive with public rights in fishing as incidents of navigation.[42]

Courts have also touched on public trust doctrine in analyzing the concept that the people "own" all the water within the State. This idea was first introduced in 1911 as an addition to California Civil Code Section 1410,[43] whose amended version appears as California Water Code Section 102:

> All water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation in the manner provided by law.[44]

The early case of Palmer v. Railroad Commission[45] held that the section did not affect private rights, but was merely declaratory of the sovereignty of the State over water for purposes of regulation. However, the California Supreme Court relied on the section in Ivanhoe Irrigation District v. All Parties.[46] The Court stated that the unappropriated waters of the State are held by the State in trust for the people.[47] But the limited trust described in this case, relating to the rights of the public and duties of the State as the ultimate purveyor of water, was declared to be "mere dicta" and "not a statement of the law of California"[48] when the case came again before the Court.

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[42] See discussion, infra, of People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897), p. 24.
[43] Cal. Civil Code Section 1410, amended 1911 Cal. Stats. 821.
[44] Cal. Water Code Section 102 (West 1971).
[45] 167 Cal. 163, 138 P. 997 (1914).
[46] 47 Cal.2d 597, 306 P.2d 824 (1957), rev'd on other grounds, 357 U.S. 275 (1958).
[47] Id. at 627.
[48] Ivanhoe Irr. Dist. v. All Parties, 53 Cal.2d 692, 716, 350 P.2d 69, 3 Cal. Rptr. 317 (1960); See P. Taylor, "Destruction of Federal Reclamation Policy? The Ivanhoe Case", 10 Stan. L. R. 76 (1957-58).

C. Areas and Effect of Application of the Public Trust Doctrine

1. Navigable Waters

The most extensive development of the public trust concept has dealt with the protection of public rights in navigable waters, including tidelands and inland navigable waterways. After defining the legal and physical dimension of navigable waters, the following public trust aspects will be considered: The uses of the resource which the public may make; the constraints on government actions dealing with or affecting the resource; and the limitations imposed on private right holders by the assertion of public rights and the exercise of governmental trust power.

a. Definitions

The physical definition of tidelands is the area between mean high and low tide.[49] Inland navigable waters and their beds and banks reach to the ordinary high water mark.[50]

Legal navigability depends on the purpose for which it is defined. There are different definitions of navigability for the scope of the federal navigation servitude, for the title to lands underlying navigable waters, and for the extent of public rights in navigable waters under the public trust

[49] Marks v. Whitney, 6 Cal.3d 251, 258, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). The title to the sea bed underlying the "marginal sea", extending from low tide to three miles seaward was confirmed in the states in the Submerged Lands Act of 1953, Act of May 22, 1953, c. 65, 67 Stat. 29 (43 U.S.C. 1303 et seq.). See R. Dewsnup, Public Access Rights in Waters and Shorelands 17 (National Water Commission Legal Study No. 8-B, 1971).

[50] Colberg, Inc. v. State of California ex rel State Dept. of Public Works, 67 Cal.2d 408, 420, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); People ex rel. Baker v. Mack, 19 Cal. App.3d 1040, 1050, 97 Cal. Rptr. 448 (1971).

doctrine. The first two are federal definitions, and the third is a state definition.[51]

For the purpose of the regulation of waters by Congress under the Commerce Clause of the United States Constitution,[52] rivers are navigable which are "in fact, used or susceptible to being used in their natural condition 'or with reasonable improvements' for purposes of trade and navigation."[53] For purposes of title to the beds of navigable waters,[54] title is held by the State if, at the time of the state's admission to the Union, the waters were in fact capable of use for trade and navigation in their natural condition.[55]

The federal tests are not binding on the states for purposes of state recognition of public and private rights in navigable waters.[56] Although some states limit public rights of use to waters over state-owned lands (or allow only navigation itself and not its incidents), others, including California, have adopted less restrictive definitions.[57]

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[51] In England, only waters influenced by tidal action were deemed to be navigable. This restrictive definition was held at an early date inapplicable to the United States with its great inland waterways. The Daniel Ball, 77 U.S. (10 Wall) 557, 563 (1871) announced the rule that waters navigable in fact were navigable in law, and this idea has been central to all subsequent definitions of navigability in American jurisdictions. See J. Gould, Law of Waters 118 (3d ed., 1900).

[52] United States Constitution, Art. 1, Section 8.

[53] United States v. Appalachian Power Co., 311 U.S. 377, 406-09 (1940).

[54] If waters were navigable under this test, the State received title to the beds upon admission to the Union. The federal government had interests in the beds of other waters such as to be able to give title thereto to private patentees.

[55] Utah v. United States, 403 U.S. 9, 10-11 (1971).

[56] Fox~ River Co. v. Railroad Commission, 274 U.S. 651, 655 (1927).

[57] See 1 Clark, ed., Waters and Water Rights 214-17 (1967); R. Dewsnup, Public Access Rights in Waters and Shorelands (National Water Commission Legal Study No. 8-B, 197l). See Hitchings v. Del Rio Woods Recreation and Park Dist., 55 Cal. App.3d 560, 127 Cal. Rptr. 830 (1976).

In California, navigability for purposes of recognition of public rights of use is defined by the "pleasure-craft" test.[58] This test has been used to find that streams are navigable that are used by skiffs, rowboats,[59] or small boats,[60] or are of depths of as little as 2.7 feet.[61] One recent case approved of a finding of navigability by the Wisconsin Supreme Court in water ranging from eight inches to two feet deep.[62]

In addition, navigability may arise at any time, [63] and the stream need not be navigable throughout the year[64] or even at low tide.[65] Nor need it be navigable in all places.[66] In navigable waters created by flooding, the public has rights of use until the land is reclaimed by the owner.[67]

b. Public Rights of Use

The uses permitted the public originally included only navigation for commerce and incidental fishing rights.[68] Today, the range of allowable public uses has expanded to include boating, bathing, fishing, hunting, and

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[58] The basic test is enunciated in Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139, 1141, 1143 (1893). Lamprey has often been cited approvingly in California cases. See Bohn v. Albertson, 107 Cal. App.2d 738 (1951); People ex rel. Baker v. Mack, 19 Cal. App.3d 1040, 1044, 97 Cal. Rptr. 448 (1971);Miramer v. Santa Barbara, 23 Cal.2d 170, 175, 143 P.2d 7 (1943).

[59] Id. at 746-47.

[60] Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912).

[61] People ex rel. Baker v. Mack, 19 Cal. App.3d 1040, 97 Cal. Rptr. 448 (1971).

[62] Id. at 1045, citing Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

[63] Bohn v. Albertson, 107 Cal. App.2d 738, 238 P.2d 128 (1951).

[64] Hitchings v. Del Rio Woods Recreation and Park Dist., 55 Cal. App.3d 560, 570-71, 127 Cal. Rptr. 830 (1976).

[65] Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912).

[66] See Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898), cited in Hitchings v. Del Rio Woods Recreation and Park Dist., 55 Cal. App.3d 560, 570 n. 4, 127 Cal. Rptr. 830 (1976).

[67] Bohn v. Albertson, 107 Cal. App.2d 738, 750, 238 P.2d 128 (1951).

[68] T. Lauer, "The Riparian Right as Property", in Water Resources and the Law 133, 213-23 (1958); Marks v. Whitney, 6 Cal.3d 251, 259, 491 P.2d 374, 98 Cal. Rptr. 790 (197l).

recreation.[69] In a case involving tidelands, the California Supreme Court has stated that scenic and ecological preservation are proper public uses.[70] In addition, the public may make reasonable uses of the bed in connection with its use of the water. Such uses include bathing, fishing, poling, and anchoring.[71]

c. Constraints on Legislative Actions Dealing with or Affecting Navigable Waters

The recognition of public rights in navigable waters and tidelands[72] constrains the legislature to preserve or advance the purposes of the

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[69] Bohn v. Albertson, 107 Cal. App.2d 738, 749, 238 P.2d 128 (1951).

[70] Marks v. Whitney. 6 Cal.3d 251, 259-60, 491 P.2d 374, 98 Cal. Rptr. 790

[71] Bohn v. Albertson, 107 Cal. App.2d 738, 749, 238 P.2d 128 (1951).

[72] A special area of confusion in treating the public trust as property involves the ownership of tidelands or the beds of navigable rivers. Some jurisdictions limit the public trust to waters overlying publicly owned land. C. Meyers and A. Tarlock, Water Resource Management 790 (1971). Others distinguish the public trust in such waters from the bare right of navigation in waters overlying privately owned beds 1 Clark, ed., Waters and Water Rights 198-99 (1967). California makes no such distinctions. Courts have often stated that public rights in navigable waters are not dependent on ownership of underlying beds. In Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971), the court referred to Bohn v. Albertson, 107 Cal. App.2d 738, 238 P.2d 128 (1951), a case dealing with public rights in tidelands. In Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal.3d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), the court declared that the rules of law applicable to tidelands were applicable to all navigable waters. In People v. California Fish Co., the court stated that the public trust in tidewaters is not terminated by the alienation of all property rights into private ownership (the "bare legal title"). In all waters determined to be navigable under California's liberal tests, whether overlying public or privately owned beds, broad public rights of use have been recognized. See Marks v. Whitney and Hitchings v. Del Rio Woods Recreation and Park Dist., 55 Cal. App.3d 560, 127 Cal. Rptr. 830 (1976) and cases cited therein. See also People ex rel. Baker v. Mack, 19 Cal. App.3d 1040, 1050, 97 Cal. Rptr. 448 (1971); Forestier v. Johnson, 164 Cal. 24, 37, 38, 127 P. 156 (1.912); .53 Ops. Cal. Atty. Gen. 332 (1970); and L. Leighty, "Public Rights in Navigable Waters-Some Statutory Approaches", 6 Land and Water L. R. 459, 488 (1971). There is no case in California holding or suggesting that the rules apply differently, or that the State has greater power, vis-a'-vis the private right holder or the public where it owns or once owned the bed underlying navigable waters. But see T. Ziemann, "California's Tidelands Trust for Modifiable Public Purposes", 6 Loy. L. R. 485 (1973) and J. Gaudet, "Water Recreation—Public Use of Private Waters", 52 Cal. L. R. 171 (1964).

trust.[73] Its public trusteeship implies that it must act in a "fiduciary" capacity. When the State owns tidelands, for example, it may not generally convey its interest free of its trust obligations.[74] When the legislature deals with the trust resource in other ways, whether the resource is publicly owned or not, it must act consistently with its trust duties.[75] It may exercise its general police power to restrict public uses only if reasonable and consistent with the terms of the public trust.[76]

The obligations of the State to protect public rights of use under the public trust doctrine have been most fully explored in the area of

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[73] Administration of the trust may be delegated. Management of tidelands, for example, is delegated to the State Lands Commission. Cal. Pub. Res, Code Section 6301. Or municipalities may be delegates, as in Mallon v. City of Long Beach, 44 Cal.2d 199, 282 P.2d 481 (1955).

[74] Id. at 208.

[75] Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal.2d 408, 417-19, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

[76] Hitchings v. Del Rio Woods Recreation and Park Dist., 55 Cal. App.3d 560, 572, 127 Cal. Rptr. 830 (1976).

tideland preservation.[77] The central question has been the power of the State to alienate tidelands free of the public trust.[78]

A line of cases began in 1867, when "the state was already heavily engaged in the sale of its tidelands and swamplands",[79] which dealt with this question. The first of these cases looked solely to the physical suitability of the tidelands for navigation to decide whether public rights could be terminated.[80] If the granted lands were suitable for navigation, then the grantee took title subject to public rights of use and state administration of the trust. The next two major cases added three requirements

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[77] The rules of law applying to tidelands apply equally to other kinds of navigable waters Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal.2d 408, 423, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), including navigable lakes. Churchill Co. v. Kingsbury, 178 Cal. 554, 558, 174 P. 329 (1918).

[78] The tidelands trust, apart from its existence in the common law, is also a matter of constitutional protection:

Cal. Const. Art. 10, Section 3. All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations; provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest. (formerly Art. 15, Section 3).

Cal. Const. Art. 10, Section 4. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof. (formerly Art. 15, Section 2).

[79] R. Perschbacher, "Private Fills in Navigable Waters: A Common Law Approach", 60 Cal. L. R. 225 (1972).

[80] Ward v. Mulford, 32 Cal. 365 (1867); Taylor v. Underhill, 40 Cal. 471 (1871).

for the termination of the public trust: The granted tidelands had to have been made physically unsuited for navigation at some earlier time in the course of making navigation improvements;[81] the conveyance into absolute private ownership must have been to enhance navigation;[82] and the legislature must have clearly intended to terminate the public trust in the conveyed lands.[83] A third case affirmed the intent-of-the-legislature test and emphasized that the granted parcel in question must be a relatively small portion of the relevant tidelands area.[84]

In summary, the California Supreme Court has indicated that large scale termination of the Legislature's public trust responsibilities will be strictly scrutinized by the Court, and perhaps held ineffectual if the "effect will be to impair the power of succeeding legislatures to administer the trust in a manner consistent with its broad purpose."[85] On the other

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[81] People v. California Fish Co., 166 Cal. 576, 597, 138 P. 79 (1913).

[82] Forestier v. Johnson, 164 Cal. 24, 32, 127 P. 156 (1912).

[83] Id.; People v. California Fish Co., 166 Cal. 576, 581, 138 P. 79 (1913). Dicta in these cases indicate similar results obtain under either Cal. Const. Art. 15, Sec. 2 (now Art. 10, Sec. 4) or the common law. Forestier at 34, California Fish at 589-96. The result in this last case was put in fundamental terms: "A statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the public in general, unless such intent clearly appears." Id. at 592.

[84] City of Long Beach v. Mansell, 3 Cal.3d 462, 484-85, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).Since 1909, sales of tidelands to private parties have been prohibited by statute.

[85] City of Long Beach v. Mansell, 3 Cal.3d 462, 482 n. 17, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).Knudsen v. Kearny, 171 Cal. 250, 152 P. 541 (1915); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913); Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912). The basic nature of the State's fiduciary obligations respecting trust resources was strongly put by the United States Supreme Court in an early case:

> The sovereign power itself, therefore, cannot, consistently with the principles of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people. Martin v. Waddell, 41 U.S. 367, 419 (1842). See also J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 Mich. L. R. 471, 536-38 (1970).

hand, termination of such responsibilities in relatively small areas will be upheld if the intent-of-the-legislature test is met.[86]

In cases other than those involving grants of tidelands, courts in California have liberally construed the public purpose for which the Legislature may deal with trust resources and impair public rights to use navigable waters as natural resources. In Boone v. Kingsbury,[87] the State was allowed to issue permits for gas and oil prospecting upon tidal lands on the theory that gasoline production was in furtherance of commerce and within the trust purposes. In Gray v. Reclamation Dist. No. 1500,[88] the court upheld reclamation of lands underlying navigable water for purposes of flood control. And in Colberg, Inc. v. State of California ex rel. Dept. of Public Works,[89] the court approved of the construction of a highway bridge over the Stockton Deep Water Ship Channel, although it severely interfered with navigation:

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[86] See cases cited in nn. 80-85; also see R. Perschbacher, "Private Fills in Navigable Waters: A Common Law Approach", 60 Cal. L. R. 225, 250-53 (1972); P. Davis, "California's Tideland Trust: Shoring It Up", 22 Hast. L. J. 759, 766-68 (1971); and M. Brush, The State Public Trust in Maintenance of Navigable Waters—California and San Francisco Bay (1966). In City of Long Beach v. Mansell, supra, n. 85, termination of trust responsibilities and public rights was upheld on an estoppel theory. The court held that the State and City of Long Beach had acquiesced in the fill and development of the tidelands by its owners since 1923. The owners had built a marina and stadium on the fill. The city had granted building permits, constructed and maintained streets and city services, and exercised full municipal jurisdiction. Thus, the city and state were not allowed to assert that the owners had anything but full private ownership. However, the court emphasized that extreme reliance must be shown and that the injustice of allowing the State to assert its trust must outweigh the public benefit in maintenance of the trust. The court also noted the public benefits gained by the filling and development of the tidelands.

[87] 206 Cal. 148, 273 P. 797 (1928).

[88] 174 Cal. 622, 163 P. 1024 (1917).

[89] 67 Cal.2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

> The state, as trustee for the benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise.[90]

d. Limitations on Private Right Holders

There is a dual limitation on private rights in trust resources: The servitude in favor of public uses and the exercise of government trust powers. The clear meaning of these limitations is that private property in these resources is considerably restricted.[91]

The limitation of private rights in navigable waters has been thoroughly illustrated in the cases dealing with the federal navigation servitude. If the federal government intends to exercise its power over navigable waters for navigation purposes,[92] and if its actions destroy private rights or values asserted in such waters below the ordinary high-water mark, there is no taking of property within the meaning of the Fifth Amendment.[93] Thus, where a riparian's access to a river is destroyed, no compensation for that loss is due.[94] Loss of the value attributable to a riparian or littoral location for power generation[95] or as a port site[96] because of federal navigation projects is not included in the compensation award for the taking of lands above the ordinary high water mark.

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[90] Id. at 419.

[91] In People v. California Fish Co., the court stated that the owner of tidelands subject to the public trust had but a "license" to use the tidelands, until the "license" was revoked by exercise of the trust power. 166 Cal. 576, 138 P. 79 (1913).

[92] United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[93] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913); United States v. Willow River Power Co., 324 U.S. 499 (1945). [94] Gibson v. United States, 166 U.S. 269 (1897); Scrantan v. Wheeler, 179 U.S. 141 (1900).

[95] United States v. Twin City Power Co., 350 U.S. 222 (1956).

[96] United States v. Rands, 389 U.S. 121 (1967). Congress has since made the loss of the value of fast land attributable to access to navigable waters compensable in Section 111 of the Rivers and Harbors and Flood Control Act of 1970, 33 U.S.C.A. Sec. 595(a) (West Supp, 1977),

Although no case has involved the impairment or destruction of an "irrigation right", one author concludes that there is nothing "to suggest their compensability."[97]

In California, the cases of Marks v. Whitney[98] and Colberg, Inc. v. State of California ex rel. Dept. of Public Works[99] indicate respectively the extent to which private rights in tidelands and navigable waters are burdened by public uses and the extent to which they are subject to the potential exercise of the State's trust power. In Marks, a quiet title action, the court declared a public trust easement to exist in tidelands owned by the plaintiff, with the result that he was not allowed to fill a portion of the land and build a marina. The Supreme Court of California noted that the public servitude could be viewed as requiring the tidelands to remain in their natural state for ecological study, open space, or aesthetic purposes.[100]

In Colberg, the Supreme Court indicated that a private right of access to the sea via the Stockton Deep Water Ship Channel could be severely limited by the construction of low-level freeway bridges over the channel. Any private harm suffered through loss of use of navigable waters because of state actions to promote overland commerce was held not to be compensable, so long as there was no physical invasion of the fast land.[101]

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[97] E. Morreale, "Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation", 3 Nat. Res. J. 1, 64 (1963); See also L. Leighty, "The Source and Scope of Public and Private Rights in Navigable Waters", 5 Land and Water L. R. 391, 430 (1970); and J. Munro, "The Navigation Servitude and the Severance Doctrine", 6 Land and Water L. R. 491 (1971).

[98] 6 Cal.3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[99] 67 Cal.2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

[100] 6 Cal.3d 251, 259-60, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[101] 67 Cal.2d 408, 419-25 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

2. Fish and Fishing

Fishing became identified in many American jurisdictions, including California, as an incident of the public right of navigation.[102] In California, public rights also exist in fish themselves, predicated upon public ownership of all fish in all navigable and non-navigable waters of the State.[103] This idea has also been expressed as a classic trust, with title in the State for the beneficial use of the public.[104]

While the distinction between "fishing" and "fish" may seem slight, different origins in the common law[105] have resulted in different conceptions of the public right and the governmental responsibility with respect to that right. The essential difference is that fishing as an incident to navigation looks to public use of a protected resource (navigable waters) which is not consumed or depleted by the use. On the other hand, the trust in fish has as a focus the public consumption or conservation of the protected resource.[106]

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[102] See discussion, supra, p. 16.

[103] People v. Stafford Packing Co., 193 Cal. 719, 727, 227 P. 485 (1924): "The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state... and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law ..."; see also People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897); and Ex Parte Maier, 103 Cal. 476, 37 P. 402 (1894).

[104] In re Parra, 24 Cal. App. 339, 343, 141 P. 393 (1914).

[105] "In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals ferae naturae by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control." Geer v. Connecticut, 161 U.S. 519, 523 (1895).

[106] Or, in terms of the "negative community", the focus is the power of the individual as member of the public to reduce fish to possession and private ownership. In Ex Parte Bailey, 155 Cal. 472, 476, 101 P. 441 (1909) the court treated the two public rights of navigation and fishery as distinct, and suggested a balancing of the two interests where in conflict.

Thus, preservation of fish is the primary trust duty of the State with respect to public rights in fish themselves.[107] It has a duty of non-discrimination in regulating the capture of fish,[108] which is commensurate with the right in the people to an equal opportunity to take fish from wherever they have lawful access to the stream.[109]

Private rights are burdened by the public right to fish and the State's power to control consumption. Thus, an appropriator of water has been required to erect a fish-screen on his diversion works to protect fish.[110] The introduction into the water of substances deleterious to fish life by riparian owners has been proscribed.[111]

In general, private parties may not obstruct the passage of fish to and from public fishing grounds.[112] To the extent that "private" or non-navigable waters provide such a passageway, they are, for purposes of trust power and protection, "public" waters.[113]

D. Impact of the Public Trust Doctrine on Water Rights

The public trust has a potential to affect water rights in a manner similar to its effect on other private rights. The future impact of the public trust on water rights depends in part on four expanding aspects of the doctrine, which have significance for all private rights in trust

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[107] In re Phoedovius, 177 Cal. 238, 170 P. 412 (1918); Ex Parte Maier, 103 Cal. 476, 483, 37 P. 402 (1894); "[The people] may, if they see fit, absolutely prohibit the taking of it [fish], or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good." In re Parra, 24 Cal. App. 339, 343, 141 P. 393 (1914).

[108] In re Phoedovius, 177 Cal. 238, 170 P. 412 (1918); Ex Parte Kennke, 136 Cal. 527, 69 P. 261 (1902).

[109] Ex Parte Bailey, 155 Cal. 472, 101 P. 441 (1909).

[110] People v. Glenn-Colusa Irr. Dist., 127 Cal. App. 30 (1932).

[111] People v. Stafford Packing, 193 Cal. 719, 227 P. 485 (1924); People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897).

[112] Id. at 400.

[113] Id. at 400-01.

resources: Broadening of the definition of navigability; the increasing range of public uses allowable under the doctrine; expansion of the purposes for which the legislature may exercise its trust powers; and the power of the legislature to terminate or impair public rights of use.

In all four areas, the underlying premise is the superiority of public rights[114] safeguarded by the public trust doctrine, whether by common law authority, constitutional provision, or otherwise.[115] A corollary to this premise is that the effects of the state's exercise of its trust powers on private rights are not compensable.[116]

The broadening of the definition of navigability has gone hand in hand with the expansion of public uses permitted under the doctrine. There has been, in effect, a redefining of navigability in terms of the new uses (especially recreational) which the public desires to make of waters within the State.[117] In Bohn v. Albertson, it was suggested that public rights should follow public needs, and that navigability was irrelevant.[118] Extension of the purposes for which the State may exercise its trust powers creates greater possibilities of non-compensated interference with private uses. It also bears upon the ability of the legislature to impair public

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[114] See p. 16 and n. 29, supra.

[115] The public trust is primarily a common law doctrine. It may find expression in constitutional provision or statutes. See, e.g., Cal. Const. Art. 10, Secs. 3 and 4, n. 64, infra; Cal. Pub. Res. Code, Section 7991, n. 70, infra; and Cal. Fish and Game Code, Section 5937, p. 54 infra.

[116] See pp 22-23, supra.

[117] The trend has been to declare new uses to be "incidents of navigation." See Forestier v. Johnson, 164 Cal.2d 24, 40 (1912). However, one author asserts that the scope of public rights in England was, in principle, larger than the use of water for navigation alone: "In medieval England the general public exerted few other demands for water use .... In short, medieval common law recognized the only substantial public demand for water that was exerted." 1 Clark, ed., Waters and Water Rights 183, 203 (1967); see also R. Dewsnup, Public Access Rights in Waters and Shorelands 44-45 (National Water Commission Legal Study No. 8-B, 1971).

[118] 107 Cal. App.2d 738, 744 (1951).

uses of the resource itself. Thus, while the public may make use of a bridge traversing a river[119] or of gasoline from tidewater drilling[120] for commercial intercourse, there may be an impairment of the direct use of the resource in its natural state. The ability of the Legislature to terminate public rights in small portions of the resource increases the possibility of loss or impairment of public rights of use.

While consumptive water rights themselves have not yet been impaired by the assertion of the public trust doctrine, there is nothing in theory to prevent it.[121] Water use by private right holders which depletes the flow of a stream or decreases the quality of the water so as to make it unsuitable for fish life, navigation, recreation, or scenic and ecological uses, is as inconsistent with public trust protection as fencing a stream off from the public,[122] filling tidelands,[123] or depositing debris in a river.[124] On the other hand, state actions for the "promotion of commerce" could conceivably permit impairment of the natural integrity of the protected resource by virtue of the state power to "deal with" the public trust resources.[125] The dimension of the public trust in fish and navigable waters which affects water rights has not been addressed directly by the courts. Judicial clarification of this dimension may be expected when appropriate cases arise.[126]

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[119] Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal.2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

[120] Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928).

[121] See E. Morreale, "Federal Power "in Western Waters: The Navigation Power and the Rule of No Compensation", 3 Nat. Res. J. 1, 64-65, 74-75 (1963).

[122] People ex rel. Baker v. Mack, 19 Cal. App.3d 1040, 97 Cal. Rptr. 448 (1971),

[123] Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[124] People v. Truckee Lumber Co., 116 Cal. 397 (1897).

[125] See Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67

[126] Similarly, the public trust poses potential constraints on the State in its administration of water rights. E.g., the State may not be able to approve appropriations of water which harm public rights of use, or it may be obliged to condition permits and licenses to protect those rights. See R. Robie, "The Public Interest in Water Rights Administration", to be published in the forthcoming Proceedings of the 23rd Annual Rocky Mountain Mineral Law Institute.

E. The Public Trust and the Police Power

The same principles underlying the concepts of limited property in water resources[127] also make water and water rights eminently regulable by the State for the health, safety, and welfare of society. The power to so regulate is the state's police power.[128]

There are significant differences between the state's general police power and its trust power.[129] While the police power may be exercised for the full spectrum of social needs, the trust power is limited to exercise for proper trust purposes only, and only with respect to resources within the public trust.[130]

The major difference between the public trust and the police power lies in their relation to private property rights. The police power is the general attribute of the sovereignty of the State to promote "the public welfare by restraining and regulating the use of liberty and property."[131] The emphasis is on the "restraint" and "regulation" of private property. But the public trust power of the State is predicated upon the existence in the common law of superior rights in the public which, as "easements" or "servitudes" of a proprietary nature, limit from the outset

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[127] See nn. 23, 24 and the accompanying text.

[128] Gin S. Chow v. Santa Barbara, 217 Cal. 673, 702, 22 P.2d 5 (1933); D. King, "Regulation of Water Rights Under the Police Power", in Water Resources and the Law 271, 273-74 (1958).

[129] Some courts have referred to the power to deal with navigable waters as the police power. See Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 637, 163 P. 1024 (1917). Insofar as the trust power may affect private rights differently from the police power, and insofar as the public trust constrains the general police power of the State, the two powers are and should be considered distinct. Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal.2d 408, 419, 421, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

[130] Id. R. Dewsnup, Public Access Rights in Waters and Shorelands 14 (National Water Commission Legal Study No. 8-B, 1971).

[131] D. King, "Regulation of Water Rights Under the Police Power", in Water Resources and the Law 271, 272-73 (1958).

private rights in or affecting trust resources.[132] Thus, when the State exercises its "supervisory power" over the trust resource, regardless of what rights exist between private rights holders, none exist as against the State.[133]

[132] See n. 29, supra. See also Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942).
[133] Colberg, Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal.2d 408, 416, 419, 422, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

III. State Water Resources Control Board Authority Related to Instream Uses

A. Introduction

The state and federal governments have a wide range of regulatory powers under their police power authority by which they can provide for instream protection and enhancement. This section will focus on the State Water Resources Control Board's authority that relates to instream uses. The Board primarily provides for instream uses in its administration of the water rights appropriation system, but the Board also has very important additional areas of authority through which it can provide for instream needs: Statutory adjudications, enforcement of California Constitution Article 10, Section 2, and water quality control.

The "public interest" is the State Water Resources Control Board's guiding statutory standard in administering the water rights appropriation system.[134] The public interest in instream uses is well established,[135] and California expressly recognizes that instream fish, wildlife, and recreation uses are beneficial uses of water.[136]

The recognition of instream needs figures in two threshhold determinations the Board makes for every water rights application. The Board must determine whether water is "available for appropriation" or whether it is in the public interest to have the water remain instream for fish and wildlife.[137] And, the Board must decide whether it should reject an application because the proposed appropriation "would not best conserve the public interest."[138]

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[134] Cal. Water Code Section 1258 (West 1971). Johnson Rancho County Water Dist. v. State Water Rights Board, 235 Cal. App.2d 863, 874, 45 Cal. Rptr. 589 (1965).
[135] See discussion at page 34, below.
[136] Cal. Water Code Section 1243 (West Supp. 1977).
[137] Cal. Water Code Section 1243, 1243.5 (West Supp. 1977 and West 1971).
[138] Cal. Water Code Section 1255 (West 1977).

The Board generally uses its power to impose terms and conditions on permits and licenses to provide for instream needs. The Board can impose "such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated."[139] The Board also can modify terms and conditions in a number of situations, and modification can be the occasion for providing for instream protection or enhancement. The Board's authority to impose terms and conditions, however, applies only to the limited amount of water subject to new appropriative rights and to appropriative rights which come within the Board's authority to modify terms and conditions. This authority generally does not encompass pre-1914 appropriative rights, riparian rights, and prescriptive rights.

With regard to appropriations for instream purposes where the appropriator would not control the water, the Board has taken the position that no permit can be issued. Recently, the Department of Fish and Game[140] and California Trout, Inc.[141] filed suits against the State Water Resources Control Board, claiming that the Board should accept their applications to appropriate water for instream uses. Both plaintiffs state that they are seeking appropriative rights for instream uses because other mechanisms for instream protection and enhancement are ineffective.

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[139] Cal. Water Code Section 1253 (West 1971).

[140] E. C. Fullerton, Director of the California Dept. of Fish and Game v. State Water Resources Control Board, Civil No. 61136, Cal. Super. Ct., Humboldt County, November 3, 1977.

[141] California Trout, Inc. v. State Water Resources Control Board, Civil No. 233733, Cal. Super. Ct., Sacramento County, November 14, 1977.

B. Protection of Instream Uses Within the Water Rights Appropriation Process

1. Considering Applications to Appropriate: Initial Determinations

The Board makes two initial determinations, for every water rights application, that can affect instream uses. First, it must determine whether there is water "available for appropriation" [142] which is a different inquiry from determining whether water is "unappropriated water."[143] Second, the Board must reject an application "... when in its judgment the proposed appropriation would not best conserve the public interest."[144]

a. "Water Available for Appropriation"

A prerequisite to the Board's issuance of a permit is that "[t]here must be unappropriated water available to supply the applicant."[145] But it is not clear whether the Board must allow unappropriated water to be appropriated. Water Code Section 1201 provides that water that is not "otherwise appropriated" or claimed is "public water of the state and subject to appropriation..."[146] and Section 1253 requires the Board to allow "appropriation for beneficial purposes of unappropriated water...."[147]

Two other sections of the Water Code, however, give the Board some discretion in deciding whether to allow appropriation of unappropriated water. Section 1243 first declares that instream fish, wildlife and recreation uses are beneficial uses of water, and then states:

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[142] Cal.Water Code Sections 1243, 1243.5 (West 1971 and West Supp. 1977).
[143] Cal.Water Code Sections 1200-1202 (West 1971).
[144] Cal.Water Code Section 1255 (West 1971).
[145] Cal.Water Code Section 1375 (West 1971).
[146] Cal.Water Code Section 1201 (West 1971).
[147] Cal.Water Code Section 1253 (West 1971).

> In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources. [148]

This section clearly implies that the Board can decide that water, although "unappropriated", is nevertheless not "available for appropriation" because it is in the public interest to allow that water to remain instream. Water Code Section 1243.5 states the matter somewhat differently, but the implication is the same:

> In determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses....[149]

While this distinction may not be vital in many situations, it could be a central issue in federal applications for appropriation. In United States v. California, the Ninth Circuit Court of Appeals decided that the "United States can appropriate unappropriated water ... but must first ... apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water....

> [T]he Board must grant such applications if unappropriated waters are available ..." and cannot impose any terms and conditions on federal permits.[150] California may be able to provide for instream needs by determining that no unappropriated waters are available and thereby reach the same result it is barred by United States v. California from achieving with permit and license terms and conditions.[151]

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[148] Cal. Water Code Section 1243 (West Supp. 1977).
[149] Cal. Water Code Section 1243.5 (West 1971).
[150] United States v. California, 550 F.2d 1239, 1242-43 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).
[151] Id. The appellate court upheld the district court's ruling that the Board cannot impose terms and conditions on federal permits and licenses.

b. "Best Conserve the Public Interest"

The second initial determination the Board must make, which involves the protection of instream uses, is whether it should reject[152] an application because the proposed appropriation "would not best conserve the public interest."[153] Instream use is a type of use that must be weighed along with other beneficial uses when the Board makes this determination. It is within the Board's discretion to determine what use best conserves the public interest. The Water Code requires only that the Board consider three factors,[154] all of which encompass instream uses, in determining whether a particular use is individually in the public interest: General water resource plans, the relative benefit of all beneficial uses, and water quality control plans.

1) Public Interest

Water Code Section 1256 requires the Board to "give consideration to any general or co-ordinated plan looking toward the control, protection,

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[152] "Rejection" is a term connoting summary refusal of an application. Cal. Water Code Section 1271 (West 1971), for example, provides that an application "shall be rejected and cancelled" where the application is defective and the applicant does not amend his application within 60 days. However, the term "reject" appears in other Water Code Sections, such as Cal. Water Code Section 1255 (West 1971), where a hearing would be held by the Board. Cal. Water Code Section 1350 (West 1971) makes it clear that use of the term "reject" does not necessarily mean action without hearing: "The board may grant, or refuse to grant a permit and may reject any application, after hearing."

[153] Cal. Water Code Section 1255 (West 1971). This question is intertwined with the determination of whether water is "available for appropriation." The Board, under Section 1255, may be able to reject an application for an appropriation because it "would not best conserve the public interest", even though the application was for a beneficial use of unappropriated water, where the Board determines that it is in the public interest to have a certain amount of water remain instream under Sections 1243 and 1234.5.

[154] Provisions in other codes, such as the requirements of the California Environmental Quality Act (Cal. Pub. Res. Code Section 21000 et seq.) also affect the Board's public interest determinations.

development, utilization and conservation of the water resources of the state, including the California Water Plan ... and any modification thereto ..." in determining what is the public interest.[155] A California appellate court held that this direction to consider the plan, however, "... does no more than command the board to hold in mind and pay regard to the plan and its projects in passing on water rights applications" so that, "[h]aving paid that regard, the board may accept or reject a specific project."[156]

The California Water Plan discusses the need for protection of instream uses,[157] and it outlines possible implementation measures:

> In order to provide sufficient flowing water in a stream for fish and wildlife and for the enhancement of recreational aspects of a stream, it may be necessary to store water in headwater reservoirs to permit planned releases during low-water periods. The combined releases and natural flows would be planned for a desirable all-year regimen of flow in the interests of protection and enhancement of fish, wildlife, and recreation.
>
> In order to accomplish the foregoing objectives, the planned stream flows should be protected against appropriations of water for other purposes.[158]

Water Code Section 1257 states the second factor the Board must consider in determining the public interest:

> The relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational,

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[155] Cal. Water Code Section 1256 (West 1971). This section also applies in Board determinations of public interest in setting permit and license terms and conditions.

[156] Johnson Rancho County Water Dist. v. State Water Rights Board, 235 Cal. App.2d 863, 871, 45 Cal. Rptr. 589 (1965).

[157] California Department of Water Resources, Bulletin No. 3, The California Water Plan, 21, 31 (1957).

[158] Id. at 221-22.

> mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant.[159]

The Board must weigh fish, wildlife, and recreational uses together with other beneficial uses when it considers a water rights application. Instream uses are not to be given greater consideration than any other uses. However, if the Board, in weighing the "relative benefit" of competing uses finds that instream uses best conserve the public interest, it can apparently reject an application for other beneficial uses under Section 1255, or determine that no water is "available for appropriation", under sections 1243 and 1243.5 .

Water Code Section 1258 states the third public interest factor: The Board, in acting upon applications to appropriate, must consider water quality control plans adopted by regional water quality control boards under the Porter-Cologne Water Quality Control Act.[160] Water quality control plans set water quality objectives which must be based, in part, on the regional boards' consideration of beneficial uses of water.[161] "Beneficial uses" are defined to include the following instream uses: "[P]ower generation; recreation, aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[162]

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[159] Cal. Water Code Section 1257 (West 1971). This section also applies in Board determinations of public interest in setting permit and license terms and conditions.

[160] Cal. Water Code Section 1258 (West 1971). Section 1258 also applies in Board determinations of public interest in setting permit and license terms and conditions. The Porter-Cologne Water Quality Control Act is at Water Code Section 13000 et seq.

[161] Cal. Water Code Section 13241(a) (West 1971).

[162] Cal. Water Code Section 13050(e) (West 1971).

2) Rejection Versus Terms and Conditions

The public interest thus encompasses the protection and enhancement of instream uses. It appears that if instream use is the best use of water in a particular instance, so that diversion or storage "would not best conserve the public interest", the Board could reject an application under Section 1255. This conclusion raises an important question, however: Can the Board reject an application where it determines that the public interest is not best conserved by allowing the appropriation, but is best conserved by allowing the water to be left instream, or must the Board issue the permit and provide for instream needs by devising terms and conditions, whenever possible?

The "best conserve" language of Section 1255 and the consideration of "relevant benefit" language of Section 1257 support an expansive interpretation of the Board's authority to refuse an application rather than issue a permit with terms and conditions. Several cases imply this interpretation when they state that "when one applies for appropriation of water, he does not have a fundamental vested right in the success of his application."[163] However, there is language in Section 1253, for example, that requires the Board to "allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions" as the Board determines will best protect the public interest.[164]

This conflict was presented in Boyd Trucking Company v. State Water Resources Control Board.[165] Boyd Trucking Company applied twice for

[163] Bank of America v. State Water Resources Control Board, 42 Cal. App.3d 198, 206, 216 Cal. Rptr. 770 (1974), citing several cases.
[164] Cal. Water Code Section 1253 (West 1971).
[165] Boyd Trucking Co. v. State Water Resources Control Board, Civil No. 15626, 3d D.C.A., dismissed April 9, 1976.

permits to appropriate by storage in three reservoirs for recreation and fish culture purposes. The Board rejected the permit applications both times because the intended use of water was not reasonable and was not in the public interest, even though the uses were beneficial and unappropriated water was available.[166] Both Board decisions cited Water Code Section 1255.[167]

In the subsequent lawsuit, the superior court issued a writ of mandate directing the Board to set aside its decisions and to approve applications "subject to a suitably worded condition permitting recapture of all or part of the subject water, after notice and hearing, if and when it shall appear in the future that the water is actually required for a more reasonable competing use."[168] The Board appealed, but the case was eventually dismissed based on a stipulation which provided that a so-called "recapture clause" would be inserted as a condition in the permit and license.[169] In essence, the court refused to allow the Board to reject the application because the appropriation would not best conserve the public interest, and it required the Board to remedy its objections with suitable terms and conditions.

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[166] California State Water Resources Control Board, Decision 1425 (April 19, 1973) and Decision 1446 (Jan. 16, 1975).

[167] California State Water Resources Control Board, Decision 1425, at 4 (April 19, 1973) and Decision 1446, at 6 (Jan. 16, 1975).

[168] Boyd Trucking Co. v. State Water Resources Control Board, "Announcement of Intended Decision", Civil No. 51143, Cal. Super. Ct., Shasta County, 4 (Sept. 4, 1975).

[169] Boyd Trucking Co. v. State Water Resources Control Board, "Stipulation", Civil No. 15626, 3d D.C.A., April 9, 1976.

2. Prescribing Permit and License Terms and Conditions

a. Introduction

Generally, the Board uses permit and license terms and conditions to protect the public interest in instream uses. Water Code Section 1253 states the Board's authority to impose such terms and conditions:

> The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.[170]

The case law recognizes that the Board "is vested with a broad discretion" in the exercise of its authority.[171] Board regulations set out some of the terms and conditions the Board imposes. The Board also designs particular terms and conditions, in response to protests[172] filed with the Board in the water rights application process, or on its own initiation. Some of the terms and conditions incorporated in the regulations may affect instream uses: The Board has continuing authority to prevent waste and unreasonable use, method of use, and method of diversion of water;[173] to modify a permit or license diversion right if necessary to

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[170] Cal. Water Code Section 1253 (West 1971). Cal. Water Code Sections 1256-1258 (West 1971) outline the considerations the Board must make in determining what is in the public interest. See discussion at page 34, above.

[171] Bank of America v. State Water Resources Control Board, 42 Cal. App.3d 198, 212,116 Cal. Rptr. 770 (1974).

[172] Cal. Water Code Section 1330 (West 1971).

[173] 23 Cal. Admin. Code Section 761a. See discussion at page 60, below.

meet water quality objectives;[174] to require public access for fishing;[175] to require that provision be made for the passage of water for fish where water is diverted by means of a dam;[176] and to require the release of stored water based, in part, on Department of Fish and Game recommendations.[177] Department of Fish and Game protests are also a source of terms and conditions for the protection and enhancement of instream uses.[178]

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[174] 23 Cal. Admin. Code Section 761b. See discussion at page 84, below.

[175] 23 Cal. Admin. Code Section 762. A fishing access condition was the primary issue in Bank of America v. State Water Resources Control Board, 42 Cal. App.3d 198, 116 Cal. Rptr. 770 (1974). In the court's view, "the term [requiring access to the applicant's reservoir] will be in the public interest as it will serve to compensate the public for diminished recreational value of the Cosumnes River resulting from lower flows in the river due to the diversions to the applicant's reservoirs for recreational use on private land." (Id. at 203). The court found that there was not substantial evidence to support the use of such a condition in that case, but recognized that the Board "has the jurisdiction and the right to impose a condition requiring public access but only for precise and specific reasons founded on tangible record evidence." (Id. at 213).

[176] 23 Cal. Admin. Code Section 762.5. See discussion at page 55, below.

[177] 23 Cal. Admin. Code Section 763.5. See discussion at page 47, below.

[178] The Board could use Fish and Game's Section 1243 recommendations and findings as a basis for determining that no water is "available for appropriation", and not only as a basis for inserting terms and conditions. Fish and Game is not the only protestant who seeks instream protection and enhancement provisions.

b. The Department of Fish and Game's Procedure Under Water Code Section 1243

1) The Protest and Negotiation Mechanism

Water Code Section 1243 is the basis of the Department of Fish and Game's participation in the water rights appropriation process.[179] The second paragraph of Section 1243, added in 1972, provides:

> The board shall notify the Department of Fish and Game of any application for a permit to appropriate water. The Department of Fish and Game shall recommend the amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources and shall reports [sic] its findings to the board.[180]

Bank of America v. State Water Resources Control Board[181] illustrates the procedure Fish and Game follows under Section 1243. Bank of America filed an application to appropriate water from the Cosumnes River. The Board notified Fish and Game, which filed a protest. Fish and Game and Bank of America then negotiated a written agreement designed to provide continued protection and maintenance of the Cosumnes River fishery, which the court described:

> [T]he parties agreed upon six detailed conditions regulating the amount and periods of diversion. These conditions constituted a detailed formula for withdrawal of water that were [sic] keyed to seasonal dates, to maximum and minimum total flows in the river, and to the manner of measurements of the flows. The formula also provided for continuing jurisdiction in the Board to modify the minimum fisheries' flows requirements to

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[179] Mr. Charles M. Harris, Unit Chief, Permit and Processing, State Water Resources Control Board, Division of Water Rights, estimates that the Department of Fish and Game has filed protests in approximately 70 or 80 percent of recent water rights applications. (Personal Communication, Nov. 7, 1977).

[180] Cal. Water Code Section 1243 (West Supp. 1977).

[181] Bank of America v. State Water Resources Control Board, 42 Cal. App.3d 198, 211, 116 Cal. Rptr. 770 (1974).

> conform to such subsequent determinations as, periodically, the Board might make to assure fish protection.[182]

The parties agreed to have the Board include the terms of the agreement in the permit. In exchange, Fish and Game withdrew its protest of Bank of America's application. The Board decision then incorporated the terms to which the parties had agreed.

The court stated that Fish and Game's judgment in the protest and negotiation mechanism is "entitled to great weight":

> Charged with the statutory obligation, Fish and Game is the guardian and custodian of the public's deep and continuing interest in the fish and game resources of the state. It has the collective experience and expertise to make the essential determinations in the technical areas of water flows and fish maintenance.[183]

The court pointed out, however, that agreements Fish and Game makes with applicants in exchange for withdrawing its protests are not binding on the Board,[184] even though the Board generally does incorporate the agreements as permit and license conditions.

Although Fish and Game uses this protest and negotiation mechanism to satisfy Water Code Section 1243, nothing in that section expressly requires the use of formal protests. The language of Section 1243 may allow Fish and Game greater leeway in how it reports its recommendations and findings to the Board than it has used, since the section does not explicitly limit Fish and Game's reports to cases in which an application has been filed. Fish and Game apparently could provide the Board with a selected stream or systematic statewide evaluation of water needs for fish and wildlife preservation and

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[182] Id. at 211.
[183] Id. at 212.
[184] Id.

enhancement to satisfy the requirements of Section 1243.[185] If Fish and Game felt its further participation were required in response to a particular application, it could then follow its present protest and negotiation procedure.

2) Criticisms of the Procedure

Commentators and Fish and Game itself criticize the current protest and negotiation procedure. One author notes that a "case-by-case procedure does not allow a determination [of instream use needs] until a project has been fully planned and a specific applicant is before the Board ...."[186] As a result, "the extent of the reservation on a case-by-case basis will necessarily be determined by weighing the utility of the specific project against the value of the instream use instead of basing such reservation on general public policy ...."[187] This raises the problem that "it is difficult for noneconomic uses based on such policy to be broadly considered."[188]

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[185] Fish and Game has stated that it should embark upon "a program surveying the significant streams throughout the State of California, ascertaining what type of minimum flows are required to preserve the existing fishery resources, and then file an application to appropriate such water to that beneficial use." California Department of Fish and Game, Memorandum in Support of Its Application to Appropriate for Instream Uses, 9 (Jan. 16, 1976). See discussion of the Fullerton case at page 63, below.

The Board's use of Fish and Game recommendations and findings would be governed by 23 Cal, Admin. Code Section 733(e) which states, in part: "Before submission of a matter for decision, official notice may ... be taken of any generally accepted technical or scientific matter within the board's special field, provided parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Such parties shall be given a reasonable opportunity to request to refute such officially noticed technical or scientific matters by evidence or by written or oral presentation or authority, the manner of such refutation to be determined by the board."

[186] Robie, Modernizing State Water Rights Law, 1974 Utah L. Rev. 760, 770 (1974).

[187] Id.

[188] Id.

Fish and Game has three main criticisms of the present procedure. The first concerns the point in time Fish and Game enters the planning and decision-making process:

> [B]y the time any federal or state or local agency applies for an appropriative water right, that agency has already determined the scope and size of the project and how much water it needs. The Department of Fish and Game is then cast in the role of ascertaining how much they can salvage from the proposed project. There is no real objective approach permitted in the current system where the Department must be the protestant.[189]

The second criticism relates to Unites States v. California.[190] The United States is "the largest dam builder, diverter and exporter of water in the State of California", but is not subject to the terms and conditions the Board inserts under the California appropriative permit system, including those suggested by Fish and Game.[191]

The third criticism focuses on the problem that the use of permit and license terms and conditions "provides little if any permanent protection to fish and wildlife ...."[192] Even if the Board requires certain by-pass flows or releases from storage as a result of Fish and Game's recommendations, instream protection may not be ensured:

> This by-passed water in most cases is subject to appropriation downstream and becomes a target over and over again for other would-be appropriators. This necessitates the Department of Fish and Game to continually protest each subsequent application and make its case anew, hopefully with the same result each time. Fish and Game could be successful nine times out of ten and, on

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[189] California Department of Fish and Game, Memorandum in Support of Its Application to Appropriate for Instream Uses, 8 (Jan. 16, 1976).

[190] United States v. California, 550 F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).

[191] E. C. Fullerton, Director of the California Department of Fish and Game, and California Department of Fish and Game v. the California State Water Resources Control Board, "Plaintiff Department of Fish and Game's Brief", 2-3 (filed July 14, 1977), Civil No. 61136, Cal. Super. Ct., Humboldt County, November 3, 1977.

[192] Id.

> the tenth water application, lose. Thus, nine out of ten wins could result in the total destruction of a stream's fishery resource.[193]

c. Types of Provisions Used to Protect and Enhance Instream Uses

1) Instream Flow Requirements

The Board's series of decisions concerning instream use needs on the Russian River is one example of its imposition of instream flow requirements as permit terms and conditions.[194] In Decision 1030, the Board issued permits to certain water districts and a municipality for direct diversion and storage of Russian River water. The Board made the districts' permits subject to a "Stipulation and Agreement" between the Sonoma County Flood Control and Water Conservation District and the Department of Fish and Game.[195] The stipulation set minimum flows for the preservation of fish life of 25 and 125 cubic feet per second (cfs) in two reaches of the river, and a minimum flow of 150 cfs in a third reach, for both protection of fish life and recreation.[196] The Board found that "the aforesaid flows for protection and maintenance of fish life and for recreational use are reasonable and in the public interest ...."[197]

Since the Board issued Decision 1030 in 1961, Fish and Game has consistently requested and the Board has consistently imposed in other permits conditions preserving stream flows of 25, 125, and 150 cfs in the three Russian

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[193] Id.

[194] California State Water Resources Control Board, Decision No. 1030 (Aug. 17, 1961), Decision No. 1110 (Feb. 21, 1963), Decision No. 1142 (Aug. 26, 1963), and Decision No. 1266 (Feb. 15, 1967).

[195] California State Water Resources Control Board, Decision No. 1030, at 47-48 (Aug. 17, 1961).

[196] Id. at 37.

[197] Id.

River reaches.[198] Fish and Game and the Board use the following term:

> For the protection and preservation of fishlife and the maintenance of related recreational uses, permittee shall divert only from that portion of the streamflow exceeding _____ cubic feet per second as recorded at the nearest U.S. Geological Survey Gaging Station on the river.
>
> 150 cubic feet per second - Coyote Dam to Wohler Intake
> 125 cubic feet per second - Wohler Intake to Pacific Ocean[199]

The amount of water which can be diverted is thus determined by the amount of water available in excess of the minimum flow.[200]

2) Requirements for the Release of Stored Water[201]

One commentator has succinctly explained the need for requiring the release of stored water for instream protection and enhancement:

> Especially in the West, many streams virtually dry up in the late summer and fall and even reservation of all the water [naturally flowing] in the stream may be insufficient to maintain fishery resources or to permit recreation. To overcome this difficulty in California, the State Water Resources Control Board ... has required an applicant seeking a permit to divert and store water to release a portion of the stored water during certain times of the year to protect and enhance instream uses when natural flows are low. The required

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[198] See e.g., California State Water Resources Control Board, Decision No. 1266 (Feb. 15, 1967). This consistent agreement appears to constitute a de facto reservation of instream flows for the particular Russian River reaches.

[199] California Department of Fish and Game, Protest, Water Rights Application No. 24935, filed Sept. 7, 1976.

[200] The Sonoma County Flood Control and Water Conservation District had originally proposed "to 'appropriate' 125 cfs by simply allowing that amount of the flow in the river to remain undisturbed for the benefit of recreational facilities." To the extent the District's applications were for this purpose, they were not approved. The Board stated: "An essential element of a valid appropriation of water is physical control, akin to possession." California State Water Resources Control Board, Decision No. 1030, at 30 (Aug. 17, 1961).

[201] This discussion focuses on requirements for releases that the Board imposes. Water Code Section 1242.5 is outside this discussion because it allows appropriations to be made for the purpose of voluntarily releasing water for water quality purposes:

> The Board, subject to the provision of Section 100 and whenever it is in the public interest, may approve appropriation by storage of water to be released for the purpose of protecting or enhancing the quality of other waters which are put to beneficial uses.

Cal, Water Code Section 1242.5 (West 1971), Section 1242.5 releases to protect or enhance water quality can serve to protect and enhance fish, wildlife, and other instream uses.

> release of the water which would otherwise be used by the applicant for his own purposes, is a reasonable condition for the privilege of diverting a public resource.[202]

Board regulation 763.5 states that the Board has the authority to "require releases of water diverted and stored whenever such releases are determined by the board to be in the public interest." The Board may exercise this authority in conjunction with applications to appropriate water, "including prescribing or modifying permit terms and conditions."[203] However, once a permit is issued without a release requirement and construction has begun, or a "substantial financial commitment for construction" has been made, the Board can only require a "release or bypass" if the permittee agrees or if the Board had expressly reserved jurisdiction to require such bypass or release at the time the permit was issued.[204]

If either an applicant or permittee objects to a release or bypass requirement, the Board must hold a hearing and make findings. The Board must take into consideration:

> (1) the basis of any recommendation of the Department of Fish and Game pursuant to Water Code Section 1243; (2) whether such releases are necessary to maintain or enhance beneficial uses or to meet water quality objectives in the relevant water quality control plan; (3) the probable effect of releases upon the applicant's proposed project; (4) evidence to assist in the preparation of dry and critical year relief provisions related to releases; and (5) any other issues which may be relevant to the appropriateness of a release requirement.[205]

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[202] Robie, Modernizing State Water Rights Law, 1974 Utah L. Rev. 760, 771 (1974).

[203] 23 Cal. Admin. Code Section 763.5(a).

[204] 23 Cal. Admin. Code Section 763.5(b). The meaning of "bypass" in this section is not clear. Section 763.5(b) adds that (b) does not apply to the Board's continuing jurisdiction authority (23 Cal. Admin. Code Section 761) or to the Board's authority to revoke permits (Cal. Water Code Section 1410 et seq. (West 1971)), and does not apply to "actions required to implement" the Watershed Protection Act (Cal. Water Code Section 11460 et seq. (West 1971)) and the Delta Protection Act (Cal. Water Code Section 12200 et seq. (West 1971)).

[205] 23 Cal. Admin. Code Section 763(c). Subsection (d) adds a provision for reducing releases during dry and critical years.

Regulation 763.5 was filed in 1975. Prior to 1975, the Board required releases from storage under its police power authority in three of its most important decisions: The Delta Decision,[206] the Lower American River Decision,[207] and the New Melones Decision.[208] Release requirements in these decisions were for the protection and enhancement of various instream uses.

[206] California State Water Resources Control Board, Decision No. 1379 (July 1971). In October 1971, a suit was filed to set aside Decision 1379 (Central Valley East Side Project Assn., et al. and Kern County Water Agency, et al v. State Water Resources Control Board, Civil Nos. S2582 and S2583, U.S. Dist. Ct. (E.D. Cal.)) and in January 1972, the court issued an injunction preventing implementation of Decision 1379 until the case was decided. (Decision 1379 had rescinded an earlier decision, Decision 1275, which, as a result of the injunction, became operative again). In September 1976, the court modified the order enjoining the use of Decision 1379, to allow the Board to use the Decision 1379 evidentiary record in the Delta water rights hearings. All proceedings in this case were stayed in July, 1974, until United States v. California is resolved (550F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977)). A second case which seeks to require the Central Valley Project to be operated in compliance with Board Decisions 1379, 1400, 1407 and 1422 has also been stayed until final disposition of United States v. California (California v. Morton, Civil No. S2924, U.S. Dist. Ct. (E.D. Cal.) filed June 1973).

[207] California State Water Resources Control Board, Decision No. 1400 (April 1972). In June 1972, a suit was filed to set aside Decision 1400 (San Joaquin County Flood Control and Water Conservation District v. State Water Resources Control Board, Civil No. S2730, U.S. Dist. Ct. (E.D. Cal.). All proceedings on this suit were stayed pending the outcome in United States v. California, 550 F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).

[208] California State Water Resources Control Board, Decision No. 1422 (April 1973). In October 1973, the United States filed United States v. California, Civil No. S3014, U.S. Dist. Ct. (E.D. Cal.) to void Decision 1422 in part and to declare that the U.S. Bureau of Reclamation's water rights are not subject to Board regulation. The district court granted summary judgment to the United States in October 1975 (403 F. Supp. 874). The Ninth Circuit Court of Appeals affirmed in August 1977 (550 F.2d 1239). The State Water Resources Control Board filed a petition for certiorari with the United States Supreme Court in August 1977, and certiorari was granted (46 U.S.L.W. 3373, No. 77-285, Dec. 5, 1977).

a) The Delta Decision

The Delta Decision imposed terms and conditions, in furtherance of the Board's reserved jurisdiction, on water rights permits for the federal Central Valley Project and the State Water Project diversions from the Sacramento-San Joaquin Delta. The Board had reserved jurisdiction "to establish or revise conditions for salinity control, for protection of fish and wildlife and to coordinate terms of the various permits for the two projects."[209] The Board set "State Delta Standards" for the protection of beneficial uses in the Delta and for the protection of fish and wildlife, and required that:

> Permittees ... maintain, either by a discontinuation of direct diversion at the project pumps [in the Delta] and/or by release of natural flow or water in storage, water quality in the channels of the Delta equal to or better than those enumerated in the State Delta Standards.[210]

The Board had concluded that:

> On the basis of legislative policy declarations and the Board's statutory powers to condition permits so as to best develop, conserve and utilize in the public interest the water sought to be appropriated, it may not only require the project operators to refrain from interfering with natural flow required for proper salinity control and for fish and wildlife in the Delta, but also provide a reasonable quantity of water that has been conserved by storage under authority of their permits for these purposes.[211]

b) The Lower American River Decision

The Board adopted the Lower American River Decision pursuant to its reserved jurisdiction, in this case to formulate "terms and conditions relative to flows to be maintained from Auburn Dam downstream to the mouth

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[209] California State Water Resources Control Board, Decision No. 1379, at 6 (1971).
[210] Id. at 52.
[211] Id. at 15-16. The Board added that it "does not address itself to the subject of repayment of costs of enhancement of fish and wildlife but, hopefully, the Legislature and the Congress will give high priority to this matter."

of the American River for recreational purposes and for protection and enhancement of fish and wildlife."[212] At the time the Decision was written, the Bureau of Reclamation was not making major deliveries of Folsom project water. Summer flows in the Lower American from Nimbus Dam to the Sacramento River were larger than under natural conditions as a result of power production releases from Folsom Dam and upstream private dams.[213] The Board noted that augmented summer flows would be available until demand for water from the Auburn-Folsom South Project develops: "[T]he Bureau will be able for many years to make releases from Nimbus Dam of the flows ... needed for fish and wildlife and for recreational purposes without impairing its ability to meet the full requirements of the Folsom South service area via the Folsom South Canal."[214]

The Board suggested that, when Lower American instream flow needs and the needs of the Folsom South Canal service area eventually do conflict, water could be moved to the canal service area by an alternative route that would maintain Lower American flows, instead of taking water directly south

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[212] California State Water Resources Control Board, Decision 1400, at 1 (1972). Currently, provisions for the Lower American River and the requirements of the Lower American River Decision are the subject of negotiations involving the Bureau of Reclamation, Department of Water Resources, State Water Resources Control Board, Department of Fish and Game, United States Fish and Wildlife Service, the County of Sacramento, and several utility districts, water districts, and environmental groups. A draft "Memorandum of Understanding on Lower American River Flows and Folsom South Service Area" is the focus of continuing negotiations for fish protection and enhancement on the Lower American, Calaveras, Mokelumne, and Cosumnes Rivers. See discussion at page 95, below.

[213] Id. at 16.

[214] Id. at 21.

from Nimbus Dam via the Folsom South Canal. The Bureau could allow the water to flow down the Lower American to the Sacramento River and then bring it back from further down the Sacramento River, via the proposed "Hood-Clay connection", to the lower reaches of the Folsom South Canal.[215]

The Bureau of Reclamation anticipated that in 15 or 20 years, it would need a Hood-Clay facility to pump Sacramento River water to the Folsom South Canal to provide additional supplies for the East Side Project if it is authorized. The Board found that the Hood-Clay facility may be required for the separate purpose of continuing Nimbus Dam releases for fish, wildlife, and recreation needs.[216]

The Board ordered the Bureau to maintain flows in the Lower American River for maintenance of fish and wildlife of not less than 1,250 cfs from October 15 to July 15 and 800 cfs for the rest of the year. The Board required flows for recreational purposes of not less than 1,500 cfs from May 15 to October 14 each year. If there is an inadequate supply of project water in a year, the recreation flow can be reduced or eliminated to prevent cutbacks in delivery for irrigation in the Folsom South service area. The Bureau can reduce fish and wildlife flows and irrigation deliveries proportionally.[217]

The Board also required that:

> After completion of a Hood-Clay connection, no reduction in [fish and wildlife or recreation] flows shall be made ... which will result in American River flow into the Sacramento River less than the concurrent supply of water from American River to any areas which can be served through a Hood-Clay connection.[218]

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[215] Id. at 17. See discussion of Environmental Defense Fund v. East Bay Municipal Utility District at page 81, below.

[216] Id. at 21.

[217] California State Water Resources Control Board, Order Clarifying Decision 1400 (May 1972). The Board continued its reserved jurisdiction. Decision 1400, at 22,

[218] California State Water Resources Control Board, Decision 1400, at 23-24 (1972).

The Lower American River Decision thus not only protects instream fish, wildlife, and recreational uses, but also firmly states that where water can be left instream to facilitate a greater number of beneficial uses and still meet project demands, it should be left instream.[219]

c) The New Melones Decision

In the New Melones Decision, the Board considered the Bureau of Reclamation's applications to appropriate water from the Stanislaus River. Unlike the Delta and Lower American River Decisions, the Board acted here to protect both upstream and downstream instream uses. The central factor in the Board's decision was its determination that, although there was "unappropriated water available to satisfy the demands of the project as proposed ... the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties ..."; the Bureau "... has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years."[220] The Board decided not to issue permits for use of water outside the four Stanislaus River basin counties at that time, but retained jurisdiction over the permits "... for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantial."[221]

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[219] Although the Board's reserved jurisdiction only encompassed Bureau of Reclamation permits related to the Auburn Dam, and not to Folsom project permits, the Board had to consider the operation of the series of projects involving the American River, including Folsom Reservoir and Nimbus Dam, which are federal projects downstream from Auburn Dam, and several upstream private hydroelectric projects.

[220] California State Water Resources Control Board, Decision 1422, at 26 (1973).

[221] Id. at 26-27.

The Board found that the "public interest requires that the use of the Stanislaus River for Whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other [222] beneficial uses." One commentator remarked: "... the Board insisted that the river not be destroyed until it was necessary to do so. In this sense, D1422 is only a stay of execution."[223] The Board's language appears, however, to be equivocal with regard to the future of upstream uses. On the one hand, the Board speaks of "deferring significant impairment of upstream recreational values until a need for other uses is demonstrated."[224] On the other hand, the Board states that it will allow increased storage for consumptive uses only when the permittee has firm delivery commitments and "the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam .... "[225]

The Board authorized releases of 98,000 acre-feet per year for fish and wildlife preservation and enhancement and additional storage to provide releases for water quality control purposes.[226] The Board noted that the

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[222] Id.

[223] McHugh, Allocation of Water from Federal Reclamation Projects: Can the States Decide?, 4 Ecology L.Q. 343, 357 (1974).

[224] California State Water Resources Control Board, Decision 1422, at 28 (1973).

[225] Id. at 18, 30. The Board recognized that hydroelectric power generation would be a beneficial use of project water, but it also recognized that storage for power purposes would conflict with preservation of upstream recreational uses by inundating a portion of the river. The Board limited storage for release for power generation to the amount it authorized for release for other purposes—downstream flows for fish and wildlife preservation and enhancement, recreation, and water quality control. (Id. at 27).

[226] Id. at 30-31. Release of the 98,000 acre-feet is to be at a rate specified by the Department of Fish and Game, and releases for water quality control purposes are to be scheduled to maintain the regional water quality control board's basin plan objectives.

Department of Fish and Game had revised its release recommendations substantially to 267,000 acre-feet per year for the Stanislaus River fishery, plus an additional 50,000 acre-feet per year for Delta fishery needs.[227] Although the Board retained the 98,000 acre-feet per year figure, it reserved jurisdiction over the Bureau's permits "for the purpose of revising water release requirements for water quality objectives and fish releases and for establishing dry year criteria pursuant to studies to be conducted by the permittee and other parties in an effort to better define water needs."[228]

These terms and conditions on federal permits are under the cloud of the United States v. California case, which is discussed below.[229] United States v. California is now pending before the United States Supreme Court.[230]

3) Fish Bypass and Fishways Requirements

The Fish and Game Code provides a third Board power used to protect and enhance instream uses. Section 5937 of that code requires the owner of a dam to allow sufficient water at all times to pass through a fishway or over, around, or through the dam "to keep in good condition any fish that may be planted or exist below the dam.[231]

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[227] Id. at 20.
[228] Id. at 32.
[229] United States v. California, 550 F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).
[230] Id.
[231] Cal. Fish and Game Code Section 5937 (West 1958). The section adds that: During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.

In 1975, the Board adopted Regulation 762.5, "in compliance with" Section 5937, which inserts the following term in all permits for diversion of water by means of a dam which "do not contain a more specific provision for the protection of fish":

> [T]he permittee ... [must] allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam ....[232]

The Regulation also provides that:

> In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir.[233]

The actual and potential effect of this section and regulation is not settled. In projects for which Fish and Game has foreseen potential significant impacts on fish, it has worked out agreements that provide for fish protection: Fish and Game has not used Section 5937 or Regulation 762.5 as a sole basis for protecting fish.[234] If Fish and Game failed, for some reason, to protest a water right application, it might then rely on those provisions for instream protection.[235]

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[232] 23 Cal. Admin. Code Section 762.5. This section provides for the same low flow arrangements as Fish and Game Code Section 5937. Cal. Fish and Game Code Sections 5946-5947 (West 1958) contain interesting provisions concerning only Mono and Inyo counties (Fish and Game District 4-1/2). These sections declare that no right to appropriate water may be granted unless the permit or license is conditioned on compliance with Section 5937, and that no releases from storage will be allowed "in varying flows in such a manner as to destroy fish life below such release."

[233] Id.

[234] Communication with Mr. Charles K. Fisher, Associate Fishery Biologist, California Department of Fish and Game, Dec. 28, 1977.

[235] Id. Fish and Game also might rely on these provisions if its protest were unsuccessful in obtaining an adequate permit term. The effectiveness of these provisions is also limited. At most, they can only require bypass of inflow.

A California Attorney General's opinion issued in 1951 interpreted Section 5937 very narrowly. It stated that the section "is not a reservation of water for the preservation of fish life" but only a requirement that water that is not needed for domestic and irrigation purposes be released to support fish life below the dam and "not be wastefully withheld."[236] In 1974, however, the California Attorney General rejected this earlier interpretation, which "nullifies Section 5937 as a fishery protection measure."[237] Fishery protection was the "clear legislative intent" of the section, and the earlier view "can no longer stand in the light of current state policy expressing the urgency of preserving California's important fishery resources."[238] The Attorney General stated that Section 5937 is "an enactment by the state in carrying out its trust responsibility to preserve fishery resources leaving the beneficial use to the people."[239]

One commentator concluded that the later Attorney General's opinion interpreted Section 5937 to mean that "every appropriation is subject to a condition that sufficient water to meet the needs of existing or future fisheries must be reserved for that purpose."[240] Although that commentator feels that Section 5937 is useful, he notes that because no definite standards are set, enforcement may be difficult after diversion and investments have been made and that "recapture" of water under Section 5937 would also be difficult.[241]

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[236] 18 Ops. Cal. Atty. Gen. 31, 37 (July 23, 1951).
[237] 57 Ops. Cal. Atty. Gen. 577, 582 (Nov. 11, 1974).
[238] Id.
[239] Id. at 582-83. See discussion of the public trust doctrine at page 6, above.
[240] Robie, Modernizing State Water Rights Law, 1974 Utah L. Rev. 760, 770-71 (1974).
[241] Id. at 771.

d. Restrictions on the State Water Resources Control Board's Terms and Conditions Authority with Respect to Federal Projects --United States v. California

The federal-state relationship is generally outside the scope of the Commission's mandate. A brief overview of the status of United States v. California[242] is necessary, however, because of the importance of the Board permit and license terms and conditions for instream protection and the very large percentage of the State's water held by the United States.

The United States responded to the Board's New Melones Decision by filing United States v. California, challenging the State's authority to condition water rights permits issued to the Bureau of Reclamation pursuant to California law.[243] The United States asked the court to declare that the Board's conditions are void and that the Bureau of Reclamation has no duty even to apply for a Board permit, but can unilaterally appropriate unappropriated water for use in any federal reclamation project.[244] One authority concluded:

> This response appears to be motivated by the fear that implementation of the Board's decisions would have two major consequences for the federal government. First, the benefits to be realized from the projects will be reduced, as water that is required to be released under D1379 and D1400 or that is refused for storage under D1422 will not be available for the irrigation, municipal, and power uses envisioned by the Bureau. Secondly, the Board's decisions would result in a financial loss to the federal government as no mechanism exists at present to reimburse the Bureau for water released for recreation, fish and wildlife enhancement, or water quality.

[242] United States v. California, 550 F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).
[243] United States v. California, Civil No. S3014 (E.D. Cal., filed Oct. 15, 1973).
[244] United States v. California, 403 F. Supp. 874, 877 (E.D. Cal. 1975).

> This loss of revenue would threaten the financial viability of the project and would have the effect of forcing the federal government to subsidize the benefits to California's environment.[245]

In the "MacBride Decision", the federal district court granted the United States the declaratory relief it sought. The court held that the United States "can appropriate unappropriated water" for reclamation projects and that the United States must apply to the Board for "a determination by that Board of the availability of unappropriated water", but that this requirement is only "in accordance with comity."[246] The Board must grant an application "if unappropriated waters are available"; the Board cannot impose any terms and conditions on permits issued to the United States; and, the Board's New Melones Decision is void.[247]

The Ninth Circuit Court of Appeals affirmed the district court judgment in all but one respect. It is not a matter of comity, but is a requirement of law that the United States "comply with the forms of state law, including application to state water boards where necessary ... to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project ... and ... to give notice to

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[245] McHugh, Allocation of Water From Federal Reclamation Projects: Can the States Decide?, 4 Ecology L.Q. 343, 353 (1974).

[246] United States v. California, 403 F. Supp. 874, 902 (E.D. Cal. 1975). See discussion of the unappropriated water - water available for appropriation distinction at page 32, above. "Comity" is described in Judge Wallace's partial dissent in the Court of Appeals' decision as "a concept of deference and voluntary action", and he points out that "to use such a concept as a basis for requiring affirmative federal action seems peculiarly incongruous." United States v. California, 550 F.2d 1239, 1244 (9th Cir. 1977).

[247] Id.

the state of the scope of the project."[248] The United States Supreme Court has agreed to hear this case.[249]

3. Modifying Permit and License Terms and Conditions

The Board has several sources of jurisdiction to modify permit and license terms and conditions: When it reserves jurisdiction over a permit; when a permit contains a continuing authority term; when a permittee or licensee proposes to change his place of use, purpose of use, or point of diversion; and when a permittee requests an extension of time. The Board can impose provisions for the protection and enhancement of instream uses when it modifies permit and license terms and conditions.

The Board's Delta and Lower American River Decisions are examples of the Board's use of reserved jurisdiction to set terms and conditions in existing permits for instream needs.[250] The Water Code provides that the Board may reserve jurisdiction to change, add, or delete permit terms and conditions where there is not sufficient information available and a period of actual operation is needed to obtain information, or when an application is for only a part of a project and the terms and conditions on all project permits must be coordinated.[251]

The concept of reserving jurisdiction in order to be able to respond to and evaluate post-project effects on fisheries and wildlife is also

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[248] United States v. California, 550 F.2d 1239, 1242-3 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977). The law that requires compliance is Section 8 of the Reclamation Act of 1902 (32 Stat. 388, now 43 U.S.C. Section 383).

[249] United States v. California, 550 F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).

[250] California State Water Resources Control Board, Decision No. 1379 (July 1971), and Decision No. 1400 (April 1972).

[251] Cal. Water Code Section 1394 (West 1971). The Section provides that jurisdiction shall be reserved only for so long as the Board finds it to be "reasonably necessary", and never after a license is issued.

important. The Board reserved jurisdiction in its New Melones Decision in part to provide time for further study of instream needs. The Board required release of up to 98,000 acre-feet per year for fish and wildlife maintenance,[252] but continued its reserved jurisdiction "to later revise the releases for preservation and enhancement of fish and wildlife upon reviewing the results of further studies... proposed by the Bureau and agreed to by the Department of Fish and Game."[253]

Since 1973, the Board has inserted a continuing authority term in all permits, as well as in pre-1973 permits where the permittees request time extensions.[254] Continuing authority encompasses "all rights and privileges" under a permit or license, "including method of diversion, method of use, and quantity of water diverted."[255] The Board's continuing authority is aimed at enforcing the Constitutional and statutory prohibition against waste and unreasonable use, method of use, or method of diversion of water.[256] The Board may not take any action pursuant to its continuing authority without determining, after notice and an opportunity for hearing, that a specific requirement is both appropriate and physically and financially feasible.[257] Continuing authority may affect instream needs to the extent that the Board may impose "specific requirements over and above those contained in ... [the] permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable

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[252] California State Water Resources Control Board, Decision 1422, at 30 (1973).
[253] California State Water Resources Control Board, Decision 1422, at 21 (1973).
[254] 23 Cal. Admin. Code Section 761(a).
[255] Id.
[256] Cal. Const. Art. 10, Sec. 2; Cal. Water Code Section 100 (West 1971). See discussion of instream use protection under Cal. Const. Art. 10, Sec. 2 at page 77, below.
[257] 23 Cal. Admin. Code Section 761 (a).

draft on the source."[258] Reducing the draft on the source would result in more water being left in the source for instream uses.

Water Code Section 1701 requires permittees and licensees to obtain Board permission for any change of point of diversion, place of use, or purpose of use.[259] The Board will not grant permission if the change would injure "any legal user of the water involved."[260] One study suggests that, although traditionally the only criteria for changes has been whether other rights have been impaired.

> As states take steps to recognize and protect instream values, this recognition may take the form of an 'instream right', which is entitled to be considered and protected along with other rights when changes are proposed which could adversely affect instream values.[261]

The Board has taken instream values into account in considering change petitions. The Board must give notice of petitions to make changes, and protests against the change can be filed with the Board.[262] Fish and Game has protested change petitions and has been successful in obtaining conditions for fish protection.[263]

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[258] Id.
[259] Cal. Water Code Section 1701 (West 1971).
[260] Cal. Water Code Section 1702 (West 1971).
[261] United States Fish and Wildlife Service, Dewsnup and Jensen, Identification, Description, and Evaluation of Strategies for Reserving Flows for Fish and Wildlife, DRAFT, WELUT PROJECT 23, Phase One at 3-28 (Feb. 10, 1977).
[262] Cal. Water Code Section 1704 (West 1971). A hearing or proceeding in lieu of a hearing is required if a protest is received.
[263] See e.g., California State Water Resources Control Board, Decision 1362 (July 1970). The petitioner requested a change in point of diversion under his permit. The Department of Fish and Game protested, and Fish and Game and the petitioner agreed to conditions which included provisions for flow maintenance releases, a fish ladder, and fish planting.

The Water Code also allows the Board to grant extensions of time to permittees for beginning or completing construction under their permit or for putting water to beneficial use.[264] Fish and Game has protested extension petitions in an effort to mitigate fish and wildlife losses, although apparently no permits have been modified as a result.[265]

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[264] Cal. Water Code Section 1398 (West 1971).

[265] Communication with Mr. Charles K. Fisher, Associate Fishery Biologist, California Department of Fish and Game (Dec. 27, 1977). Fish and Game has a policy of not protesting extension petitions where a permittee has substantially constructed necessary facilities.

C. Civil Suits to Establish Rights to Apprppriate for Instream Uses – The California Trout and Fullerton Cases

1. Background of the Cases

Two current cases raise particular problems regarding the appropriability of water for instream purposes. In 1973, California Trout, Inc., a private corporation, submitted an application to the Board for a permit to appropriate three cubic feet per second throughout the year in Redwood Creek in Marin County. Its application stated that water would not be diverted, but would be allowed to flow naturally in the creek "for the preservation and enhancement of the fish and wildlife from which Cal-Trout and its members derive beneficial use."[266] In 1976, the Department of Fish and Game applied to the Board for a permit to appropriate from 40 to 300 cubic feet per second from May to October in the Mattole River in Humboldt County. Fish and Game "sought to conserve and protect the valuable salmon and steelhead trout resources of the Mattole River by attempting to keep some of the water in the Mattole River."[267]

The Board rejected both applications, stating that under present law a diversion or some form of physical control is necessary for appropriation.[268]

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[266] Plaintiff's Trial Brief at 2-3, California Trout, Inc., v. State Water Resources,Contro1 Board, Civil No. 233933, Cal. Super. Ct., Sacramento County, Nov. 14, 1977.

[267] Plaintiff's Opening Brief at 1-4, Fullerton v. State Water Resources Control Board, Civil No. 61136, Cal. Super.Ct., Humboldt County, Nov. 3, 1977. The Mattole River is included in the California Protected Waterways Plan.

[268] Letter from Bill Dendy, Executive Officer, State Water Resources Control Board, to attorney for California Trout, April 17, 1973. Letter from the State Water Resources Control Board to C. E. Fullerton, Director, Department of Fish and Game, Dec. 21, 1976.

In California Trout, Inc., v. The State Water Resources Control Board[269] and Fullerton v. The California State Water Resources Control Board,[270] the plaintiffs sought court orders compelling the Board to accept and consider their applications. The primary issue was the same in both cases: Is it possible, under current California water rights law, to appropriate water without either diverting water or having some form of physical control of the water?

Both California Trout, Inc. and Fish and Game stated that they applied for an instream water right because other existing provisions in California law do not adequately protect and enhance instream uses. California Trout, Inc. decided that it had to act affirmatively to secure Redwood Creek's flow because its "continued ability to derive beneficial use from that stream is endangered."[271] It cited studies that indicate that the survival of salmon and steelhead trout in California is threatened, and that Fish and Game "'has not been provided sufficient funds or powers to correct past damage to spawning streams or funds to even assure the protection of those resources from future developments.'" [272]

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[269] California Trout, Inc. v. State Water Resources Control Board, Civil No. 233933, Cal. Super. Ct., Sacramento County, Nov. 14, 1977 [Hereinafter cited as California Trout].

[270] E. C. Fullerton, Director of the California Department of Fish and Game, and California Department of Fish and Game v. The California State Water Resources Control Board, Civil No. 61136, Cal. Super. Ct., Humboldt County, Nov. 3, 1977. [Hereinafter cited as Fullerton]. The Department of Water Resources filed an amicus curiae brief in support of the Department of Fish and Game. The Association of California Water Agencies and the Pacific Legal Foundation filed a joint amicus curiae brief in support of the State Water Resources Control Board. The County of Humboldt was allowed to intervene in the case, and filed a brief in support of the State Water Resources Control Board.

[271] Plaintiff's Trial Brief at 5, California Trout.

[272] Id. at 5-8, citing Advisory Committee on Salmon and Steelhead Trout Established by Assembly Concurrent Resolution 64 (1970 Legislative Session), "Report on California Salmon and Steelhead Trout: An Environmental Tragedy."

Fish and Game insisted that existing Water Code provisions do not adequately protect instream uses from the adverse impacts of water projects and diversions: "If the protection afforded by the Water Code were adequate, then Fish and Game would not have filed this suit."[273] In particular, Fish and Game argues that, as a result of United States v. California,[274] the statutory appropriation procedure does not protect instream uses where the federal government applies for unappropriated water. It suggests that because the federal government must recognize prior appropriative rights, possibly the only way California can "protect its fishery resources against federal water projects [is] if it recognizes an appropriative instream water right...."[275]

2. The Requirement of Diversion or "Control Akin to Possession"

The Board refused to consider Fish and Game's and California Trout's applications because no provision was made either to divert water from the stream, to regulate water within the stream, or to exercise some other form of physical control of the water. The Board argued that "[a]n appropriative water right is essentially a possessory right. Without possession, evidenced by physical control of the water, no appropriative right is possible ...."[276] and that "the courts have always held that some physical act with respect to the water is necessary."[277] The Board quoted a classic authority:

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[273] Plaintiff's Closing Brief at 2, Fullerton. See discussion at page 43, above.
[274] United States v. California, 550 F.2d 1239 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3373 (No. 77-285, Dec. 5, 1977).
[275] Plaintiff's Closing Brief at 5, Fullerton.
[276] Defendant's Reply Brief at 2, Fullerton; Brief of Defendants at 3, California Trout.
[277] Defendant's Reply Brief at 6, California Trout.

> '...a water right under the Arid Region Doctrine of appropriation is a possessory right, and consummated only when the appropriator actually takes possession of the water which he attempts to appropriate. Hence one of the essentials is that the appropriator must construct some work or works necessary to take this possession and to conduct the water to the place where its use to a beneficial purpose is the consummating act of his appropriation.'[278]

The Board argued that possession is the key to a valid appropriation. Actual diversion from the natural channel is not necessary:

> Although ... numerous court decisions speak of an actual diversion of water from a stream channel as an essential element of the right to appropriate water, this is true only in the sense that diversion of water supplies the required elements of dominion and possession. Other means may also be employed.[279]

The Board discussed different examples of valid appropriations without actual diversion: Storage of water for stockwater or recreation use; storage of water for subsequent release for downstream beneficial uses such as recreation and fish, wildlife, and water quality protection and enhancement; construction and operation of mills; and livestock watering.[280] It concluded that these examples are all distinguishable from the Fullerton and Cal-Trout situations where "the applicant has no possessory interest in either the water or the surrounding land."[281]

California Trout and Fish and Game urged that California courts have recognized the right to appropriate water for instream use since 1855, when the right of a mill owner to place his water-wheel in a stream was found to be

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[278] Defendant's Reply Brief at 5, Fullerton, and Brief of Defendant at 6, California Trout, quoting Kinney on Irrigation and Water Rights, 2d ed., Vol. 2, at 1240-41 (1912).

[279] Defendant's Reply Brief at 9, Fullerton.

[280] Id. at 9-11. The Board stated that, with regard to appropriation for livestock watering, the ownership of the land with the consequent right of access to the water supplies the necessary possessory right...."

[281] Id. at 11.

a valid appropriation.[282] California Trout argued that the mill cases demonstrate that a person can appropriate instream flow simply by putting the flow of water to beneficial use,[283] and that the common law does not require diversion or possession or control.[284]

California Trout developed the argument that an appropriative right is not "essentially a possessory right" and that it does not depend on possession or control.[285] A person can acquire a property right without "possessing" or "controlling" a tangible thing: The law calls this type of property right an "incorporeal hereditament." By definition, a person cannot tangibly "possess" or "control" an incorporeal hereditament. An appropriative water right is such an incorporeal hereditament:[286]

> This derives from the fact that one cannot gain any more than the right to the usufruct of a stream. The usufructuary right is the right to take the benefits of a flowing, ever-changing stream of water. It is not the right to a specific portion of the corpus of the stream at a particular point in time The appropriative right is the right to the use of the flowing stream, not to any particular parcel of water. The use cannot be grasped. It is intangible—an incorporeal hereditament.[287]

California Trout also argued that the cases do not support the Board's contention[288] that ownership of the land through which water flows supplies

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[282] Plaintiff's Trial Brief at 19-27, California Trout, citing Tartar v. The Spring Creek Water and Mining Co., 5 Cal. 395 (1855); Plaintiff's Opening Brief at 22-26, Fullerton.

[283] Plaintiff's Trial Brief at 24-25, California Trout. Plaintiff implied in a footnote that the "instream stockwatering" cases, "aesthetic enjoyment" cases, and "natural overflow" cases also provide examples of instream appropriations where the key factor was beneficial use.

[284] Plaintiff's Trial Brief at 28-34, California Trout.

[285] Id. at 34.

[286] See discussion at page 8, above.

[287] Plaintiff's Trial Brief at 36-37, California Trout.

[288] Brief of Defendants at 11, California Trout.

the necessary control or possession in the mill and stockwatering appropriations.[289] It claimed that "the most basic feature of the appropriative rights doctrine ... is its non-dependence on ownership of land bordering a stream."[290]

Both plaintiffs also contended that the physical diversion or possession requirement was used primarily to give notice of intent to use water and to show diligence in putting water to use.[291] The Water Code does not expressly require diversion or possession or control, and has "completely supplanted" the reasons for having a diversion requirement. As Fish and Game asserted:

> There is no reason why a showing of physical control over water should be required under today's circumstances when that water can be put to a recognized beneficial use without the necessity of a diversion or impoundment. Beneficial use of water in an orderly manner was and is the goal. The device of requiring physical control of water was appended solely as an aid to achieving order.[292]

3. Instream Appropriation by Private Parties

California Trout involves an issue not presented in Fullerton; that is, "whether a private corporation, such as California Trout, Inc., has standing to file an application ... to appropriate water for protection of fish in a stream or whether only ... Fish and Game ... has that authority."[293]

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[289] Plaintiff's Trial Brief at 39, California Trout.
[290] Id.
[291] Plaintiff's Opening Brief at 5-9, Fullerton; Plaintiff's Trial Brief at 41-43, California Trout.
[292] Plaintiff's Opening Brief at 9, Fullerton.
[293] California State Water Resources Control Board, Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate, 5, June 20, 1977. California Trout, Inc. v. Superior Court, Civil No. 16919, 3d D.C.A., June 26, 1977.

In fact, this issue involves two questions. One is whether a private party can obtain an appropriative right to a public use where that party would not have an exclusive right of use. The second is whether only Fish and Game can appropriate for a public use.

The Board asserted that it "cannot act on applications by a private party to appropriate water for the exclusively public use of protecting fish and wildlife."[294] Although "[n]o California court has had occasion to consider whether private rights can attach to the public use of water to protect fish," the Board, based on cases in other states, contended that exclusive use of water is necessary for a valid appropriation.[295] California Trout's proposed use is "not a use by which its members will benefit to the exclusion of the general public."[296] California Trout countered that "[t]here is no such requirement that benefit be exclusive to the appropriator, and in fact such a notion is contrary to the entire constitutional and statutory scheme of this state."[297]

In a second line of argument, the Board contended that California Trout, in applying for a public use of water, was "attempting to exercise a public duty that cannot and has not been delegated to it by the State."[298] The State holds "title to and property in" the fish in the State in trust for the people, the right and power to protect and preserve fish for the common use and benefit of the people is a prerogative of the sovereign, and the Legislature has delegated its power to protect fish to the Department of Fish and Game, and not to California Trout or any other private party.[299]

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[294] Defendant's Amendment to Answer, California Trout.
[295] Brief of Defendants at 23, California Trout.
[296] Id.
[297] Plaintiff's Trial Brief at 52, California Trout.
[298] Defendant's Amendment to Answer, California Trout.
[299] Id.

The National Water Commission discussed private appropriation for instream uses and raised several of the problems that the Board was concerned about:

> The Commission believes the public interest is better served ... [where private interests are protected through public rights which safeguard instream values] than by awarding water rights for the social values of natural streams to private individuals. The latter course of action would result in a number of private individuals holding water 'rights' to natural stream values, and would raise difficult and complex questions. For example, could the public be denied enjoyment of instream social values by the private water right owners? Could such owners sell and transfer their private rights to these social values? Would these rights descend to the heirs of the owners?[300]

California Trout responded to a statement of such concerns[301] by declaring that it "does not seek to limit for whose benefit Redwood Creek flows. It merely seeks to insure that it flows."[302] The Board could insert terms and conditions to cover such questions as exclusion of the public and "simply deal with those problems within the four corners of the permit, rather than denying the statutory right to a permit entirely."[303]

4. Current Status of the Litigation

In November 1977, the two Superior Courts reached opposite conclusions in California Trout and Fullerton. The brief order in California Trout requires the Board to accept and consider plaintiff's application:

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[300] United States National Water Commission, Water Policies for the Future 273-74 (1973).

[301] Brief of Defendants at 23, California Trout. Although the Board contended that California Trout cannot have an appropriative right because its use would not be exclusive, it also argued that if any such appropriation is to be permitted, Fish and Game should be the permittee, because a private organization might exclude the public from the enjoyment of natural stream values.

[302] Plaintiff's Trial Brief at 59, California Trout.

[303] Id. at 59-60.

> [T]he Court finds and declares that in its view, water may be appropriated within the meaning of the Water Code and California case law without the exercise of physical control of the water Moreover, the Court finds and declares that defendant Board must accept and determine on its merits an application seeking to appropriate water for the exclusive public use of protecting fish and wildlife, and, in this regard, plaintiff has 'standing' to bring this action in declaratory relief and to file such an application.[304]

In Fullerton, a different superior court refused to require the Board to accept Fish and Game's application:

> There is no question but what the use of the water which is sought by plaintiff is a beneficial use; in fact, that has already been determined by the legislature (Water Code Section 1243). In the opinion of the Court, however, the legislature has also determined that such use is not itself an 'appropriation.' It seems to the court that if the old requirements of physical diversion in appropriation are to be abrogated that should be a matter for the legislature to determine.[305]

The court noted that the Legislature amended the Water Code "as late as 1972", to provide for the protection and enhancement of instream uses.[306] The court implies that Water Code Section 1243,[307] which requires the Board to notify Fish and Game of water rights applications so that Fish and Game can recommend the amounts of water required for instream needs, provides an adequate procedure for protecting and enhancing instream uses.

It is expected that both decisions will be appealed, possibly to different appellate courts.

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[304] Judgment, California Trout, Inc. v. State Water Resources Control Board, Civil No. 233933, Cal. Super. Ct., Sacramento County, Nov. 14, 1977.

[305] Judgment, Fullerton v. State Water Resources Control Board, Civil No. 61136, Cal. Super. Ct., Humboldt County, Nov. 3, 1977."

[306] Id. at 3.

[307] California Trout, Inc. made an unsuccessful motion to coordinate the California Trout and Fullerton cases, Judicial coordination of actions which share common questions of fact or law filed in different courts is authorized by Cal. Code Civ. Proc., Section 404 et seq. (West 1973).

5. Recent Proposed Legislation

Three bills have been introduced in the past 14 years which would have allowed a state agency to "reserve" water for instream uses.[308] None of these became law. The most recent of these was Senate Bill 97, introduced in 1977. Its legislative declaration stated that:

> [T]he available surface waters of the state are a limited and increasingly scarce resource; that the demands placed upon this resource by a growing population and economy have seriously reduced and will continue to reduce instream supplies sufficient to maintain fish and wildlife; that opportunities for recreational activities dependent on viable fish and wildlife populations are likewise dwindling; that present law does not adequately ensure the availability of sufficient instream water to support fish and wildlife in that authorized conservation efforts are fragmented and effective comprehensive planning is therefore impracticable. The Legislature further finds and declares that it is necessary to establish an instream water right for the preservation and enhancement of fish and wildlife and related recreational purposes.[309]

Senate Bill 97 would have amended the Fish and Game Code to allow the Department of Fish and Game to "reserve" unappropriated water for the preservation or enhancement of fish and wildlife resources or for related recreational purposes. "Reserved" water would not have been subject to appropriation, except by Fish and Game for a purpose which is compatible with the reservation purposes.[310]

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[308] Assembly Bill 1977, introduced by Assemblywoman Davis (1963 Legislative Session); Senate Bill 1354, introduced by Senator Nejedly (1976 Legislative Session); Senate Bill 97, introduced by Senator Nejedly (1977 Legislative Session).

[309] Senate Bill 97, introduced by Senator Nejedly (1977 Legislative Session).

[310] An appropriation by Fish and Game of reserved water would still require diversion or possessory control. Provision for an appropriation by Fish and Game would permit it to determine that diversion of water for use in a preserve, for example, would be a better use of available water than retention of the water in a stream.

The term "reservation" was used to indicate that an instream water right is a new concept, distinguishable from an appropriative water right because possession or control is not required. In every other respect, a "reservation" would have been like an appropriation. For example, it would have been subject to public interest terms and conditions and would have been considered a right in a statutory adjudication.

D. Protection of Instream Uses in Statutory Adjudications

The Board has used its authority to conduct statutory adjudications to provide for instream needs in only one instance. A statutory adjudication is a proceeding conducted by the Board when it finds that the "public interest and necessity will be served" by a determination of the water rights on a stream system.[311] The Board prepares an "Order of Determination" which it files with the superior court of the county where the stream is located, and the court enters a decree determining the rights of all persons involved in the proceeding.[312]

The Water Code provides that the Board may determine "all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right" in a statutory adjudication.[313] The scope of the Board's investigation must include the stream system, the diversion of water, and "all beneficial uses being made of the water, and ... the water supply available for those uses..."[314]

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[311] Cal. Water Code Section 2525 (West 1971). Statutory adjudications are initiated by petition of a water right claimant on a stream system. See, generally, M. Archibald, Appropriative Water Rights in California, 35-41 (Governor's Commission to Review California Water Rights Law, Staff Paper No. 1, 1977).
[312] Cal. Water Code Section 2750 et seq. (West 1971).
[313] Cal. Water Code Section 2501 West 1971).
[314] Cal. Water Code Section 2550 (West Supp. 1977).

Proofs of claim for instream uses have been filed in only one instance. In the statutory adjudication involving the Scott River,[315] both Fish and Game and the United States Forest Service filed such proofs for the protection of instream uses. Fish and Game based its proof of claim of a water right on:

> the water policy of the State of California and the fact that the State has a property interest in the fish and wildlife existing in California which is held in trust for the beneficial use of the people. (Article XIV, Section 3, California Constitution; California Environmental Quality Act.)[316]

The Forest Service filed proofs of claim for water rights for instream use and for diversion for various purposes, based upon riparian rights and upon the federal reservation doctrine.[317] Other claimants filed notices of contests to proofs of claim filed by Fish and Game and the Forest Service.

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[315] The adjudication was initiated on March 18, 1970, and is not yet completed. Special provisions were enacted in 1971 to cover the statutory adjudication of the Scott River; see Cal. Water Code Section 2500.5 et seq. (West Supp. 1977). A portion of the Scott River is a designated component of the California Wild and Scenic Rivers System (Cal. Public Resources Code Section 5093.54 (a) (West Supp. 1977)), and a portion is covered by the California Protected Waterways Plan (1971 Cal. Stats. ch. 761).

[316] California State Water Resources Control Board, Scott River Adjudication, Proof of Claim No. 692. California Constitution Article 14, Section 3 has been renumbered and is now Article 10, Section 2.

[317] California State Water Resources Control Board, Scott River Adjudication, Proofs of Claim No. 666, 682, 683, 684, and 686. Federal reserved water rights are discussed in the United States National Water Commission, Water Policies for the Future 464 (1973): "It has been held by the U. S. Supreme Court [Arizona v. California, 373 U.S. 546 (1963)] that withdrawal of land from entry (by Congress...) for Federal use (e.g., for ... national ... forests ...) may also result in the acquisition of a Federal right to use water on the reserved land." The Commission noted that Federal reserved water rights have characteristics which are "quite incompatible" with state appropriation systems; Federal rights, for instance, "may be created without diversion or beneficial use...."

The conflicting proofs of claim and notices of contests of Fish and Game, the Forest Service, and other claimants on the Scott River led to an effort to obtain a stipulated agreement to resolve the issues related to instream fish and wildlife uses. By February 1977, all concerned parties had signed the stipulation.[318]

The proposed Order of Determination prepared by the Board's staff in accordance with the stipulation includes provisions for minimum instream flows for fish and wildlife within the Klamath National Forest,[319] additional instream flows to provide incremental fish flows and for recreational, scenic, and aesthetic purposes within the forest,[320] and construction and operation of diversion structures to allow fish migration.[321] It also reserves high flushing flows for fisheries.[322]

This last provision is explained in the draft order:

> High flows in the range of 6,000 to 21,000 cfs ... during the winter and spring months at approximately five-year intervals are necessary to maintain the Scott River fishery resource. These naturally occurring peak discharges perform such necessary functions as flushing sediments from and renewing spawning gravels and food-producing riffles, and providing transportation flows for seaward migrant salmon and steelhead. To accomplish these purposes, a range of flushing flows from 10,000 to 15,000 cfs is reserved in 'management periods' [an interval of five or more years beginning with a designated high flow year].[323]

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[318] California State Water Resources Control Board, In the Matter of Determination of the Rights of the Various Claimants to the Waters of the Scott River Stream System ..., Stipulation.

[319] California State Water Resources Control Board, In the Matter of Determination of the Rights of the Various Claimants to the Waters of the Scott River Stream System ..., Draft Order of Determination (Proposed), Section 45. The Order noted that these amounts are necessary to provide "minimum subsistence-level fishery conditions" that "can be experienced only in critically dry years without resulting in depletion of the fishery resource." The draft order disallows the Department of Fish and Game's claim.

[320] Id.

[321] Id. at Section 16.

[322] Id. at Section 46.

[323] Id.

The draft order indicates that the "reserved" flushing flows will probably be available after all other adjudicated rights and future rights for additional upstream storage of 25,000 acre-feet per year in reservoirs of not more than 500 acre-feet capacity are taken into account. The draft order thus implies that the Board will condition future storage appropriations to ensure that the "reserved" flushing flows will occur.[324] The draft has not yet been presented to the Board for adoption.

Fish and Game also appeared before the Board in the Soquel Creek Adjudication.[325] At the Board's request, Fish and Game submitted a brief "In Support of Certain Flows for the Maintenance of Fishery Resources of Soquel Creek."[326] Fish and Game recommended a flow of four cfs for the preservation of the steelhead, salmon, and trout fisheries and asked that this flow be granted a priority classification, correlative with other priority rights and subject to proportionate reduction in dry years. Fish and Game made three main arguments:

> I. The Department of Fish and Game's claim of right for water to protect fishery resources is based on the water policy of the State of California and the fact that the State has a property interest in the fish and wildlife existing in California which is held in trust for the beneficial use of the people.

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[324] Id.

[325] California State Water Resources Control Board, Order of Determination, Soquel Creek Stream System, 5-6 (1975). The Department of Fish and Game apparently did not file a proof of claim in this adjudication. However, a number of individuals filed proofs of claim for such uses as "aesthetic, health, security, and wildlife" uses which were denied because they "do not require diversion of water from a stream system and thus do not provide a basis for a water right...." (Id. at 105-106).

[326] California Department of Fish and Game, "Brief of the California Department of Fish and Game in Support of Certain Flows for the Maintenance of Fishery Resources of Soquel Creek", State water Resources Control Board, Soquel Creek Stream System Adjudication (1974).

II. State water policy as expressed in the California Constitution and the Water Code authorizes the Board to give consideration to and provide protection of fishery resources in a water rights adjudication proceeding.
III. The California Environmental Quality Act requires the State Water Resources Control Board to consider protection of fishery resources in a water rights adjudication proceeding.[327]

The Board rejected these arguments, concluding that its adjudication authority is limited by law to determining "existing vested water rights" and does not extend to the reservation of "a minimum stream flow for fish correlative or otherwise for which no water right is vested." The Board then noted that "[t]he court which must rule on this order may not be so limited."[328]

E. Instream Use Protection Under California Constitution Article 10, Section 2

The Water Code requires the Board and the Department of Water Resources to enforce California Constitution Article 10, Section 2.[329] The Board and the Department must "take all appropriate proceedings or actions before executive, legislative, or judicial agencies" to prevent the waste and unreasonable use, method of use, or method of diversion of water.[330] Insofar as Article 10, Section 2 has implications for the protection and enhancement of instream uses, the Board thus must act to further those uses.

The argument made to the electors of California in support of the 1928 Constitutional Amendment stated that the purpose of the Amendment was "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished

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[327] Id.
[328] California State Water Resources Control Board, Order of Determination, Soquel Creek Stream System, 6 (1975).
[329] Cal. Water Code Section 275 (West Supp. 1977).
[330] Id.

to the sea ...."[331] Superficially, this language may appear to suggest that it is unconstitutionally wasteful to allow water to remain instream. But cases which repeat this statement of purpose are based on situations such as that in Gin S. Chow v. City of Santa Barbara,[332] where downstream riparians tried to prevent appropriators from storing flood water that flowed directly into the ocean, even though the riparians could not put the water to a reasonable and beneficial use.[333]

The purpose of the Amendment was to "render available for beneficial use" waters that would be "wasted and forever lost."[334] The Water Code now declares that instream fish, wildlife, and recreation uses are beneficial uses of water.[335] In addition, many of the issues concerning instream needs pertain to situations where protection or enhancement would not result in water flowing unused to the sea.

Two requirements of California Constitution Article 10, Section 2 may further the protection and enhancement of instream uses. Under the Constitutional provision, the use, method of use, and method of diversion of water must be reasonable, and water resources of the State must "be put to

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[331] California Secretary of State, "Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 6, 1928." The 1928 Amendment is now Article 10, Section 2.
[332] Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 700, 22 P.2d 5 (1933).
[333] W. Hutchins, The California Law of Water Rights 13-14 (1956).
[334] Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 700, 22 P.2d 5 (1933).
[335] Cal. Water Code Section 1243 (West Supp. 1977).

beneficial use to the fullest extent of which they are capable."[336] The relationship between these requirements and instream use protection and enhancement raises two issues:

1. Does Article 10, Section 2 suggest that reduction of stream flow below certain amounts at certain times by direct diversion or storage constitutes an unreasonable use, method of use, or method of diversion of water?
2. Does Article 10, Section 2 require a water diverter to use a method of diversion that protects instream values where alternative methods of diversion are available?

No case has raised the first issue. The factual situation in which the issue could arise is where diversions on a stream aggregate *a* reduction in streamflow that threatens instream uses. At that point it could be determined that further diversion of certain amounts at certain times would be an unreasonable use, method of use, or method of diversion of water since recognized beneficial instream uses would be harmed or eliminated. Article 10, Section 2 is flexible, and may in the future encompass such a finding. The courts repeatedly have indicated that what is reasonable under Article 10, Section 2 is "a question of fact to be determined according to the circumstances

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[336] The first two sentences of California Constitution Article 10, Section 2 set out the basic water policy of the State:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

in each particular case"[337] and that the scope and range of the effect of the section will be determined only after a large number of cases are decided.[338]

Board Decision 1460 addresses the second issue noted above.[339] The Sierra Club filed a complaint with the Board in which it alleged that the Los Angeles County Flood Control District's flood control project on Dry Canyon and South Fork Dry Canyon has resulted in waste and unreasonable use, method of use, or method of diversion of water.[340] The Dry Canyon project removes all surface flows from the project area by diverting flows from natural creeks into a storm drain and lateral drains. The storm drain then discharges back into the natural channel 3,500 feet downstream.[341]

The Board found that the pre-project flows "supported then existing legally cognizable beneficial uses, including recreation, and maintenance of wildlife habitat, esthetic values, and valued oak trees."[342] Removal of water by the project would significantly adversely affect existing beneficial uses "without significantly augmenting the amount of water available for other beneficial uses."[343] The Board found that the District can reasonably avoid the adverse impacts by installing devices to bypass low, non-flood flows at the drain inlets,[344] and concluded that:

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[337] Joslin v. Marin Municipal Water District, 67 Cal.2d 132, 139, 60 Cal. Rptr. 377, 429 P.2d 889 (1967).
[338] Meridian, Ltd. v. San Francisco, 13 Cal.2d 424, 444, 90 P.2d 537 (1939). See, generally, C. Lee, Legal Aspects of Water Conservation in California, 9-10 (Governor's Commission to Review California Water Rights Law, Staff Paper No. 3, 1977).
[339] California State Water Resources Control Board, Decision 1460 (Oct. 21, 1976).
[340] Id. at 2.
[341] Id.
[342] Id. at 4.
[343] Id. at 6.
[344] Id.

> [D]iversion of nonflood flows by the Los Angeles County Flood Control District in the Dry Canyon Project constitutes both a waste and an unreasonable method of diversion of water.[345]

Environmental Defense Fund v. East Bay Municipal Utility District also involved the second issue.[346] In 1970, the East Bay Municipal Utility District (EBMUD) contracted with the United States Bureau of Reclamation for delivery of up to 150,000 acre-feet of water per year from the Auburn-Folsom South Unit, American River Division of the Central Valley Project.[347] Water delivered to EBMUD by the Folsom South Canal will not flow down the Lower American River. Plaintiffs and Intervenor County of Sacramento argued that water could be allowed to flow down the Lower American, and then be diverted by EBMUD, and that "EBMUD might have acquired water from the federal government at a point below the confluence of the Sacramento and Lower American Rivers just as economically as from the diversion point actually chosen."[348] The State Water Resources Control Board's Lower American River Decision had also specifically criticized the EBMUD contract:

> This type of water development, while satisfying one water requirement, eliminates the possibility for multiple beneficial uses of the water, and is not sound management of the water resource. If the Bureau contract with the District had required that the District take delivery of project water from the Sacramento River or some other downstream location rather than the Folsom South Canal, an additional 150,000 acre-feet of project water supply (equivalent to about 210 cfs of continuous

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[345] Id. The Board ordered the District to submit final flow bypass plans to the Board for approval by January 1, 1977, and to complete work by October 1, 1977, to the Board Executive Officer's satisfaction. The Executive Officer has granted the District time extensions, and negotiations on compliance with the Board's order are continuing.

[346] Environmental Defense Fund v. East Bay Municipal Utility District,
[246] No. 23422 Cal. (Decided Dec. 20, 1977). [Hereinafter cited as EDF v. EBMUD].

[347] United States Department of the Interior Bureau of Reclamation, "Contract Between the United States of America and East Bay Municipal Utility District Providing for Water Service", Contract No. 14-06-200-5183A (Dec. 22, 1970).

[348] EDF v. EBMUD at 4.

> supply) would have been available for streamflow augmentation [in the Lower American River] below Nimbus for fish and recreational purposes prior to ultimate use for municipal purposes.[349]

Plaintiffs claimed that EBMUD is violating Article 10, Section 2 by threatening to divert water from an upstream location (from the Folsom South Canal) rather than a downstream location (e.g., from the Sacramento River). The California Supreme Court restated this basis of the complaint: "[T]he complaint ... prays for a declaration that EBMUD lacked legal capacity to enter the 1970 contract because the diversion point constitutes an unreasonable water use."[350]

The California Supreme Court did not address the issue of whether EBMUD's diversion point involves an unreasonable water use. The court held that the complaints challenging the choice of diversion point and construction

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[349] California State Water Resources Control Board, Decision No. 1400 (April 1972).

[350] EDF v. EBMUD, at 5. A second basis of the complaint was that EBMUD's failure to reclaim water violates Article 10, Section 2's reasonable beneficial use requirements. This aspect of the case is discussed in C. Lee, Legal Aspects of Water Conservation in California. 19-20 (Governor's Commission to Review California Water Rights Law, Staff Paper No. 3, 1977). The Court held that the plaintiffs failed properly to raise the reclamation issue because they did not exhaust their administrative remedies. EDF v. EBMUD, at 19.

of the Hood-Clay Connection[351] failed to state a cause of action because "they attempt to use state law to determine a matter within the authority of the federal agency."[352] The court reasoned:

> The federal reclamation laws clearly establish that construction and maintenance of water facilities are vested in the Bureau. The determination of diversion point obviously concerns construction of the federal project. The location of the diversion point in fact comprises a substantial part of the federal project. Similarly, construction and location of the Hood-Clay Connection are clearly within the authority invested in the Secretary of the Interior and the Bureau.[353]

The issue of whether Article 10, Section 2 requires water to be transported instream, where feasible, also may arise concerning the City of

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[351] On October 21, 1968, EBMUD, the Bureau, the Sacramento River and Delta Water Association, and the Central Valley East Side Project Association made an agreement which provided that the Bureau could deliver a first block of 70,000 acre-feet per year to EBMUD. In addition, a second block of 80,000 acre-feet per year could be delivered to EBMUD if the contract requirements of contractors of the Central Valley Project and the needs of Placer, Sacramento, and San Joaquin counties and of the East Side Division service area could be met. EBMUD wanted to divert water from the Folsom South Canal. The agreement required EBMUD to build a "Hood-Clay Connection" from the Sacramento River to the lower Folsom South Canal, which could deliver at least 80,000 acre-feet per year of Sacramento River water into the canal below EBMUD's diversion point if Sacramento River water was needed by the contractors or service area, to make up for the American River water taken by EBMUD.

The purpose of the Hood-Clay Connection under the 1968 agreement was thus to move Sacramento River water east to the Folsom South Canal, for delivery south. The State Water Resources Control Board suggested a different, additional purpose for the Hood-Clay Connection: It could be used to return American River water, which was allowed to flow down the Lower American for instream purposes, to the Sacramento River, back to the lower Folsom South Canal for eventual delivery to the canal service area. Service areas needs would not be impaired and lower American instream needs would be met. See discussion at page 50, above.

[352] EDF v. EBMUD at 7. The Reclamation Act of 1902 was held to preempt state law in this case. The Court stated that the Reclamation Act preempts state law in three cases: "(1) when state law conflicts with federal law, (2) when federal law vests the federal agency with final authority over the subject matter, or (3) when the application of state law would frustrate a federal objective."

[353] Id. at 18.

San Francisco's proposal to build a fourth barrel of its Hetch-Hetchy aqueduct on the Tuolumne River. The aqueduct takes water from Hetch-Hetchy Dam across the valley to the south San Francisco Bay area. The Department of Water Resources has indicated that it will oppose the fourth barrel unless, among other things, it can be demonstrated that "[t]here is no other reasonable method of bringing new water into the area via the Delta (such as through a new line, the San Felipe System, or the South Bay Aqueduct), by exchange or direct delivery."[354] If water were routed through the Delta, it would be available for instream beneficial uses in the Delta and in the Tuolumne River.

F. Water Quality Authority

1. Water Quantity and Water Quality

The Board has jurisdiction over both water quantity and water quality aspects of California water law. These subjects overlap in many ways. For example, the Board can approve "appropriation by storage of water to be released for the purpose of protecting or enhancing the quality of other waters which are put to beneficial uses."[355]

The Water Code requires the Board to consider water quality control plans in acting upon applications to appropriate water, and it provides that the Board can impose terms and conditions "necessary to carry out such plans."[356] Since 1973, the Board, under Regulation 761(b), has imposed a water quality term

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[354] Letter from Ronald B. Robie, Director, Department of Water Resources, to S. H. Cantwell, Jr., Director, Department of Public Works, San Mateo County (Oct. 28, 1977).

[355] Cal. Water Code Section 1242.5 (West 1971). The Board must act in the public interest and must not violate the mandates of Article 10, Section 2,

[356] Cal. Water Code Section 1258 (West 1971).

in new permits and in permits for which it has granted a time extension.[357] The term provides that the quantity of water diverted "is subject to modification" by the Board if, after notice and opportunity for hearing, "the board finds that such modification is necessary to meet water quality objectives in water quality control plans ...."[358] The Board, in imposing this term, clearly recognizes that control of waste discharges alone often cannot adequately protect some beneficial instream uses.

2. Recognition of Instream Uses and Needs in Basin Plans

The regional water quality control boards have prepared water quality control plans (basin plans) pursuant to the Porter-Cologne Water Quality Control Act[359] and the Federal Water Pollution Control Act Amendments of 1972.[360] Basin plans include water quality objectives designed to "ensure the reasonable protection of beneficial uses", and programs for implementing

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[357] 23 Cal. Admin. Code Section 761(b). The Board has not used this term to modify the quantity of water diverted under any permit.

[358] Id. The term also provides that "[n]o action will be taken pursuant to this paragraph unless the board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges."

[359] Cal. Water Code Section 13240 et seq. (West 1971). The Porter-Cologne Act is at Cal. Water Code Section 13000 et seq. (West 1971).

[360] Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, Pub. L. 92-500 (1972). The basin plans satisfy the continuing planning process requirements of the Act. The Act's goals and policy are, in part, stated as follows:

> The. objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of the Act:
>
> 1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> 2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 ....

Li. at Pub. L. 92-500, Section 303(e).

the objectives.[361] In establishing objectives, the regional boards considered the environmental characteristics of each hydrographic unit and the beneficial uses of water to be protected,[362] including instream fishery, habitat, and recreation uses.[363] The Porter-Cologne Act includes in its definition of "beneficial uses" of water that "may be protected against quality degradation", recreation, aesthetic enjoyment,

and the preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.[364]

The State's water quality programs primarily focus on the regulation of discharge of waste into waters of the State and the maintenance of receiving water quality. Basin plan reports have recognized that waste discharge control alone may not be adequate to protect some instream beneficial uses. The report covering the Tulare Lake Basin commented:

> The Porter-Cologne Water Quality Control Act specified preservation and enhancement of fish and wildlife resources among the beneficial uses of water. While this fact is recognized, the means of providing or allocating water to ensure the proper management of fish and wildlife resources has not been clearly defined.
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> -- -- -- --
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> [In] ... natural watercourses ... a recognized beneficial use, the maintenance of fish life, may be threatened, impaired, or destroyed through the diversion of water from the natural stream. Historically, each such diversion has been treated as a separate problem. Neither the divertor nor the regulatory agencies ... have standard guidelines to follow in the allocation of available stream flow among the various beneficial uses.[365]

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[361] Cal. Water Code Section 13241-2 (West 1971).

[362] Cal. Water Code Section 13241 (West 1971).

[363] See e.g., California State Water Resources Control Board, Central Valley Region (5), Water Quality Control Plan Report, Sacramento River Basin (5A), Sacramento-San Joaquin Delta Basin (5B), San Joaquin Basin (5C), I-2-2 (1975).

[364] Cal. Water Code Section 13050(f) (West 1971). [365] See, e.g., California State Water Resources Control Board, Central Valley Region (5), Water Quality Control Plan Report, Tulare Lake Basin (5D), II-16-109 (1975).

The North Lahontan basin report discussed the need for a coordinated program of water resources management which should include release schedules and minimum flow provisions for streams to preserve and enhance the stream environment.[366] The report noted that "[definitive management programs are necessary in areas where the level of development or use has resulted in conflicts of use, depletion of quantity, and/or deterioration of quality."[367]

The Klamath River basin report includes a "Flow Depletion and Alteration Element" in its discussion of alternative control measures for dealing with water quality problems.[368] This element concentrates on water quality impairment which is caused or aggravated by reduced streamflow caused by diversion of surface waters. The report recognizes that control of water diversion is a water rights problem, and it identified two alternate solutions: Major changes in water rights law (which would involve "very broad implications") or a more expansive exercise of present controls in the present appropriation process.[369]

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[366] California State Water Resources Control Board, Lahontan Region (6), Water Quality Control Plan Report, North Lahontan Basin (6A), I-5-53 (1975).
[367] Id. at I-5-52.
[368] California State Water Resources Control Board, North Coast Region (1), Water Quality Control Plan Report, Klamath River Basin (1A), 16-17 (1975).
[369] Id. at 16-18.

IV. Other Authority For the Protection and Enhancement of Instream Uses

A. Introduction

California statutes provide ways to protect and enhance instream uses that do not primarily involve the State Water Resources Control Board. These statutes encompass wild and scenic rivers protection, various Fish and Game powers, area of origin protection, the California Environmental Quality Act, the Fish and Wildlife Coordination Act, and relicensing of Federal Energy Regulatory Commission projects.

B. The California Wild and Scenic Rivers Act and the California Protected Waterways Act

The Legislature enacted the California Wild and Scenic Rivers Act in 1972, to preserve certain rivers which have "extraordinary scenic, recreational, fishery or wildlife values" in their free-flowing state.[370] The Legislature had begun a separate planning process in 1968, with the California Protected Waterways Act, with a similar purpose of conserving "those waterways of the state possessed of extraordinary scenic, fishery, wildlife, or outdoor recreation values."[371] Also in 1968, Congress passed the National Wild and Scenic Rivers Act, which restricts federal action in planning, funding, or licensing projects which would have an adverse effect on rivers in the system.[372] The National Wild and Scenic Rivers Act includes only the Middle Fork of the Feather River and designates portions of the North Fork of the American River and the Tuolumne River for potential inclusion in the system.

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[370] Cal. Pub. Res. Code Section 5093.50 (West Supp. 1977). The California Wild and Scenic Rivers Act is at Sections 5093.50 to 5093.65.

[371] California Protected Waterways Act, 1968 Cal. Stats. 2403, ch. 1278. Subsequent legislative acts relating to the act are at 1971 Cal. Stats. 1508, ch. 761; 1973 Assembly Concurrent Resolution ch. 113.

[372] National Wild and Scenic Rivers Act, 16 U.S.C.A. Section 1271 et seq., Pub. L. 90-542.

1. California Wild and Scenic Rivers Act

In enacting the California Wild and Scenic Rivers Act, the Legislature declared that:

> It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery or wildlife values, shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 3 of Article 14 of the State Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter.[373]

Portions of nine rivers, predominantly in the north coastal area, are included in the California Wild and Scenic Rivers System.[374] There are two main aspects of the Act: Restrictions on the construction of dams, reservoirs, and other impoundment facilities, and water diversion facilities, and provisions for management planning by the Secretary of the Resources Agency.

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[373] Cal. Pub. Res. Code Section 5093.50 (West Supp. 1977).

[374] Cal. Pub. Res. Code Section 5093.54 (West Supp. 1977) includes: The entire Smith River, and major portions of the Klamath, Scott, Salmon, North Fork of the Salmon, Wooley Creek, Trinity River, North Fork of the Trinity, New River, South Fork of the Trinity, Eel River, South Fork of the Eel, Middle Fork of the Eel, North Fork of the Eel, Van Duzen, North Fork of the American River, and the Lower American River. The Secretary for Resources can also recommend to the Legislature that other rivers be included in the system. The Eel River is treated separately: The Department of Water Resources is required to report to the Legislature in 1985 on the need for water supply and flood control projects on the Eel and its tributaries, and the Legislature must hold public hearings to determine whether legislation should be enacted to delete all or any segment of the river from the system.

A 1974 Initiative Measure, which would have included portions of the Stanislaus River in the system was rejected at the November 5, 1974, general election. Cal. Pub. Res. Code Section 5093.65 (West Supp. 1977) adds that there is a moratorium on the construction of water impoundment facilities on the Kings River until January 1, 1979, although the river is not included in the Wild and Scenic Rivers system.

a. Restrictions on Impoundment and Diversion

The Act provides that no dam, reservoir, or other impoundment facility[375] can be constructed "on or directly affecting any river" in the system.[375] The Act also restricts the construction of water diversion facilities:

> [N]o water diversion facility [shall] be constructed on any such river unless and until the secretary determines that such facility is needed to supply domestic water to the residents of the county or counties through which the river flows, and unless and until the secretary determines that facility will not adversely affect its free-flowing condition or natural character.[376]

The State Water Resources Control Board regulations provide that applications to divert water from rivers included in the Wild and Scenic River System must be "consistent with" this requirement.[377]

The Wild and Scenic Rivers Act also prohibits all state entities from assisting or cooperating financially or otherwise with any federal, state, or local entity "in the planning or construction of any project that could have an adverse effect on the free-flowing, natural condition of the rivers included in the system."[378] An Attorney General opinion requested by Fish and Game broadly interpreted the term "project" in this section. The opinion concluded that "project" includes "any construction or planning activity which could

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[375] Cal. Pub. Res. Code Section 5093.55 (West Supp. 1977). This section and Section 5093.57 make an exception for the construction of "temporary flood storage facilities" on the Eel River.

[376] Cal. Pub. Res. Code Section 5093.55 (West Supp. 1977).

[377] 23 Cal. Admin. Code Section 716. Section 717 adds that:

> The Board, in its discretion, may suspend processing of an application for a permit to appropriate water from any part of a river in the system, and ordinarily no such application will be set for hearing or proceedings in lieu of hearing pending a determination by the Secretary, as required by Section 5093.55. An adverse determination will be cause for denial of the application unless it is amended and a favorable determination thereafter obtained.

[378] Cal. Pub. Res. Code Section 5093.56 (West Supp. 1977). This section makes an exception for Department of Water Resources technical studies to determine the feasibility of alternate dam sites on the Eel River and its tributaries.

have a direct adverse effect on the free-flowing natural condition of the rivers included in the system, even though such project is not located 'on' the river."[379] The Attorney General remarked that although "dams and reservoirs appear to be the principal targets of this legislation ... we see no good reason why construction activity other than dams and reservoirs ... should not similarly be prohibited provided ... [it has] a direct adverse effect."[380]

b. Provisions for Management Planning

The second aspect of the Wild and Scenic Rivers Act is a planning process administered by the Secretary of the Resources Agency.[381] The Secretary is required to classify rivers or river segments as either "wild", "scenic", or "recreational" depending on the current level of access and development,[382] and to prepare management plans "to administer the rivers

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[379] 60 Ops. Cal. Atty. Gen. 4, 5 (Jan. 19, 1977).

[380] Id. at 8. The opinion noted that the term "free-flowing" is a concept primarily concerned with hydrological considerations and encompasses different elements than do the terms "natural character" and "natural condition." The natural character or condition of a stream "would embody other considerations besides its flow and normally would include the streambed including gravel deposits and indigenous vegetation growing thereon and along its banks." (Id. at 12). A "project", therefore, must not interrupt the free flow of a stream or disturb the streambed or riparian vegetation.

[381] Cal. Pub. Res. Code Section 5093.60 (West Supp. 1977). The Secretary has delegated the responsibility for preparing the plans to Fish and Game.

[382] Cal. Pub. Res. Code Section 5093.53 (West Supp. 1977): Those rivers or segments of rivers designated for inclusion in the system shall be classified by the secretary as one of the following:

(a) Wild rivers, which are those rivers or segments of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.

(b) Scenic rivers, which are those rivers or segments of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(c) Recreational rivers, which are those rivers or segments of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have under gone some impoundment or diversion in the past.

and their adjacent land areas in accordance with such classification."[383] "Wild" rivers thus must be managed in such a way that they remain wild, for example. The Secretary must develop the management plans "in close cooperation with the counties through which the rivers flow and their political subdivisions",[384] and submit the plans to the Legislature for approval.[385] The Secretary submitted plans to the Legislature on August 1, 1977, for the Van Duzen River, the Lower American River, and the North Fork American River.[386]

c. Water Supply Development Pressures

The Department of Water Resources estimates that 25 percent (18 million acre-feet) of stream runoff in California is set aside in the north coastal area under the Wild and Scenic Rivers Act.[387] Wild and Scenic Rivers status may not necessarily prevent water supply development. A Legislative Counsel opinion, requested by Senator Ayala, concluded that the "California Wild and Scenic Rivers Act would not, as a matter of law, prohibit the construction by the department of an additional water development facility of

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[383] Cal. Pub. Res. Code Section 5093.58 (West Supp. 1977). Section 5093.60 also defines the Secretary's administrative responsibilities: Each component of the system shall be administered so as to protect and enhance the values for which it was included in the system, without unreasonably limiting lumbering, grazing, and other resource uses, where the extent and nature of such uses do not conflict with public use and enjoyment of these values.

[384] Cal. Pub. Res. Code Section 5093.59 (West Supp. 1977).

[385] Cal. Pub. Res. Code Section 5093.58 (West Supp. 1977).

[386] The Resources Agency, Van Duzen River Waterway Management Plan (July 1977), North Fork American River Waterway Management Plan (July 1977), Lower American River Waterway Management Plan (July 1977).

[387] California Department of Water Resources, Bulletin No. 160-74, The California Water Plan Outlook in 1974 at 2 (1974).

the State Water Resources Development System on the Eel, Trinity, or Van Duzen Rivers ...."[388] The Act allows studies to continue on the Eel River and its tributaries, however, to evaluate the need for water supply and flood control projects. In 1985, the Department of Water Resources must report to the Legislature, and the Legislature must hold public hearings "to determine whether legislation should be enacted to delete all or any segment of the river from the system."[389] A 1977 bill introduced in the Senate would have repealed the Wild and Scenic Rivers Act.[390] Another bill would have removed the Act's restrictions on projects, such as timber harvesting projects in the watershed, that "directly affect" the rivers, and would have continued to restrict only

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[388] Legislative Counsel of California, Opinion No. 3513, in response to a question from Senator Ayala (March 22, 1977). The opinion reasons in following way: Water Code Section 12931 provides that the State Water Resources Development System will include certain facilities and "such other additional facilities as the department deems necessary and desirable to meet local needs ... and to augment the supplies of water in the Sacramento-San Joaquin Delta ...." (Id. at 3). Section 12938 provides for the expenditure of bond funds for the construction of additional facilities the Department determines to be necessary and desirable, such as "dams, reservoirs, aqueducts, and appurtenant works in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen and Klamath Rivers ...." The Section then states that the Department "is authorized to construct any and all facilities for which funds are appropriated to it for expenditure pursuant to this chapter." (Id. at 3-4).Pursuant to California Constitution Article 16, Section 1, the bond act was submitted to the voters, and was approved. The opinion suggested that a subsequent act of the legislature which substantially changes the terms of the bond act as approved by the voters "would raise the question of whether such subsequent act violated the constitutional rights of the electorate" under Article 16, Section 1. (Id. at 4). The opinion concludes that "[t]o permit the Legislature to prohibit construction by the department ... on the rivers in the Wild and Scenic Rivers system would ... be considered a material departure from the proposition as approved by the voters." (Id. at 5).

[389] Cal. Pub. Res. Code Section 5093.54 (West Supp. 1977).

[390] Senate Bill 345, Introduced by Senator Ayala (1977-78 Legislative Session)

projects that are actually on the rivers themselves.[391] These considerations point to the fact that designation as a wild and scenic river may not provide permanent protection for instream values.

2. The California Protected Waterways Act

The Legislature enacted the California Protected Waterways Act in 1968.[392] This Act, which was not codified, provided for the preparation of a California Protected Waterways Plan to be submitted to the Legislature in 1971. The purpose of the plan was to develop, through a public hearing and review process, a program "for the conservation of those waterways of the state possessed of extraordinary scenic, fishery, wildlife, or outdoor recreation values...."[393]

A California Protected Waterways Plan was submitted to the Legislature in February 1971. In September 1971, the Legislature passed a second act which provided for the preparation of detailed waterway management plans covering a wide range of uses: "[F]lood control, water conservation, recreation, fish and wildlife preservation and enhancement, water quality protection and enhancement, streamflow augmentation, and free-flowing rivers, segments, or tributaries."[394] The act listed waterways for which detailed

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[391] Assembly Bill 1653, Introduced by Assemblyman Keene (1977 Legislative Session). This was in response to the Attorney General's opinion discussed at 90, above.

[392] 1968 Cal. Stats. 2403, ch. 1277. There is no direct connection between the Wild and Scenic Rivers Act and the Protected Waterways Act. In 1971, a version of the Wild and Scenic Rivers Act was introduced but did not pass, but updating legislation for the Protected Waterways Act (enacted in 1968) did pass. In 1972, the Wild and Scenic Rivers Act did pass, and additional Protected Waterways legislation passed but was vetoed by the Governor. Some rivers are included in both systems, and if a plan is prepared pursuant to the Wild and Scenic Rivers planning process, no duplicative plan will be prepared under the Protected Waterways planning. Communication with Mr. Jerry Mensch, Project Manager, Waterways Management Planning, Department of Fish and Game, Dec. 13, 1977.

[393] 1968 Cal. Stats. 2403, ch. 1277, section 4.

[394] 1971 Cal. Stats. 1508, ch. 761, section 2.

plans are to be prepared.[395] Only one plan is now being prepared, for the San Lorenzo River, and no plans have been submitted to the Legislature. These plans will be planning documents only, with no administrative effect.

C. Department of Fish and Game Powers and Duties

The Department of Fish and Game has wide-ranging powers and duties to protect and enhance fish, wildlife, and recreation uses of California's water resources. This section will cover four areas of Fish and Game's activities:[396] Negotiated agreements for instream protection; provisions affecting diversion works; provisions concerning major projects; and limited powers to purchase water and water rights.

1. Negotiated Agreements for Instream Protection

Fish and Game is participating in several important negotiations involving instream needs. One is the draft "Memorandum of Understanding on Lower American River Flows and Folsom South Service Area" involving the United States Bureau of Reclamation, United States Fish and Wildlife Service, Department of Water Resources, Department of Fish and Game, County of

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[395] Id. The waters listed are: (a) The Klamath River in both California and Oregon, and its tributaries, the Trinity, Salmon, Shasta, and Scott Rivers, (b) the Smith River in Del Norte County, (c) Redwood Creek in Humboldt County, (d) Bear River in Humboldt County, (e) the Mattole River in Humboldt County, (f) the Van Duzen River in Humboldt County, (g) the Eel River and major tributaries in Humboldt, Mendocino, and Trinity counties, (h) the Big River, Garcia River, Navarro River, Noyo River, Alder Creek, and Ten-Mile River, all in Mendocino County, (i) the Russian River and Gualala River, both in Mendocino and Sonoma counties, and (j) Cazadero Creek in Sonoma County.

[396] This discussion will include only Fish and Game powers and duties not already discussed. See above, for example, the discussion of Fish and Game's participation in the appropriation process. Some aspects of Fish and Game's activities in protecting instream uses will not be included in this paper at all, such as its participation in the United States Forest Service's use permit process.

Sacramento, and several utility districts, water districts, and environmental groups.[397] One important objective of the draft memorandum concerns the enhancement of anadromous fish resources of the Calaveras, Mokelumne, and Cosumnes Rivers.[398] The memorandum provides that the United States Fish and Wildlife Service and Fish and Game will prepare "anadromous fish development plans" for the rivers.[399] The State and Federal governments tentatively agree to assume all costs allocated to anadromous fish development.[400]

Basically, the agreement marshalls water from the Calaveras, Mokelumne and Cosumnes Rivers, the Folsom South Canal when it is extended, and the proposed Peripheral Canal, to provide for a range of needs. These include firm water rights and contracts, groundwater management needs in Sacramento and San Joaquin counties, Lower American instream flow needs essentially as set out in the Board's Lower American River Decision, and water for

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[397] "Memorandum of Understanding on Lower American River Flows and Folsom South Service Area", Revised Draft (Nov. 10, 1977). Another important draft agreement is an outgrowth of the 1970 "Four Agency Agreement" for Sacramento-San Joaquin Delta and Bay studies between the United States Bureau of Reclamation, United States Fish and Wildlife Service, Department of Water Resources, and Department of Fish and Game. This draft agreement provides that the Central Valley Project and State Water Project will be operated to "restore and maintain" fish and wildlife resources in the Delta and Bay at average recent historical levels and to "[r]ealize the Projects' potential for increasing these resources above historical levels consistent with other purposes of the Projects." (Revised Draft, September 7, 1977, at 4). One report suggests that an additional operations agreement for meeting the proposed fish and wildlife objectives would probably be necessary and that "additional legislation to back up an operations agreement" may be needed. (State Water Resources Control Board, Phase I Prehearing Staff Report, In the Matter of Water Quality Control Plans for the Protection of Beneficial Uses in the Sacramento-San Joaquin Delta and Suisun Marsh /3 (Nov. 1976)

[398] "Memorandum of Understanding on Lower American River Flows and Folsom South Service Area", Revised Draft (Nov. 10, 1977).

[399] Id. at 13-14.

[400] Id. at 13.

anadromous fish development on the Calaveras, Mokelumne and Cosumnes Rivers.[401] Proposed provisions concerning fishery development on the Mokelumne River indicate that there are many approaches that can be devised to meet instream needs. For example, Woodbridge Irrigation District, which has a contract with the East Bay Municipal Utility District for delivery of Mokelumne River water, would take delivery of "exchange water" to be made available from the Peripheral Canal and/or the Folsom South Canal:

> The parties intend that all or part of the Mokelumne River water which would otherwise be delivered to Woodbridge Irrigation District by EBMUD would be held in Camanche Reservoir for release in conjunction when possible with Folsom South Canal releases chiefly during fall, winter and spring months to provide anadromous fish development from Camanche Dam to the Delta.[402]

State and federal agencies may have to rely extensively on negotiating a "law of the river" to provide for instream needs if the Board cannot condition federal permits. This may be extremely difficult to accomplish. Water rights holders and project contractors may refuse to agree to a firm supply for instream needs and may refuse to risk the development of fisheries based on water that is available for instream use only for an interim period.

2. Provisions Related to Diversions

In 1976, the Legislature added a broad declaration of the public interest in fish and wildlife resources to the Fish and Game Code. Section 1600 of that code states:

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[401] Id. at 13-22.

[402] Id. at 19-20. Anadromous fish depend on stream "odors" to find their "home stream." Exchanges to facilitate the release of "home stream" waters is an important goal in these negotiations. (Communication with Mr. John Skinner, Water Management Coordinator, Department of Fish and Game, Jan. 6, 1978).

> The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people's food supply and therefore their conservation is a proper responsibility of the state. This chapter is enacted to provide such conservation for these resources.[403]

Public and private entities must notify Fish and Game if they plan to divert or obstruct the natural flow of a stream or change the bed, channel, or bank of a stream.[404] If "an existing fish or wildlife resource may be substantially adversely affected ...", Fish and Game must propose reasonable modifications or measures to protect the fish and wildlife.[405] A party may not begin construction until it is found that fish and wildlife will not be adversely affected or until Fish and Game's proposals or an arbitration panel's decisions are incorporated into a project.[406] Fish and Game generally uses these powers to protect wildlife habitat where streambed alteration is involved, often with respect to very minor streams.[407]

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[403] Cal. Fish and Game Code Section 1600 (West Supp. 1977).

[404] Cal. Fish and Game Code Sections 1601 and 1603 (West Supp. 1977). These sections differ in certain respects. For example, state and local government agencies and public utilities must notify Fish and Game of "any project that will divert, obstruct or change the natural flow or bed, channel or bank ... in which there is at any time an existing fish or wildlife resource or from which those resources derive benefit ...." (Section 1601). However, it is unlawful for "any person" only to "substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank ...." (Section 1603).

[405] Cal. Fish and Game Code Sections 1601 and 1603 (West Supp. 1977). Proposals to public agencies and public utilities must include procedures for reviewing any protective measures.

[406] Cal. Fish and Game Code Sections 1601-1606 (West Supp. 1977).

[407] Communication with Mr. Charles K. Fisher, Associate Fishery Biologist, California Department of Fish and Game (Dec. 28, 1977).

As discussed earlier, Fish and Game also can require the owner of a dam to allow water to pass "to keep in good condition any fish that may be planted or exist below the dam."[408] When there is no free passage for fish over or around a dam, Fish and Game can require the owner of a dam to build a "suitable fishway."[409] Where fishways are impracticable because of the height of the dam, for example, Fish and Game can require a dam owner to build a hatchery,[410] or to plant fish.[411] Fish and Game also has the power to require that fish screens be placed and/or operated and maintained across any diversion to prevent fish from leaving a stream.[412]

3. Provisions Concerning Major Projects

The Davis-Dolwig Act[413] requires that all state-constructed water projects provide for the preservation of fish and wildlife.[414] Recreation and fish and wildlife enhancement are among the purposes of state water projects, and:

> [F]acilities for the storage, conservation or regulation of water [must] be constructed in a manner consistent with the full utilization of their potential for the enhancement of fish and wildlife and to meet recreational needs ....[415]

The purpose of the Act is to provide for the planning and funding of fish, wildlife, and recreation features in state water projects.[416] The Department of Water Resources must give "full consideration" to recommendations made by Fish and Game and other interested federal, state, and local

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[408] Cal. Fish and Game Code Section 5937 (West 1958). See discussion at page 54, above.
[409] Cal. Fish and Game Code Sections 5931, 5933 (West 1958).
[410] Cal. Fish and Game Code Sections 5938-5941 (West 1958).
[411] Cal. Fish and Game Code Section 5942 (West 1958).
[412] Cal. Fish and Game Code Sections 5980-6100 (West 1958 and West Supp. 1977)
[413] Cal. Water Code Sections 11900-11925 (West 1971).
[414] Cal. Water Code Section 11900 (West 1971).
[415] Id.
[416] Cal. Water Code Section 11901 (West 1971).

agencies aimed at preserving and enhancing fish, wildlife, and recreation uses.[417] It must incorporate any recommended features, "including, but not limited to, additional storage capacity", that it determines to be necessary or desirable "to the extent that such features are consistent with other uses of the project, if any."[418] The Act provides for General Fund financing for enhancement facilities.[419]

Several other Water Code Sections also provide for Fish and Game participation in major water project studies. The State Water Resources Law of 1945[420] requires the State to engage in the study and coordination of local, state, and federal water development projects.[421] The law provides that "when engineering and economic features of the project make it practicable", projects must be designed, constructed, and operated to protect "migratory fishes."[422] A 1973 law requires all flood control and watershed protection projects to be "designed, constructed, and operated so as to realize their full potential for the enhancement of the State's fish and wildlife resources and to provide recreational opportunities to the general public."[423]

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[417] Cal. Water Code Section 11910 (West 1971).
[418] Id.
[419] Cal. Water Code Sections 11922-11922.9 (West 1971)
[420] Cal. Water Code Section 12570 et seq. (West 1971).
[421] Cal. Water Code Section 12580 West 1971).
[422] Cal. Water Code Section 12582 (West 1971).
[423] Cal. Water Code Section 12841 (West Supp. 1977).

4. Limited Powers to Purchase Hater and Water Rights

Fish and Game has limited powers to purchase water and water rights for certain purposes.[424] For example, Fish and Game can buy water to establish ecological preserves.[425] It can also acquire water and water rights to carry out the purposes of the Wildlife Conservation Law of 1947, which was enacted to establish a "single and coordinated program for the acquisition of lands and facilities suitable for recreational purposes, and adaptable for conservation, propagation, and utilization of the fish and game resources of the State ...."[426]

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[424] Cal. Water Code Sections 1392 and 1629 (West 1971) limit the value a permittee or licensee may receive for the purchase or condemnation of appropriative water rights by government bodies to the amount originally paid to the State for the permit or license. Section 1392 provides:

> Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefore shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division, or for any rights granted or acquired under the provisions of this division, in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division. Section 1629 has identical provisions for licenses. No reference to these sections appear in any reported case.

[425] Cal. Fish and Game Code Section 1580 (West Supp. 1977).

[426] Cal. Fish and Game Code Sections 1301 and 1348 (West 1958 and West Supp. 1977).

D. Instream Use Protection Under Area of Origin Statutes

Area of Origin statutes are legislative expressions of a protective policy towards the areas in which water originates. The County of Origin[427] and the Watershed Protection[428] statutes are the principal area of origin provisions.[429] An Attorney General's opinion described the common purpose of the statutes:

> [T]o reserve for the areas where water originates some sort of right to such water for future needs which is preferential or paramount to the right of outside areas, even though the outside areas may be the areas of greatest need or the areas where the water is first put to use.... [430]

These statutes do not specifically address instream water uses. However, because instream fish, wildlife, and recreation uses are beneficial uses of water, and these uses are economically and environmentally valuable to areas of origin,[431] it may be possible that these instream uses can be protected under the area of origin protection statutes.

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[427] 1931 Cal. Stat. 1514. This statute is codified in Cal. Water Code Section 10505 (West 1971). Section 10505.5 was added in 1969.

[428] 1933 Cal. Stat. 2643, 2650. This statute is codified in Cal. Water Code Sections 11460-11463 (West 1971).

[429] A third principal area of origin provision is the Delta Protection Act (Cal. Water Code Sections 12200-12205 (West 1971)). The Act provides that no water should be diverted "from the Sacramento-San Joaquin Delta to which the users within said Delta are entitled ..." (Section 12203) and that Delta water rights and appropriate salinity control needs must be met before water can be exported from the Delta to areas of water deficiency. (Section 12204).

[430] 25 Ops. Cal. Atty. Gen. 8, 10 (Jan. 5, 1955).

[431] See e.g., Bush, Is the Trinity River Dying, Proceedings, Instream Flow Needs, Vol. II., at 112 ff (1976), which discusses the social, political, and economic effects of the transbasin diversion of the Central Valley Project Trinity River Division on Trinity County and the dramatic effects upon the ecosystem of the river itself.

The County of Origin statute applies to water held under "state filings."[432] Under the statute, the State Water Resources Control Board must not release or assign "state filing" water if it judges that the water applied for is "necessary for the development of the county" in which the water covered by the application originates.[433] All state filings applications, and all state filings permits or licenses issued after 1969, are also subject to the provision that no water is authorized to be used outside of the county of origin "which is necessary for the development of the county."[434]

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[432] "State filings" are provided for in Cal. Water Code Section 10500 et seq. (West 1971 and West Supp. 1977). "State filings" were originally provided for in 1927 by the Feigenbaum Act. The effect of that Act is described at 25 Ops. Cal. Atty. Gen. 8, 11 (Jan. 5, 1955) The effect of the 1927 legislation was to withdraw the then unappropriated waters of the State filed on by the Department of Finance from any further appropriation by private parties. And, if any further implementation of prior law was needed, the 1927 act established a procedure whereby, within the concepts applicable to privately owned water rights, the State in its role as trustee for the people could fairly be said to perfect its own "right" to water needed for the general or co-ordinated plan to the exclusion of all other persons or parties.

[433] Cal. Water Code Section 10505 (West 1971).

[434] Cal. Water Code Section 10505.5 (West 1971). This section was added in 1969, in response to problems created by Section 10505 which are described in State Water Development: Legal Aspects of California's Feather River Project, 12 Stan. L. Rev. 439, 452-53 (1960). Section 10505 alone does not provide much protection because, if the Board decides the assignment will not be detrimental to the area of origin, the Section is satisfied if the Board's decision is made in good faith. In addition, "there is a weakness that unforeseen needs of the source areas which may arise after the assignments have been made are not protected since the assignments are not revocable." (Id. at 453).

The Watershed Protection statute applies to water used in the federal Central Valley Project and the State Water Project.[435] The statute provides that:

> [A] watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived ... directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.[436]

The term "development" in the County of Origin statute does not clearly include or exclude instream uses. Notably, however, the Watershed Protection Act separately lists the "beneficial needs" of the watershed or area as potentially requiring an adequate water supply. The fact that the phrase "beneficial needs of the watershed, area, or any of the inhabitants or property owners therein" is written disjunctively indicates that the beneficial instream needs of the watershed would be protected separately and apart from the needs for out-of-stream development.

Apparently only one case has involved the question of whether the area of origin statutes can be applied to prevent water that is needed for instream uses in the areas of origin from being exported. In County of Trinity v. Andrus,[437] the County unsuccessfully sought to enjoin the Bureau of Reclamation from implementing a drought year plan for operation of the Central Valley Project Trinity River Division which it alleged would

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[435] Cal. Water Code Sections 11460-11463 (West 1971). This statute applies only to projects included in the Water Code part pertaining to the "Central Valley Project", but the State Water Project is a unit of the Central Valley Project, as described in the Code. See Cal. Water Code Section 11200 et seq. (West 1971).

[436] Cal. Water Code Section 11460 (West 1971).

[437] County of Trinity v. Andrus, No. 5-77-343-PCW (E.D. Cal. 1977).

not insure the preservation of fish in the Trinity River. The County claimed that the Bureau should increase Trinity River flow releases, and one basis of its claim was that "the United States has no right to divert the water in question under California water law", specifically the area of origin statutes.[438] The Court rejected this argument.[439]

The Court determined that the area of origin statutes create "substantive rights" that "cannot now be disregarded by the Bureau...."[440] But, a state entity cannot act to protect these rights because to do so would interfere with Bureau operational decisions:

> To permit the state to enforce the duty, imposed on the Secretary by section 8, to respect and preserve the rights of watershed areas and counties of origin, would require state involvement and control of a significant portion of the Bureau's operational planning on a yearly basis. Accordingly, the authority to enforce such rights must be vested in the Secretary alone, and only the Secretary has the authority—subject to judicial review—to determine whether the waters in question here fall within Trinity County's priority as defined by California law.[441]

Furthermore, the County had failed to present sufficient evidence to show "that the Bureau's refusal to recognize the priorities asserted was unreasonable."[442] The County had not shown that increased water was "necessary for the development" of Trinity County.[443] The Court stated that, since the Water Code recognizes that fish preservation and recreation are beneficial uses of water "independent of the income derived therefrom", the Watershed Protection statute "appears to require the Secretary to provide any water 'reasonably required to adequately supply' the needs of

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[438] Memorandum of Opinion, County of Trinity v. Andrus, No. 5-77-343-PCW, at 8 (E.D. Cal. 1977).
[439] Id.
[440] Id. at 32.
[441] Id.
[442] Id. at 34.
[443] Id.

the watershed area for those purposes regardless of the impact on development."[444] The Court suggested that "[i]f plaintiff could demonstrate the amounts of water necessary to increase fish populations, this provision [of the Watershed Protection statute] might well require that those amounts be released."[445]

[444] Id.

[445] Id.

E. The California Environmental Quality Act

The California Environmental Quality Act (CEQA)[446] requires state agencies to use their authority to regulate activities of individuals, corporations, and public agencies "so that major consideration is given to preventing environmental damage."[447] CEQA can affect the protection of instream water uses in two ways. It is a legislative guideline for determining what is in the public interest. And, it requires that regulatory agencies not approve projects where there are feasible ways to substantially lessen environmental damage of proposed projects.

The State Water Resources Control Board uses CEQA as the latest and most comprehensive legislative guideline of what constitutes the public interest.[448] CEQA generally declares that California's policy is to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state."[449] Several CEQA provisions are particularly applicable to instream protection, such as the statement that it is the state policy to:

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[446] Cal. Pub. Res. Code Section 21000 et seq. (West 1977).

[447] Cal. Pub. Res. Code Section 21000(g) (West 1977). The National Environmental Policy Act (42 U.S.C.A. Section 4321 et seq.) makes the consideration of environmental factors a primary duty of all federal agencies. Environmental impact statements must be prepared for "proposals for legislation and other major federal actions significantly affecting the quality of the human environment", (42 U.S.C.A. Section 4332) which may include projects affecting instream uses.

[448] California State Water Resources Control Board, Decision No. 1379, at 11 (July 1971).

[449] Cal. Pub. Res. Code Section 21102(a) (West 1971).

> Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.[450]

The California Attorney General noted this section of CEQA, and approved the Board's reference to it when the Board adopted regulations relating to the preservation of fish and wildlife.[451] The Attorney General concluded that the Board "is required [by CEQA] to regulate the activity of water appropriation so that major consideration is given to preservation of California fishery resources."[452]

The second aspect in which CEQA can affect instream related decisions involves a recent amendment to CEQA:

> [P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.[453]

Environmental impact reports[454] must now include certain findings when a public agency determines that a project will have significant environmental effects.[455] If the mitigating changes are within the agency's jurisdiction, it must either find that changes have been required in or incorporated into the project which mitigate or avoid the significant environmental effects, or that "[s]pecific economic, social, or other considerations make infeasible the mitigation measures or project alternatives...."[456] These CEQA

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[450] Cal. Pub. Res. Code Section 2100l(c) (West 1977).
[451] 57 Ops. Cal. Atty. Gen. 577, 579 (Nov. 21, 1974). The regulation discussed in the opinion is 23 Cal. Admin Code Section 762.5, which is considered at page 55, above.
[452] Id. at 583.
[453] Cal. Pub. Res. Code Section 21002 (West 1977). This section was enacted in 1976.
[454] See Cal. Pub. Res. Code Section 21002.1 (West 1977).
[455] Cal. Pub. Res. Code Section 21081 (West 1977).
[456] Id.

requirements thus constrain agencies, which have regulatory authority over projects that may have significant environmental effects on instream uses, to act affirmatively to find ways to "protect, regenerate and enhance" the instream environment.

F. Fish and Wildlife Coordination Act

The federal Fish and Wildlife Coordination Act[457] is the central statement of federal fish and wildlife responsibility.[458] The purpose of the Act is primarily:

> [T]o provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation....[459]

The Act also brings state fish and game agencies into federal project planning and licensing processes. Whenever a federal agency proposes a project, or proposes to permit or license a project, that involves a stream impoundment, diversion, or other control facility, the federal agency or permittee must first consult with the United States Fish and Wildlife Service and with the appropriate state fish and wildlife agency on ways to conserve, develop, and improve wildlife resources.[460]

Federal agencies are authorized to "modify or add to the structures and operations" of projects, and to acquire land, "in order to accommodate

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[457] 16 U.S.C.A. Section 661 et seq.

[458] Federal agencies not covered by this Act are still subject to the National Environmental Policy Act (NEPA) (42) U.S.C.A. Section 4321 et seq.). The courts have stated that compliance with NEPA is de facto compliance with the Fish and Wildlife Coordination Act, since the same factors would be considered under both acts. See e.g., Environmental Defense Fund v. Froehlke, 473 F.2d 346 (1972).

[459] 16 U.S.C.A. Section 661. Section 666(b) defines "wildlife" to include fish and wildlife habitat.

[460] 16 U.S.C.A. Section 662(a).

means and measures for such conservation of wildlife resources as an integral part of such projects...."[461] Although the Act is permissive in that it only requires federal agencies to make "adequate" provisions for wildlife resources that are "consistent with the primary purposes of [such projects] ...",[462] individual project authorizations can make wildlife resource provisions mandatory.[463]

G. Relicensing of Federal Energy Regulatory Commission Projects

The Federal Energy Regulatory Commission[464] (FERC) has extensive jurisdiction over the licensing of hydroelectric projects in California. An FERC license must be obtained:

> [F]or the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam....[465]

The FERC can impose terms and conditions both in original licenses and, after the expiration of the original license, in new licenses and renewals,[466]

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[461] 16 U.S.C.A. Section 662(c).

[462] 16 U.S.C.A. Section 663(a).

[463] See e.g., Letter from Secretary of the Interior Transmitting Supplemental Report on the Auburn-Folsom South Unit, Central Valley Project, California, Pursuant to Section 9(a) of the Reclamation Project Act of 1939, at 35 (Oct. 22, 1963).

[464] On October 1, 1977, the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary for the Department of Energy and the Federal Energy Regulatory Commission, which is an independent commission within the Department of Energy. Department of Energy Organization Act, 91 Stat. 565, Pub. L. 95-91 (Aug. 4, 1977) and Executive Order No. 12009 (Sept. 15, 1977).

[465] 16 U.S.C.A, Section 797(e). The Federal Power Act is at 16 U.S.C.A. Section 791 et seq.

[466] 16 U.S.C.A. Section 803(g), 808(a).

It has "wide latitude and discretion" in setting terms and conditions,[467] and in both original licensing and relicensing proceedings has set terms and conditions for the protection and enhancement of certain instream uses.

FERC license provisions for release of water to maintain salmon runs below the New Don Pedro Dam on the Tuolumne River were the subject of one illustrative case, State of California v. Federal Power Commission.[468] The two irrigation districts that had jointly applied for the license complained that the license terms and conditions pertaining to release for fish runs "impair[ed] the irrigation uses of the districts covered by water rights acquired under California law, and that the Commission is without authority to impair those rights."[469] The Secretary for the United States Department of the Interior and the State of California, on the other hand, asserted that the terms and conditions were "not sufficiently far-reaching."[470]

The Federal Power Commission (FPC) required the districts, for the first twenty years of the project's operation, to maintain certain minimum stream flows in the Tuolumne River for fish run purposes.[471] After the first twenty years, the FPC would require the licensees to maintain minimum flows "as may be prescribed hereafter by the Federal Power Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the California Department of Fish and Game" if it can be shown that there

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[467] Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153 (1967). This case focused on conditions set under Section 803(g).

[468] State of California v. Federal Power Commission, 345 F.2d 917 (1965), cert. denied 382 U.S. 941, 86 S. Ct. 394, 15 L. Ed.2d 351.

[469] Id. at 922.

[470] Id. at 919.

[471] Id. at 921. Licenses issued by the Federal Energy Regulatory Commission can be issued for a period not exceeding fifty years (16 U.S.C.A. Section 799).

is "substantial evidence that such minimum flows are available and are necessary and desirable and consistent with the provisions of the [Federal Power] Act."[472]

The court concluded that the FPC "had authority to incorporate in the tendered license a condition which could operate to impair the districts' full use of their irrigation water rights in some future year."[473] It also concluded that the FPC's reserving the problem of fish protection conditions to be placed in the license after twenty years was proper, since the FPC could not ascertain at the outset the kind of fish release program that would then be needed.[474] The FPC had noted a variety of factors that could change: Weather patterns might change; alternate sources of water for fish protection could be developed; other techniques might be feasible such as the use of fish hatcheries; the salmon run might be destroyed after twenty years anyway by downstream activity beyond the licensees' control; and the licensee districts' needs might decrease because of urbanization and industrialization or because of increased efficiency.[475] The court accepted, as a limit to what fish-related requirements the FPC could impose after twenty years, the provision that the FPC would not require a fish release "which will impair the continuing economic feasibility of the project."[476]

The initial fifty-year period usually granted by the FPC has elapsed for many projects in California, and relicensing is in process for a number

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[472] State of California v. Federal Power Commission, 345 F.2d 917, 922 (1965) cert. denied 382 U.S. 941, 86 S. Ct. 394. 15 L. Ed.2d 351.
[473] Id. at 924.
[474] Id. at 924-25.
[475] Id. at 925, note 4.
[476] Id. at 924.

of projects. The FPC has relicensed only two major projects so far.[477] The Pacific Gas and Electric Company, licensee for the Bucks Creek Project in Plumas County, reached agreement with Fish and Game and the United States Forest Service regarding license terms and conditions for the protection of fish, wildlife, and recreational resources, and the terms and conditions were included in a new license.[478] The license terms provide for minimum flows and minimum lake levels.[479] Southern California Edison Company similarly reached agreements with the same agencies for a license term providing for a minimum stream flow.[480]

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[477] Communication with Mr. Charles K. Fisher, Associate Fishery Biologist, California Department of Fish and Game, Jan. 13, 1977.

[478] United States Federal Power Commission, Order Issuing New License (Major), Pacific Gas and Electric Co. Bucks Creek Project, 2-4, 16-18 (Dec. 19, 1974). The original project license expired December 31, 1968. There was thus a six-year period in which "annual licenses" were issued under the terms and conditions of the original license, pursuant to 16 U.S.C.A. Section 808(a). United States Fish and Wildlife Service, C. Hazel, Jones and Stokes, Inc., Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife, Part B: California Executive Summary, xvii (1976) notes: "By issuing annual extensions of old FPC licenses instead of issuing new licenses the FPC is causing fish and wildlife to be denied water which has been agreed to by the sponsor and the resources agencies ...."

[479] United States Federal Power Commission, Order Issuing New License (Major), Pacific Gas and Electric Co. Bucks Creek Project, 17-18 (1974).

[480] United States Federal Power Commission, Order Issuing New License (Major), Southern California Edison Co. Big Creek No. 3 Project (1977).

V. Methods of Protecting Instream Uses in Western States Other Than California

A. Introduction

Traditionally, the philosophy of water law in the western states has been to maximize the use of limited water supplies to promote economic development. State laws which regulate water use have often failed to protect non-economic values in water adequately. This lack of protection stems from the adoption of the appropriation system of water rights, whose requirements of diversion and use favor agricultural, industrial, and municipal development over the protection and enhancement of "social values" in instream uses.[481]

Western states are increasingly recognizing that the state must protect social values as well as economic values in water. As unappropriated waters dwindle or disappear, many states are taking steps to promote the selective development of water resources, including protecting public rights in instream uses.[482]

States are using a variety of strategies to protect and enhance instream uses. Most states use a combination of strategies. Washington, for example, authorizes moratoriums on appropriation, reservations of minimum flows, contractual acquisitions of water rights by state agencies, and consideration of instream values during permit and planning processes. It has apparently eliminated the diversion requirement and has adopted a state environmental protection act.[483] Oregon provides for instream protection by authorizing reservation

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[481] A Summary-Digest of State Hater Laws, 719 (R. Dewsnup and D. Jensen, eds. (1973)); Water Policies for the Future, National Water Commission, 271 (1973).
[482] Id. p. 272.
[483] See nn. 490, 500-03, 520, 526, 535, 539, infra.

of certain waters from appropriation, by the establishment of minimum flows, protection of wild and scenic rivers, and contractual acquisition of water rights by state agencies, and by requiring consideration of instream values during permit and planning processes.[484]

Most of the legislation to preserve instream values has been adopted since 1970[484a] Since the states have not yet implemented all of this legislation,[485] and since the courts have yet fully to review the subject, the extent of protection provided by these acts remains unclear.

B. Withdrawal from Appropriation

The most prevalent method of protecting instream values is legislative and administrative withdrawal of water from appropriation. Such withdrawal takes the form of moratoriums on appropriation, reservation or appropriation of water for instream uses, wild and scenic river provisions, and establishment of minimum flows.

1. Moratoriums on Appropriation

Faced with over-appropriation of certain watercourses, some states impose moratoriums on appropriations. Moratoriums give water planners time

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[484] See nn. 492-94, 505-10, 520, 529, 533, infra.

[484a] Early legislation in Oregon and Idaho to protect instream values is discussed in F. Trelease, Water Law 61-62 (2d ed., 1974).

[485] Oregon has not formulated a state water plan as authorized by Ore. Rev. Stat., Sec. 536.310 but has adopted certain elements of a management program including a water policy and the establishment of minimum flows on most of the streams. The procedural requirements of Sec. 90.22.010 of the Rev. Code of Washington have posed such an obstacle to the establishment of minimum flows that minimum flows have been established for only one stream. The Washington State Department of Ecology has begun to adopt a comprehensive and coordinated state water plan pursuant to Sec. 43.27A.090. The Department of Ecology has divided the state into 62 drainage basins. To date water policies (pursuant to Sec. 43.27A.090) and base flows (pursuant to Sec. 90.54.020) have been established in five of the basins. Montana has adopted a water plan in only one of the state's hydrologic divisions under the authority granted by Sec. 89-132.2(2) of the Rev. Codes of Mont.

to ascertain if unappropriated water exists and to plan the development of unappropriated water. Planning can include provisions for permanent removal of all or some of the water from appropriation in order to meet instream needs.

In 1974, the Montana Legislature imposed a moratorium on appropriation from the Yellowstone River for up to three years to allow the state to make a final determination of existing rights.[486] The state imposed the moratorium to alleviate the threat to certain instream uses posed by proposed appropriations.[487] Utah's governor has the power to suspend the right to appropriate from a watercourse if suspension is necessary to preserve the water for the general public welfare.[488] It is not clear, however, that the governor can invoke a moratorium to protect instream values, since "public welfare" has not yet been defined in Utah to include those values.[489] The Washington State Department of Ecology has the authority to withdraw certain waters from appropriation until such time as the state has gathered sufficient data to make sound decisions about future allocation.[490]

2. Reservations of Water

Some western states provide for longer-lasting withdrawals by "reserving" from appropriation water that is needed to protect instream values.

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[486] Rev. Codes of Mont., Sec. 89-8-103 and 89-8-105 (1977 Cum. Supp.). The moratorium was imposed only upon appropriations. Reservations authorized by Sec. 89-890 (see notes 495 and 499, infra.) have been allowed during the period of the moratorium.

[487] Rev. Codes of Mont., Sec. 89-8-105 (1977 Cum. Supp.).

[488] Utah Code Ann., Sec. 73-6-1 (1953).

[489] A. Tarlock, Recent Developments in the Recognition of Instream Uses in Western Water Law, Utah L. Rev. 871, 894 (1975). See Tanner v. Bacon, 103 Utah 494, 136 P.2d 957, 964 (1943).

[490] Rev. Code of Washington, Sec. 90-54-050 (1976 Supp.).

Reservation provisions allow a state agency to evaluate the instream flow needs and to reserve sufficient water from a state's unallocated water supply to satisfy those needs.[491] Depending upon the legislative authorization, the state may reserve water for one or several instream needs. Reserved water has a priority as of the date of reservation and is protected from all subsequent appropriations, except appropriations for limited uses specifically authorized by legislation.

The Oregon Legislature has reserved certain waters from appropriation. Some are reserved for the preservation of their recreational and scenic values and others are reserved to "maintain, increase, and perpetuate game fish and game fish propagation within the state."[492] Some withdrawals are subject to subsequent appropriations for protection of fish, for use in state parks, or for domestic stockwatering uses.[493] In addition to such legislative withdrawals, the Oregon State Water Resources Board may administratively reserve any unappropriated water when necessary to conserve the water resources of the state in the public interest.[494]

In Montana, any political subdivision or agency of the state may apply to the Board of Natural Resources and Conservation to reserve waters for existing or future beneficial uses.[495] Montana recognizes fish and wild-life uses as beneficial uses.[496] The Montana Fish and Game Commission and

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[491] R. Dewsnup and D. Jensen, Identification, Description, and Evaluation of Strategies for Reserving Flows for Fish and Wildlife, 3-l7 (1977).
[492] Ore. Rev. Stat., Sec. 538.110 through 538.160 (1975).
[493] Id.
[494] Ore. Rev. Stat., Sec. 536.410 (1975).
[495] Rev. Code of Montana, Sec. 89-890(1) (1947).
[496] Rev. Code of Montana, Sec. 89-867(2) (1977 Cum. Supp.).

the Department of Parks and Lands have filed 20 applications for reservations on the Yellowstone River during the moratorium on that river.[497] Reservations approved by the Commission and the Department will have a priority over any subsequent applications for appropriations.

3. Provisions for Minimum Flows

A specialized form of reservation concerns provisions for the establishment of minimum flows. Generally, state water agencies are authorized to determine the minimum flows necessary to safeguard certain instream values. Once these flows are determined, they are reserved from appropriation. This approach has provided effective protection of instream values in several states.[498]

Montana provides for the maintenance of minimum flows through its legislation authorizing the reservation of water, described in the previous section. Thus, the State of Montana or any Montana state agency can "apply to the Board of Natural Resources and Conservation to reserve waters to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates."[499] Any subsequent appropriation is subject to these reservations.

The Washington Department of Ecology has the authority to "establish minimum water flows or levels for streams, lakes or other public waters for

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[497] Telephone conversation with Mr. Gary Spaeth, Legal Counsel, Montana Department of Natural Resources and Conservation (Dec. 1977).

[498] L. Teclaff, Harmonizing Water Resources Development and Use with Environmental Protection in Municipal and International Law, 16 Nat. Res. J. 807 (1976).

[499] Rev. code of Mont., Sec. 89-890(1) (1947). This provision for the reservation of minimum flow is contained within the same code section which provides for the reservation of water for beneficial uses discussed at note 495, supra.

the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same."[500] Subsequent appropriations must not interfere with established minimum flows.[501]

Partly as a result of various time-consuming procedural requirements, the Department of Ecology has established a minimum flow on only one stream.[502] In an apparent attempt to provide a more expeditious method for establishing desired flows, another statute was passed. This statute provides that the state must maintain the base flows of all perennial streams to the extent necessary "to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values and navigation values."[503] The use of "minimum flow" in the earlier statute and the use of "base flow" in the latter statute have created a problem of statutory construction. The Washington Department of Ecology and Department of Fish and Game have interpreted "base" flow as the flow needed to conserve fish, aesthetic, and other instream values. They have interpreted "minimum" flow as the flow needed to enhance these values.[504]

In 1959, the Oregon Water Policy Review Board, pursuant to statutory authority and based upon recommendations from the Department of Fish and

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[500] Rev. Code of Wash., Sec. 90.22.010 (1976 Supp.). In addition the section provides that upon a request from the Department of Fisheries or the Game Commission, the Department of Water Resources shall "establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request."

[501] Rev. Code of Wash., Sec. 90.22.030. (1976 Supp).

[502] Telephone conversation with Glenn Feidler, Division Supervisor, Water Quality Management Division, Department of Ecology (Dec. 1977).

[503] Rev. Code of Wash. 90.54.020 (1976 Supp.).

[504] Supra, note 502.

Wildlife, began to establish minimum flows in all of the state's watercourses.[505] The Board has now established minimum flows on streams in 15 of the 18 districts created for the formulation of policy statements and the establishment of minimum flows.[506] The minimum flow of each stream is treated as an appropriation with a priority as of its date of adoption by the Board.[507]

4. Wild and Scenic Rivers

Several states recognize that undeveloped streams are rare and valuable natural resources and have adopted wild and scenic rivers acts to preserve these rivers' unique scenic, aesthetic, and recreational values. These acts protect designated streams or stream reaches from appropriation and prohibit construction of any impoundment or diversion works.

In 1971, Oregon passed a wild and scenic rivers act to preserve for the public benefit selected portions of the state's free-flowing rivers.[508] The act designates recreation, fish, and wildlife uses as the highest and best uses of water within certain watercourses and protects these uses from any dam, reservoir, or diversion.[509] The act also authorizes the Governor to include additional watercourses as the need arises.[510]

Oklahoma adopted a scenic rivers act in 1970, which sets aside certain streams to preserve their unique natural scenic beauty and fish, wildlife, and recreational values.[511] No state agency may "authorize or concur in"

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[505] Telephone conversation with Mr. Tom Kline, Legal Counsel, Oregon Water Policy Review Board (Dec. 15, 1977).
[506] Id.
[507] Id.
[508] Ore. Rev. Stat., Sec. 390.805 (1975).
[509] Ore. Rev. Stat., Sec. 390.815 (1975).
[510] Ore. Rev. Stat., Sec. 390.835 (1975).
[511] Okla. Stats. Ann., Sec. 1452 (1970).

the impoundment of the waters of designated rivers, except with legislative consent, or except for limited impoundments as needed by municipalities located in the counties or immediate vicinity of the "scenic river area" for domestic or municipal uses.[512]

In 1972, South Dakota authorized the Board of Natural Resource Development to recommend that certain "wild, scenic and recreational river areas" be preserved as a part of the state's diminishing resource of freeflowing rivers and streams."[513] North Dakota, through the Little Missouri State Scenic River Act, is seeking to preserve the Little Missouri River in its natural state. Subject to certain limited exceptions, no new diversions, impoundments, or modifications can be made regarding that watercourse.[514]

5. Appropriation for Instream Uses

a. Specific Authorization of Instream Appropriations

Several states authorize state agencies to appropriate water to protect instream values. In 1973, Colorado amended its appropriation statute to allow the Water Conservation Board to appropriate "such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree."[515] In 1971, Idaho authorized the Governor to appropriate, in trust, the waters of certain lakes to preserve the lakes in their present condition.[516] The Idaho Department of Parks was also authorized to appropriate, in trust, certain natural springs because of their scenic beauty and recreational value.[517]

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[512] Okla. Stats. Ann., Sec. 1453 (1970).
[513] So. Dak. Cod. Laws, Sections 46-17A-15 and 46-17A-21 (1977 Supp.).
[514] N. Dak. Cent. Code, Sections 61-29-03 and 61-29-06 (1977 Supp.).
[515] Colo. Rev. Stat., Sec. 37-92-102(3) (1973).
[516] Idaho Code Ann., Sec. 67-4301-06 (1973).
[517] Idaho Code Ann., Sec. 67-4307-12 (1973).

Montana legislation enacted in 1969 protects the state's trout fisheries by providing that:

> [T]he unappropriated waters of [ten major trout streams within the state] shall be subject to appropriation by the Fish and Game Commission ... in such amounts only as may be necessary to maintain stream flows necessary for the preservation of fish and wildlife habitat.[518]

These Fish and Game appropriations, however, protect against subsequent appropriations only until the district court whose jurisdiction includes a major portion of the stream determines that the water is needed for a use that is "more beneficial" to the public.[519]

b. The Traditional Beneficial Use and Diversion Requirements

Many states require, as a condition of a valid appropriation, that an appropriator control or divert and put water to a beneficial use. The availability of appropriation as a way to protect instream values depends upon each state's beneficial use and diversion or control requirements.

Washington, Oregon, Nevada, Idaho, Colorado, Texas, Montana, and Alaska specifically list instream values, such as fish and wildlife, recreation, and preservation of minimum flows, as beneficial uses.[520] In the other states, various state statutes can be construed together to include these uses as beneficial.[521]

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[518] Mont. Rev. Code, Sec. 89-801(2) (1977 Supp.) See also R. Dewsnup, Legal Protection of Instream Water Values, National Water Commission, 24 (1971).

[519] Id.

[520] Rev. Code of Wash., Sec. 90.14.031 (1976 Supp.); Ore. Rev. Stats., Sec. 536.300 (1975); Nev. Rev. Stat., Sec. 533.030 (1969 Supp.); Idaho Code Ann., Sec. 67-4301 (1949); Colo. Rev. Stat., Sec. 37-92-102(3) (1973); Tex. Rev. Civil Stat. Ann. Art. 7471 (1954); Alaska Stats., Sec. 46.15.260(3) (1977); Rev. Code of Mont., Sec. 89-867(2) (1977 Cum. Supp.).

[521] Water Appropriation for Recreation, 1 Land and Water L. Rev. 209, 211 (1966).

Arizona, Colorado, Washington, and Idaho have judicially or statutorily removed the diversion requirement. Actual diversion, or "possession" or "control", is apparently still required in the other western states.[522]

The Arizona Court of Appeals held that legislation adding wildlife and recreation as purposes for which water may be appropriated has eliminated the requirement of a physical diversion, since those uses could be made without a diversion.[523] In 1973, the Colorado Legislature amended its appropriation law to permit an appropriation without a diversion.[524] The amendment included within the definition of beneficial use the appropriation by the state "of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree."[525]

Washington may also have eliminated its diversion requirement. The State Pollution Control Hearings Board allowed appropriation of water for scientific research on raising fish, even though the appropriation entailed

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[522] Id. at 214-18. See 2 C. Kinney, Irrigation and Water Rights, 1243-44 (2d ed. 1912); 1 S. Wiel, Water Rights in the Western States. Sections 364-67 (3d ed. 1911); 1 W. Hutchins, Water Rights Laws in the Nineteen Western States, 366 (1971). See also Reynolds v. Miranda, 83 N.M. 443, 445, 493 P.2d 409, 411 (1972); Tanner v. Provo Reservoir Co., 99 Utah 139, 98 P.2d 695 (1940).

[523] McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494, 496 (1976).

[524] Colo. Rev. Stats., Sec. 37-92-102(3) (1973). "Most streams in Colorado are heavily over-appropriated and at first glance it seems the authorization is a meaningless gesture. However, the primary motive is to give the Colorado Conservation Board standing to object to changes in use which would have a negative effect on instream flows." Instream Flow Information Paper: No. 2, Cooperative Instream Flow Service Group (1977).

[525] Id.

no diversion. The Board held that "an appropriation of water for a beneficial use cannot be denied because no diversion or impedance is required."[526]

The Idaho Supreme Court construed 1971 legislation, authorizing the Department of Parks to appropriate certain waters to preserve their scenic beauty and recreational value, as dispensing with the diversion requirement for those waters.[527] The holding does not appear to disturb the general statutory requirement of diversion.[528]

C. Contractual Arrangements by State Agencies to Acquire Vested Rights

Most western states authorize their fish and game agencies to acquire water rights by contract.[529] The Arizona statute empowering its Fish and Game Commission to acquire waters by purchase, lease, exchange, gift, or condemnation for the construction and operation of facilities relating to the preservation or propagation of wildlife[530] is a typical enabling statute.[531]

In those states which have retained the diversion requirement, however, a question remains as to whether or not waters obtained by contractual arrangement could be left in the stream to protect instream values.

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[526] In the Matter of Donald E. Bevan v. State of Washington, Dept. of Ecology, Pollution Control Hearings Board No. 48 (1972).

[527] State Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440,530 P.2d 925, 929 (1974).

[528] Welsh, In-Stream Appropriation for Recreation and Scenic Beauty, 12 Idaho L. Rev. 264, 273 (1976).

[529] Ariz. Rev. Stat., Sec. 17-241 (1975); Colo. Rev. Stat., Sec. 33-1-11 (1973); Idaho Code Ann., Sec. 36-104(7) (1977); Rev. Code of Mont., Sec. 26-104.6 (1977 Cum. Supp.); Nev. Rev. Stat., Sec. 501.181 (1968); Ore. Rev. Stat., Sec. 496.146 (1975); So. Dak. Cod. Laws, Sec. 41-2-19 (1977); Utah Code Ann., Sec. 23-14-14 (1953); Wyo. Stat., Sec. 23-1.10 (1957).

[530] Ariz. Rev. Stat., Sec. 17-231 and 17-241 (1975).

[531] See note 529, supra.

D. Acting in the Public Interest to Protect Instream Uses

In many western states, review of water rights applications involves a determination of whether an appropriation is in the public interest.[532] Although the public interest has in the past been considered primarily in economic terms, some states now expressly require that non-economic instream values be taken into account in considering permit applications.

When determining whether a proposed use would be in the public interest, the Oregon Water Resources Board "shall have due regard for conserving the water for all purposes, including public recreation, protection of commercial and game fishing and wildlife, and scenic attraction."[533] The Utah State Engineer is statutorily required to consider recreational and environmental factors when determining if a proposed appropriation would be detrimental to the public welfare.[534] The Washington Supervisor of Water Resources may deny a permit if the Department of Fisheries determines that the appropriation would diminish the flow of water needed to maintain fish populations. [535]

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[532] Ariz. Rev. Stat., Sec. 45-143(B) (1956); Nev. Rev. Stat., Sec. 533.370 (1973); Alaska Stats., Sec. 46.15.080 (1977); Tex. Rev. Civ. Stat. Ann. art. 5.133(3)(c); (1971 Supp.); New Mex. Stat., Sec. 75-5-6 (1968); No. Dak. Cent. Code, Sec. 61-04-07 (1960); Ore. Rev. Stat., Sec. 537.190 (1975); So. Dak. Cod. Laws, Sec. 46-5-18 (1977); Utah Code Ann., Sec. 73-3-8 (1953); Wyo. Stat., Sec. 41-203 (1957). See also Water Policies for the Future, National Water Commission, 273 (1973).

[533] Ore. Rev. Stat., Sec. 537.170(3)(a) (1975).

[534] Utah Code Ann., Sec. 73-3-8 (1953).

[535] Rev. Code of Wash., Sec. 75.20.050 (1976 Supp.).

E. Statewide Planning Programs

The state water plans of South Dakota, North Dakota, and Oregon must include evaluations of fish and wildlife, recreation, scenic rivers, and other instream flow needs.[536] In other states, the extent to which instream values are a factor in the planning process is a matter of administrative policy. All states but Oregon require only that local and state agencies consider the state water plan and its objectives before taking action. Oregon is the only state that provides that any state action which conflicts with the water policy is ineffective and unenforceable.[537]

Montana, Washington, and South Dakota[538] have adopted state environmental policy acts which require evaluation of the extent of adverse impacts a proposed action will have upon the environment, and the filing of an environmental impact statement, before a state agency can initiate action.[539] The evaluation also requires that adverse impacts of the proposed action on instream values be mitigated.

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[536] So. Dak. Cod. Laws, Sec. 46-17A-14 (1977 Supp.); No. Dak. Cent. Code, Sec. 61-02-28 (1960); Ore. Rev. Stat., Sec. 536.310 (1975).

[537] Ore. Rev. Stat., Sec. 536.360 and 536.370 (1975).

[538] Nebraska and Wyoming have adopted environmental protection acts which do not require the filing of environmental impact statements (Wyo. Stat., Sees. 35-502.2 to .56 and Nev. Rev. Stat., Secs. 81-1501 et seq. (Reissue 1976). These acts provide for the adoption of rules and regulations to prevent the pollution of the air, water, and land. Regulations adopted pursuant to the statutory authority will protect the instream flow from pollution.

[539] Rev. Codes of Mont., Sec. 69-6501 et seq. (1977 Cum. Supp.); Rev. Code of Wash., Sec. 43.21C.010 et seq. (1976 Supp.). So. Dak. Cod. Laws. Ann., Sections 34A-9-1 through -13 (1977 Revision); See also W. Rodgers, Environmental Law 184 (1977), and 5 E.L.R. 50015 (1975), as reprinted from the Fifth Annual Report of the Council on Environmental Quality -Chapt. 4 (G.P.O. 1974)

F. The Public Trust Doctrine

The public trust doctrine has expanded in several of the western states[540] to provide for greater public rights of use of state waterways. Instream values connected with these public uses have thus received increased protection.[541]

The expansion of the public trust concept has primarily involved a redefinition of "navigability" to determine waters in which public rights of use exist. It has also involved a finding of public rights in waters which are navigable because of artifically induced fluctuations of the water level. And it has, in two states, involved the rejection of

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[540] Even though the extent of the public trust in the eastern states is beyond the scope of this discussion, its status in four eastern states is significant.

The Michigan Environmental Protection Act of 1970 specifically recognizes the existence of a public trust in the waters of the state. The statute gives any person, political subdivision of the state, or legal entity the right to bring an action to protect the public trust in the air, water, and other natural resources. The act also defines the extent of the public trust in these resources by protecting them from "pollution, impairment, or destruction." Mich. Comp. Laws, Sec. 691-1201 (1970).

Maine, New Hampshire, and Massachusetts have perpetuated the protection of the public's right to "fish and fowl" upon any great pond that originated in the Massachusetts Bay Colony Ordinance of 1641-1647. L. Leighty, Public Rights in Navigable State Waters -Some Statutory Approaches, 6 Land and Water L. Rev. 459, 471 (1971). Maine and New Hampshire have continued to protect all great ponds with a surface area greater than ten acres N.H. Rev. Stat. Ann., Sec. 271.20 (1966); Conant v. Jordan, 107 Me. 227, 77 Atl. 938 (1910). Massachusetts has limited the extent of the trust by subsequently redefining great ponds as those with a water surface area in excess of 20 acres Mass. Ann. Laws, Ch. 131, Sections 1 and 36 (1965). Public uses of the great ponds have been extended beyond fishing and fowling to encompass most types of recreation. Gratto v. Palangi, 154 Me. 308, 147 A.2d 455 (1958); Slater v. Gunn, 170 Mass. 509, 49 N.E. 1017 (1898); Whitcher v. State, 87 N.H. 405, 181 Atl. 549 (1935).

[541] R. Dewsnup and D. Jensen, Identification, Description, and Evaluation of Strategies for Reserving Flows for Fish and Wildlife, 3-101 (1977)

"navigability" altogether as a determinant of public rights of use of state waters.

All states received title to the beds of streams navigable at the time of their admission to the Union under the federal definition.[542] Public rights of use were uniformly recognized in those waters. Several states, including Oregon, Oklahoma, Washington, Idaho, North Dakota, South Dakota, and Texas, have broadened the definition of navigability to include streams overlying privately owned beds.[543] Thus, Idaho has statutorily defined waters to be navigable if they are capable of floating cut timber of greater than six inches in diameter.[544] South Dakota has defined waters to be navigable if they can be used for pleasure boating.[545]

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[542] See text accompanying nn. 54 and 55, supra.

[543] Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158, 1162 (1936); Curry v. Hill, 460 P.2d 933, 936 (1969); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937); Strand et al. v. State, et al., 132 P.2d 1011, 1020 (1943); Ozark - Mahoning Co. v. State, 76 N.D. 469, 34 N.W.2d 488, 491 (1949); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (1935); Diversion Lake Club v. Heath, 126 Tex. 129, 865.102d 441, 445 (1935).

[544] Idaho Code, Sec. 1601(a) (1977). See also S. Idaho Fish and Game Assn. v. Picabo Livestock, Inc., 96 Id. 360, 528 P.2d 1295, 1297 (1974). Another Idaho statute declares that all such navigable waters are "open to public use as a public highway for travel and passage, up or downstream, for business or pleasure and to exercise the incidents of navigation -- boating, swimming, fishing, hunting and all recreational purposes." Idaho Code, Sec. 36-1601(b) (1977). See n.540, infra discussing eastern states' statutory definition of the public trust.

[545] Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937).

Washington expanded its recognition of public rights of use in navigable waters overlying privately owned beds. Public rights are now recognized to include waters that inundate private land because of artificially caused fluctuations of the water level of a stream.[546]

New Mexico and Wyoming have rejected the idea of navigability altogether to determine public rights of use. They have found that all unappropriated water in the state is subject to public rights of use. The New Mexico Supreme Court relied on the constitutional provision dedicating all unappropriated water of the state to the public. This dedication imposed a trust on such waters, regardless of their navigability, for the public uses of fishing and recreation.[547] The Wyoming Supreme Court similarly held that the constitutional provision that all waters of the state belong to the public creates a public right of use in all unappropriated waters, regardless of their navigability.[548]

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[546] Wilbur v. Gallagher, 77 Wash.2d 307, 462 P.2d 232, 238 (1969).
[547] State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421, 427 (1947),
[548] Day v. Armstrong, 362 P.2d 137, 147 (1961).

VI. Issues

A. How successful have instream protection and enhancement measures been in California?

1. How should "protection" and "enhancement" be measured?

2. Are adequate data available on instream uses, instream needs, streamflow, and other stream environment characteristics?

3. Are adequate data available on the amount of unappropriated water remaining for streamflow protection and enhancement? On available state filing water?

B. Should determinations of instream flow needs be statutorily required?

1. Should instream flow needs be determined and addressed on a case-by-case basis or should a systematic approach be used?

2. Should a systematic approach be by stream segment? Watershed? Statewide?

3. Should periodic review and analysis of instream protection and enhancement provisions and applications be required?

4. Should special criteria be set for dry and critically dry years?

5. Who should determine instream flow needs?

a. Should one or several state agencies be responsible? Which ones?

b. What provisions should be made for public participation?

C. Should standards other than for streamflow be statutorily required?

1. Should it be required that water be transported instream when ever feasible? If so, how should feasibility be evaluated?

2. Should groundwater extraction be regulated where pumping inter feres with streamflow?

D. Should instream protection and enhancement be incorporated into the water rights system more fully than at present?

1. Should streamflow and other stream need determinations be established more precisely as standards for the State Water Resources Control Board's evaluation of whether water is available for appropriation? As standards for permit and license terms and conditions?

2. Should state agencies be given express authority to reserve water from appropriation in order for it to remain in the stream for instream uses?

3. Should state agencies be given express authority to appropriate water without diversion or control? Only for designated instream uses?

4. Should private parties be given express authority to appropriate water without diversion or control? Only for designated instream uses?

5. Should instream needs be recognized and protected in statutory adjudications? Who should represent instream interests?

E. Should special programs be developed to protect and enhance instream uses in streams now largely devoted to servicing established water rights?

F. Who should pay for instream protection? Enhancement? For storage space in reservoirs required to meet instream needs? For costs incurred as a result of modifying project operations for instream considerations?