

THE USE OF STATE INSTREAM FLOW LAWS FOR FEDERAL LANDS: RESPECTING STATE CONTROL WHILE MEETING FEDERAL PURPOSES

BY

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This Article examines the relationship between the four major federal land-managing agencies and state water law and makes a five-part recommendation for finding a balance in the tension between the state and federal governments over water rights for federal lands. First, federal agencies need to articulate a cohesive policy for evaluating options for instream flow protection under state law. Second, in response to federal recognition of state law solutions, states need to remove barriers for protecting federal interests. Third, in the process described above, the federal agencies must maintain their options under federal authorities for establishing water rights and not refrain from utilizing those authorities before securing the equivalent protection under state law. Fourth, federal and state officials need to continue seeking unique and creative solutions to the tension between state and federal law on water rights, while recognizing that the devil lies in the details of these innovative approaches. Finally, both the state and the federal governments should enhance citizen and public involvement in the policy discussions and ultimate resolution of these water rights conflicts.

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I. INTRODUCTION

Imagine your favorite national park, wildlife refuge, wilderness area, national forest, or recreational area. Now consider how your favorite spot would look without water. Every ecosystem relies on water; ecological integrity cannot be maintained without it. Often land conservation efforts focus on the physical metes and bounds of a particular parcel of land without adequately considering the mechanisms for protecting the water resources associated with the overall conservation goal. Water shortages, familiar in the western United States and quickly moving east, demand that water resources be considered in conservation planning initiatives.¹

From the scientific perspective, the role water plays in preserving the integrity of an ecosystem is essential. Any particular parcel of land or larger ecosystem can include streams, rivers, lakes, ponds, wetlands, pools, springs, and groundwater resources. The addition or removal of water has profound consequences for an ecosystem's integrity. The hydrologic

¹ Steve T. Miano & Michael E. Crane, *Eastern Water Law: Historical Perspectives and Emerging Trends*, 18 NAT. RESOURCES & THE ENV'T 14, 14 (2003); Jeremy Nathan Jungries, *"Permit" Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East*, 29 HARV. ENVTL. L. REV. 369, 385 (2005).

relationships that maintain ecological integrity are complex and often unrecognized by legal systems. As a result, legal frameworks often come up short or unfocused from the scientific perspective.² Scientists have made significant advancements in their understanding and quantification of water in the natural system.³ The law can benefit from these advancements, but the science is rarely compelling on its own, especially when legal tools are limited and restrictive. As scientists in the field recognize, “[i]nadequate laws and policies can prevent the best science and informed public support from playing their legitimate role.”⁴

Despite the limitations inherent in the legal landscape, the last decades have seen progress and provided countless opportunities for science to play an integral role in moving legal and policy debates forward.⁵ Because each state enacts its own water code, state legislatures and administrative agencies have led the way in developing initiatives to protect water resources.⁶ Most significantly, the western states amended or reinterpreted state law to protect non-consumptive, instream water use—as opposed to the more traditional consumptive, diversionary water rights.⁷ “Non-consumptive” or “instream flow” refers to water use that does not involve removing water from the natural system through a diversion. For example, a water right for a certain quantity of water to be left in place to maintain a river’s flow or a lake’s water level is considered a non-consumptive use. Questions remain whether the federal government can use state instream flow law to protect federal interests.

The significance of federal use of state instream flow law directly relates to the amount of federal land in the West. The federal government owns and manages many of our most prized public lands and associated water resources.⁸ The United States has distinguished itself by the choices

² See ROBERT GLENNON, *WATER FOLLIES* 210 (2002) (stating that a “complete misunderstanding of hydrology has been memorialized in many states”).

³ See Tom Annear, *Quantifying Instream Flow Needs*, 31 *WATER REPORT* 16, 18–23 (Sept. 15, 2006) (continuing scientific progress aides quantifying flow needs, but does not solve instream flow controversies).

⁴ *Id.* at 17.

⁵ TOM ANNEAR ET AL., *INSTREAM FLOWS FOR RIVERINE RESOURCE STEWARDSHIP* xvii (rev. ed. 2004).

⁶ DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 113 (1997).

⁷ See *id.* at 112 (describing how state legislatures have enacted instream flow protection measures in western states).

⁸ The Bureau of Land Management (BLM) administers 261 million acres (one-eighth of the surface area of the United States). Considered a multiple-use agency, BLM has traditionally focused on grazing and the development of timber and mineral resources, but also manages wilderness areas, wild and scenic rivers, conservation areas, watersheds, historic, and archeological sites. The U.S. Forest Service manages 155 national forests and 20 national grasslands, totaling over 193 million acres. The U.S. Fish and Wildlife Service administers more than 535 refuges and over 3,000 small waterfowl breeding areas, totaling over 96 million acres. Finally, the National Park Service manages 388 individual areas covering more than 84 million acres. These areas include national parks, monuments, battlefields, historic sites, lakeshores, recreation areas, and scenic rivers. See U.S. Bureau of Land Mgmt., Nat’l Landscape Conservation Sys., NLCS Summary Tables, http://www.blm.gov/nlcs/summary_tables.htm

its citizens have made to preserve land as national parks, national wildlife areas, national forests, and conservation areas. Both collectively and individually, we as a people, acting through our elected representatives, have chosen to set aside certain areas because of their ecological, historical, scientific, or scenic value. Our system of public lands each dedicated to particular public purposes distinctly characterizes our ethics and our national choice to preserve these treasures intact for future generations.

At the time each parcel of land was set aside, Congress and the Executive articulated the purposes for the land designation.⁹ These federal purposes were codified in specific statutory mandates and set forth in executive orders. Various federal agencies, including the National Park Service (NPS), the United States Fish and Wildlife Service (FWS), the United States Forest Service (FS) and the Bureau of Land Management (BLM), among others, are responsible for carrying out these federal purposes. Each of these federal land-managing agencies operates pursuant to specific statutory mandates that outline a directive for the respective federal lands.¹⁰ Frequently, these directives necessitate the protection of water resources and agencies are required, as a matter of federal law, to fulfill their statutory obligations.¹¹ Federal land managers, therefore, face the challenge of using federal law to protect water resources or matching state water law provisions with various federal mandates. The question for federal land managers, therefore, is not whether to protect water resources but which legal mechanisms will allow them to carry out their mandate. This question includes whether state instream flow laws can be used for federal lands.

This Article examines the relationship between the four major federal land-managing agencies and state water law focusing specifically on the protection of non-consumptive water use in the western states.¹² Part I examines the fundamental tension between state control of water resources and federal reserved water rights under the federal reserved water rights doctrine. Part II summarizes the statutes, regulations and policies associated with the four major federal land-managing agencies: NPS, FWS, FS, and BLM. The Article focuses particular attention on the water rights policies of each agency by comparing the language describing each agency's use of

#outstanding (last visited Nov. 11, 2006); U.S. Forest Serv., Meet the Forest Service, <http://www.fs.fed.us/aboutus/meetfs.shtml> (last visited Nov. 11, 2006); U.S. Fish & Wildlife Serv., America's National Wildlife Refuges (2002), <http://www.fws.gov/refuges/generalInterest/factSheets/FactSheetAmNationalWild.pdf> (last visited Nov. 12, 2006); U.S. Nat'l Park Serv., NPS Overview (Oct. 17, 2006), http://www.nps.gov/pub-aff/refdesk/NPS_Overview.pdf (last visited Nov. 12, 2006).

⁹ See generally Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Land Law: An Analysis and Assessment*, 44 NAT. RESOURCES J. 943 (2004).

¹⁰ *Id.* at 943-45.

¹¹ Jungries, *supra* note 1, at 370.

¹² See also David Gillilan, *Will There Be Water for National Forests?*, 69 U. COLO. L. REV. 533, 562 (1998) (noting that Alaska, Arizona, Montana, and Nevada are the only states that allow the federal government to hold instream rights). However, the role of federal regulatory authority through statutes like the Endangered Species Act and federal facilities operation through agencies like the Bureau of Reclamation and the Army Corps of Engineers also raise tensions with state law.

state law to protect federal resources. Part III evaluates and categorizes limitations under state instream flow laws for federal land managers. Specifically, the Article organizes the challenges under state law into four categories—definitional, structural, administrative, and political.

Finally, Part IV of the Article makes recommendations for improving the opportunities for federal agencies to utilize state instream flow law. First, federal agencies need to articulate a process for determining whether seeking a water right under state law is appropriate and make a commitment to seek solutions under state law. Second, in response to a federal commitment to seek solutions using state law, states need to remove barriers for protecting federal interests. Third, as the process described above unfolds, the federal government must continue to carry out congressionally-mandated goals and preserve water rights on federal land, even if it means using federal law to do so. The federal government should not compromise its ability to protect federal lands by abandoning federal law options before securing equivalent protections under state law. Fourth, federal and state officials need to continue seeking unique and creative solutions to the tension between state and federal law on water rights, while recognizing that the devil lies in the details of these innovative approaches. Fifth, to promote accepted and lasting solutions, state and the federal governments should enhance public involvement in the policy discussions and ultimate resolution of water rights conflicts.

II. THE FUNDAMENTAL TENSION—STATE CONTROL OF WATER RESOURCES AND THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

In the United States, each individual state has the authority to determine how water will be allocated within its borders.¹³ Thus, each

¹³ State control over waters originated under the equal footing doctrine which provides that the federal government held in trust for the states beds of navigable waters. *Shively v. Bowlby*, 152 U.S. 1, 49–50 (1894). Upon entering the Union, title for the beds of navigable waters passed to the individual states for the benefit and trust of the people of the state. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892), *aff'd*, 154 U.S. 225 (1894); *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489–90 (1970); Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 828–829 (2004). California adopted the first state statutory scheme to regulate surface waters in 1872, codifying the system of prior appropriations state courts had upheld for two decades. *See* A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT* 68–69 (5th ed. 2002); WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 159–67 (1971), *reprinted in* *WATER RESOURCE MANAGEMENT* 76, 78–79. State statutory regimes, however, conflicted with the common law rights asserted by federal land patent holders who resisted state control over waters supposedly reserved to them by the federal government. *JOSEPH L. SAX ET AL.*, *LEGAL CONTROL OF WATER RESOURCES* 826–28 (2d ed. 1991). The 1877 Desert Lands Act worked to encourage the use and appropriation of water, but did not clearly delineate the rights of federal holders as a matter of statutory interpretation. *See Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 157–58 (1935). In *California Oregon Power Co.*, the Supreme Court held that states control their water resources and may usurp common law with statutory regimes. *Id.* at 163–64. This holding specifically addressed the rights of federal patent holders. *See also* SAX ET AL., *supra*, at 69–70, 318–24 (discussing generally the English common law

individual state has the authority to determine the allocation of specific rights to use water among its citizens. State law governs the allocation and administration of water rights unless state law interferes with congressional directives.¹⁴ Two general categories of state law systems exist: prior appropriation and riparian.¹⁵ In the western United States, where human demands for water exceed the natural supply, the doctrine of prior appropriation governs the allocation of water rights.¹⁶ In these prior appropriation jurisdictions, water rights are determined based on the water user who is the first to put the water to "beneficial use." State law defines which uses will be beneficial. Disputes in prior appropriation states often center on priority dates, the use of water "beneficially" as defined by state law, and the availability of water for appropriation by new users.

The federal land-managing agencies operate in the context of these state law systems while carrying out their federal mandates. It is important

riparian system and the emergence of the western appropriation system).

¹⁴ *United States v. California*, 332 U.S. 19, 42–43 (1947) (holding that coastal tidelands remain in federal ownership), *and reh'g denied*, 332 U.S. 787 (1947), *and opinion supplemented by*, 332 U.S. 804 (1947), *and petition denied*, 334 U.S. 855 (1948). The first case to clearly apply the public trust principles to the overlying waters, as opposed to just the beds, involved the Mono Lake in California. *See generally* Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709 (Cal. 1983) (holding that the public trust doctrine offered an independent basis for challenging the Los Angeles Department of Water and Power's diversion of streams flowing into Mono Lake); Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701 (1995) (discussing the effect of *National Audubon Society* on the reallocation of western water resources). For a complete discussion of the relationship between federal legislative power and state water law, see Federal "Non-Reserved" Water Rights, 6 Op. Off. Legal Counsel 328 (1982).

¹⁵ Typically, riparian states in the eastern United States determined water rights based on ownership of land along a watercourse and reasonable use of that water. Miano & Crane, *supra* note 1, at 14–15; RESTATEMENT (SECOND) OF TORTS § 850(A) (1979) (defining criteria for determining if a use is reasonable). Thus any riparian owner along a watercourse has the right to use a reasonable amount of water in conjunction with the other riparian owners. The increasingly common water disputes in the eastern United States typically focus on whether one use of water is reasonable when compared to another use. As a result, many eastern states have adopted water codes to control use, as opposed to relying solely on the common law. Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317, 366–67 (2000) (discussing the emergence of "regulated riparianism"). According to Dellapenna, a regulated riparian system of water law treats water as a species of public property as opposed to treating water as common or private property. *Id.* at 329. Under regulated riparianism, water cannot be withdrawn without a permit. *Id.* at 367. The result is that the rights of the water user are determined by whether the factors required to acquire a permit (namely reasonable use) are fulfilled and not the riparian nature of the use. *Id.*; cf. Robert E. Beck, *The Regulated Riparian Model Water Code: Blueprint for Twenty First Century Water Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 113 (2000) (describing seven factors to be considered in determining whether a use of water is reasonable under the regulated riparian system of water law).

¹⁶ ALASKA STAT. § 46.15.050(a) (2006); ARIZ. REV. STAT. ANN. § 45-151E (2006); COLO. REV. STAT. § 37-92.301(3) (2005); IDAHO CODE ANN. § 42-106 (2006); KAN. STAT. ANN. § 82a-717a (2005); MONT. CODE ANN. § 85-2-401(1) (2005); NEV. REV. STAT. § 533.040(2) (2005); N.D. CENT. CODE § 61-04-06.3 (2005); OR. REV. STAT. § 537.120 (2005); S.D. CODIFIED LAWS § 46-5-7 (2005); UTAH CODE ANN. § 73-3-21 (2006); WASH. REV. CODE § 90.03.010 (2005); WYO. STAT. ANN. § 41-4-317 (2005). *See generally* DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 7 (3d ed. 1997) (listing states where the prior appropriation doctrine governs water rights).

to distinguish between the proprietary and regulatory roles a federal agency can play. Often tension between the federal and state government arises when the federal agencies are exercising their regulatory authority. This Article examines federal actors, not in their regulatory role, but as property owners within the states' boundaries. The federal government seeks to protect its proprietary interests when asserting water rights to fulfill federal purposes. Not surprisingly, state and federal sovereigns often disagree about allocation of water resources.¹⁷ This Article explores the tension that arises when the federal government seeks to protect non-consumptive water use on federal lands. Federal land managers face a fundamental dilemma of whether to secure water rights under state or federal law.¹⁸

For many western states the answer is simple: federal agencies should use state law mechanisms to secure their water rights.¹⁹ Federal land managers, however, have a choice and can assert rights under federal law, including the federal reserved water rights doctrine. States have often resisted or discouraged federal efforts to assert water rights under the federal reserved water rights doctrine, preferring instead that federal agencies secure water rights for federal lands pursuant to state law.²⁰ The federal reserved water rights doctrine²¹ provides that when the federal

¹⁷ For an excellent discussion of the history of state and federal relationships in the context of adjudicating water rights, see generally John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355 (2005).

¹⁸ See *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (holding that FS does not hold federal reserved water rights for fish, wildlife, and recreation under the Organic Administration Act of 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–82, 551 (2000)), but that water for these purposes should be acquired in the same manner as any other public or private appropriator); see also Federal “Non-Reserved” Water Rights, *supra* note 14, at 331 (discussing the Department of the Interior’s theory that the federal government may use non-reserved water on federal lands without complying with state law). See generally Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509, 510 (1979) (analyzing the Supreme Court decision to withhold federal reserved water rights); Lois G. Witte, *Still No Water for the Woods*, STREAM NOTES (Stream Sys. Tech. Ctr., Fort Collins, Colo.), Apr. 2002, available at http://stream.fs.fed.us/news/streamnt/pdf/SN_4_02.pdf (explaining the problems FS has faced using state law to achieve national forest purposes).

¹⁹ See W. WATER POLICY REVIEW ADVISORY COMM’N, WATER IN THE WEST: THE CHALLENGE FOR THE NEXT CENTURY 3-38, 3-39 (June 1998); see also John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 283 (2001) (discussing states’ strong aversion to recognizing the water rights necessary for federal conservation).

²⁰ See Gillilan, *supra* note 12, at 559–60; Witte, *supra* note 18 (detailing the state initiatives set forth in the amicus briefs for *New Mexico* for the protection of federal interests under state law); Todd A. Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077, 1077–78, 1089–90 (1984) (discussing the conflicts between the federal reserved rights doctrine and the state system of prior appropriation).

²¹ The Federal Reserved Water Rights doctrine, known as the *Winters* doctrine, was announced in the landmark case *Winters v. United States*, 207 U.S. 564 (1908). The doctrine was extended to non-Indian federal lands in *Arizona v. California*, 373 U.S. 546 (1963), modified, 376 U.S. 340 (1964), and modified, 383 U.S. 268 (1966), and modified, 466 U.S. 144 (1984), and modified, 530 U.S. 392 (2000), and modified, 531 U.S. 1 (2000).

government reserves, or in some instances acquires, land for particular purposes, there is an implied reservation of unappropriated water at the time necessary to achieve the purposes of the reservation.²² The federal reserved water rights doctrine allows the federal government to reserve, outside the parameters of state water law, an amount of unappropriated water necessary to achieve the purposes of the federal land designation. The U.S. Supreme Court acknowledged and upheld the assertion of water rights under this doctrine for the primary purposes of reservation, but indicated that federal agencies should secure water rights under state law when these rights are necessary to carry out secondary purposes on federal lands.²³ As water users within the state, the federal agencies must determine whether to invoke federal mechanisms to protect water for federal lands or rely on state law.²⁴ Specifically, if these agencies want to use state law, they must reconcile their individual federal mandates set out by Congress and the executive with provisions of the state water code.

III. WATER RIGHTS POLICIES: DEFINING THE FEDERAL RELATIONSHIP WITH STATE WATER LAWS

The tension between western states' desire that the federal government use state law to establish its water rights and the federal government's option to assert rights based on federal law may appear unavoidable. However, the policies adopted by the federal agencies regarding water protection all recognize the relationship to state water law, but provide an exception when federal purposes cannot be achieved using state law. Federal agencies exist as a result of congressional legislation and delegated Executive Branch authority. As a creature of specific legislation, statutory authority guides each of the federal land-managing agencies' actions and responsibilities. Thus, one must look to the enabling legislation of the agency, which clarifies the need to protect water resources, and subsequent

²² *Winters*, 207 U.S. at 577.

²³ See *Arizona*, 373 U.S. at 595 (holding that the federal government reserves water rights when it reserves land for particular purposes, while also upholding the master's findings concerning the allocation of water to federal lands); *Cappaert v. United States*, 426 U.S. 128, 146–47 (1976) (implying federal reserved water rights when upholding the federal government's claim to an amount of water in a limestone cavern in order to preserve a prehistoric species mentioned in the proclamation setting aside the land as national monument); *New Mexico*, 438 U.S. at 702 (holding that FS does not hold federal reserved water rights for fish, wildlife, and recreation under the Organic Administration Act of 1897, but that water for these purposes should be acquired in the same manner as by any other public or private appropriator); see also D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1, 2–3 (1991) (summarizing that western water planning, development, and management have traditionally been carried out under state law).

²⁴ After the Court's decision in *New Mexico*, the question arose of whether the federal government must use federal law to establish water rights for the *primary* purposes of the reservation. For the purposes of this Article, the author assumes that federal agencies can seek protection of primary purposes under state law if it is equivalent to rights available under federal law.

direction given by Congress and the Executive Branch to determine the agency's obligations. As discussed below, each agency's enabling legislation and subsequent congressional and executive direction outline the necessity for the protection and acquisition of water rights.

For the National Wildlife Refuge System,²⁵ a nationwide system of lands managed by FWS for wildlife purposes, Congress established that "each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established."²⁶ Congress defined the mission of the system to be the administration of a "national network of lands and *waters* for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."²⁷ In this language, Congress expressly referenced the need for land and water to restore fish, wildlife, and plant resources.

Congress also indicated the value of protecting water resources when it reserved national forest lands. For National Forest System lands, managed by FS, Congress insisted that "no national forest shall be established, except to improve and protect the forest within the boundaries, or for the *purpose of securing favorable conditions of water flows*, and to furnish a continuous supply of timber for the use and necessities of citizens."²⁸ The Multiple-Use Sustained-Yield Act further authorized the Forest Service to manage forests for a range of co-equal purposes including outdoor recreation, range, timber, *watersheds*, wildlife, and *fish*.²⁹

Similarly, Congress specifically directed BLM to protect water resources so that our vast system of public lands would be protected in their natural condition. BLM oversees public domain lands that have not otherwise been reserved, homesteaded, or claimed before the Taylor Grazing Act of 1934.³⁰ BLM manages these lands pursuant to the Federal Land Policy and Management Act (FLPMA)³¹ which provides that

public lands [are to] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, *water resource*, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.³²

²⁵ National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (2000). The National Wildlife Refuge System is unique in that it is the only network of federal lands managed with the specific goal of placing wildlife and their needs first. *Id.*

²⁶ *Id.* § 668dd(a)(3)(A).

²⁷ *Id.* § 668dd(a)(2) (emphasis added).

²⁸ Organic Administration Act of 1897, 16 U.S.C. § 475 (2000) (emphasis added).

²⁹ Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2000); Witte, *supra* note 18, at 2 (describing the Organic Administration Act of 1897 and the Multiple-Use Sustained-Yield Act of 1960).

³⁰ Taylor Grazing Act, 43 U.S.C. §§ 315 to 315o-1 (2000).

³¹ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000).

³² *Id.* § 1701(a)(8) (emphasis added).

Finally, Congress directed NPS to manage park lands for the fundamental purpose of “*conserv[ing] the scenery and the natural and historic objects and the wild life therein and . . . provid[ing] for the enjoyment of the same in such [a] manner and by such means as will leave them unimpaired for the enjoyment of future generations.*”³³ Referred to as the “non-impairment mandate,” this standard guides management decisions in the national parks system including decisions regarding water resources. Protecting water resources within the park system falls well within the purposes set out for national park lands and the associated non-impairment mandate.³⁴ It is difficult to imagine our national parks without water—the Grand Canyon needs the flow of the Colorado River, Yellowstone needs the gush of Old Faithful.

In addition to the general mandates set out for each agency in their enabling legislation, Congress and the President set forth basic goals for particular land designations.³⁵ Thus, a federal agency looks to its enabling legislation coupled with the specific direction given in a particular land designation to determine the purposes that must be met.³⁶ To carry out the purposes identified through the organic legislation and the particular

³³ 16 U.S.C. § 1 (2000) (emphasis added).

³⁴ Federal lands managed by the various branches of the armed services also have claims to water. This Article will not cover those claims, but they pose interesting issues of the use of state law to achieve federal purposes. *See generally* Michael J. Cianci, Jr., James F. Williams & Eric S. Binkley, *The New National Defense Water Right—An Alternative to Federal Reserved Water Rights for Military Installations*, 48 A.F. L. REV. 159 (2000) (discussing Nevada’s national defense water right as an alternative to the traditional federal reserved water rights doctrine); Mark S. Graham, *Army Water Rights and the Judge Advocate*, ARMY LAW., May 1992, at 64 (emphasizing consideration of state water law as it applies to military installations).

³⁵ *Cf.* 2 AM. JUR. 2D *Administrative Law* §§ 223–226 (2006) (stating “it is generally held that administrative rules may not add to detract from, or modify the statute which they are intended to implement”).

³⁶ The NPS manages the National Park System, including national monuments, wild and scenic rivers, national trails, and historic sites, pursuant to the National Park Service Organic Act and various other authorities. *See* 16 U.S.C. § 1 (2000) (The National Parks Service “shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations herein after specified.”); *id.* § 1271 (declaring “certain selected rivers . . . shall be preserved in free-flowing condition”); Paul Smyth, *Conservation and Preservation of Federal Public Resources: A History*, 17 NAT. RESOURCES & ENV’T 77, 78 (2002) (discussing congressional enactment of the National Park Service Organic Act and the authority given to the NPS in general). The FWS manages the National Wildlife Refuge System pursuant to the National Wildlife Refuge System Administration Act, as amended, and various other authorities. 16 U.S.C. §§ 460k to 460k-4 (2000); *id.* §§ 668dd–668ee; *see* Michael J. Brennan & Leah A. Kukowski, *Managing the Wildlife Refuge System: Is Anything Compatible Anymore?*, 20 NAT. RESOURCES & ENV’T 51, 51–52 (2005) (discussing congressional enactment of the National Wildlife Refuge System Administration Act and the authority and discretion given to FWS in managing these lands). The National Forests are managed by the USFS pursuant to the Organic Administration Act of 1897 and the Multiple-Use Sustained-Yield Act of 1960. Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2000)); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2000). The Multiple-Use Sustained-Yield Act also governs BLM actions on the remaining unreserved public domain lands. *Id.* In addition to these “organic authorities,” each of these agencies also manages specific monuments, recreation areas, or other special designations pursuant to the specific enabling legislation or establishment documents associated with the designation.

mandate, each agency has adopted policies to guide the land managers decisions. This Article looks, in particular, at the agency policies with regard to water rights. These internal policies guide the agency's decision making on issues related to the protection and use of water resources consistent with the agency's authorities and obligations.³⁷ All of the policies recognize, to varying degrees, state law mechanisms for protecting water resources on federal lands.

The NPS policy is by far the most general and flexible and commits the agency to work with state administrators to protect park resources while reserving all legal remedies under federal law:³⁸

Water for the preservation and management of the national park system will be obtained and used in accordance with legal authorities. The Park Service will consider all available authorities on a case-by-case basis and will pursue those that are the most appropriate to protect water-related resources in parks. While preserving its legal remedies, the Service *will work with state water administrators to protect park resources*, and will participate in negotiations to seek the resolution of conflicts among multiple water claimants.³⁹

The FWS's water policy specifically directs refuge managers to seek state-based water rights to achieve the purposes at a particular refuge unit, but provides a significant exception when state law doesn't allow the federal purposes to be achieved:⁴⁰

*It is the Service's policy to comply with State laws, regulations, and procedures in obtaining and protecting water rights, both for Service facilities and for trust fish and wildlife resources on lands not owned by the United States, except where application of State statutes and regulations does not permit Federal purposes to be achieved.*⁴¹

Further, in a subsequent provision in the FWS Manual on the acquisition of

³⁷ See generally MICHAEL ASIMOW ET AL., STATE AND FEDERAL ADMINISTRATIVE LAW 6 (2d ed. 1998). For a full discussion of the binding and non-binding nature of agency policy statements on the agency, see Charles H. Koch, *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 713–20 (2005); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1464–65 (1992); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1355–56 (1992); Tom J. Boer, *Does Confusion Reign at the Intersection of Environmental and Administrative Law?: Review of Interpretative Rules and Policy Statements Under Judicial Review Provisions Such As RCRA Section 7006(a)(1)*, 26 B.C. ENVTL. AFF. L. REV. 519, 529–31 (1999).

³⁸ U.S. NAT'L PARK SERV., MANAGEMENT POLICIES 2001 § 4.6, at 39 (2000), available at <http://www.nps.gov/refdesk/mp/>.

³⁹ *Id.* § 4.6.2, at 39 (emphasis added); see also *id.* § 1.4.7, at 13 (requirement to avoid impairment); *id.* § 1.5, at 13 (external threats to park resources).

⁴⁰ U.S. FISH & WILDLIFE SERV., FISH AND WILDLIFE SERVICE MANUAL ch. 403, at §§ 1–3 (1993), available at <http://www.fws.gov/policy/manuals/>.

⁴¹ *Id.* § 1.3 (emphasis added); see also 50 C.F.R. § 35.12 (2005) (stating that these regulations do not constitute an express or implied claim or denial of exemption from state water laws on the part of the U.S. Department of the Interior).

water rights, FWS policy provides that “[w]ater rights for acquired lands are usually obtained under State law.”⁴² As a result of this policy, FWS holds 1) state-based water rights that were acquired when FWS bought land to add to the refuge system, 2) state-based rights that were applied for through the state’s water right permitting program, and 3) state-based water rights that are purchased using specific acquisition authority and then transferred to FWS uses.⁴³

FS policy also recognizes that water rights can be obtained under state law if the federal reserved water rights doctrine does not apply.⁴⁴ Interestingly, the FS policy starts with the operation of federal law and makes state law the fall back provision. FS relies “on the reservation doctrine if the land was reserved from the public domain and for the reservation purposes identified in the documents or legislation”⁴⁵ and has a policy of “[o]btain[ing] water rights under State law if the reservation doctrine does not apply.”⁴⁶

Finally, the BLM’s water policy⁴⁷ specifically provides for water rights to be secured pursuant to applicable state law except where the reserved water rights doctrine applies:

The water policy of the BLM is [to] . . . [a]cquire and perfect the water rights necessary to carry out public land management purposes *through state law and administrative claims procedures* unless a federal reserved water right is otherwise available, and a determination is made that the primary purpose of the reservation can be served more effectively through assertion of the available federal reserved water right.⁴⁸

Moreover, BLM policy recognizes the primacy of state control of water resources by stating that two of the objectives of the program are to cooperate with state governments and conform to applicable state water rights laws.⁴⁹

Although the federal policies all require the agencies to work with the states, each policy acknowledges that there may be circumstances where state law is insufficient to protect federal purposes. Under these circumstances, federal agencies frequently turn to the federal reserved water rights doctrine. Federal agencies face questions of whether mechanisms existing under state law for protecting non-consumptive use are available to federal agencies and sufficient to meet the mandates on federal lands. Most

⁴² U.S. FISH & WILDLIFE SERV., *supra* note 40, at ch. 403, at § 3.1.

⁴³ *Id.*

⁴⁴ U.S. FOREST SERV., FOREST SERVICE MANUAL § 2541.03 (1990), *available at* <http://www.fs.fed.us/im/directives/fsm/2500/2540.txt>.

⁴⁵ *Id.* § 2541.03(1).

⁴⁶ *Id.* § 2541.03(2) (emphasis added).

⁴⁷ U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT MANUAL TRANSMITTAL SHEET 7250 - WATER RIGHTS § 7250 (1984), *available at* <http://www.blm.gov/nstc/WaterLaws/pdf/BLMWaterRightsPolicy.pdf>.

⁴⁸ *Id.* § 7250.04 (emphasis added).

⁴⁹ *Id.* § 7250(1)–(2).

commonly, the federal agency turns to federal law when the agency seeks to secure instream flow or a non-consumptive use permit under state law.⁵⁰ For various reasons, detailed below, state law does not always recognize or provide a legal structure for the types of rights that will allow the agency to achieve its purposes.

IV. LIMITATIONS AND RISKS UNDER STATE LAW FOR FEDERAL AGENCIES

This Article identifies four types of problems that arise when federal agencies assert water rights under state law. First, in many states the issue is definitional; state law is defined so that there are no options for federal land managers to seek necessary water rights under state law. Definitional problems include how the state describes beneficial use, the requirement for a diversion, and the standard for establishing instream flow rights. The second challenge arises if the state law is structured in a way that prevents the federal government from securing necessary water rights. Structural issues include the mechanisms for holding instream flow rights, the priority dates for instream flow rights and enforcement of these rights. Third, federal agencies may face obstacles in the way the state administers its water rights system. For example, a federal agency may apply for a water right, but find that the state is unable to process the application. Or, a federal agency may obtain a water right and find that the state lacks the administrative ability or resources to enforce that right.

Finally, the powerful tension between state and federal authority over water creates political and institutional obstacles to the full utilization of state law by federal agencies. The very nature and scope of state legislative power and oversight can create complications for the federal land manager seeking water rights to carry out an agency's purposes. The vast quantity of federal land and numerous federal authorities can overwhelm the state water allocation systems. Under principles of state control, states, subject to the public trust, control the allocation of water within their boundaries. Many state constitutions contain explicit assertions of state authority over water rights.⁵¹ Exercising this state power, each individual state can

⁵⁰ Under state water law in the West, there is typically a distinction between diversionary or consumptive water use and non-diversionary or non-consumptive, or instream flow, use. 2 OWEN L. ANDERSON ET AL., *WATERS AND WATER RIGHTS* § 12.02(c)(1) (Robert E. Beck ed., repl. vol. 2001). Instream or non-consumptive water rights are generally asserted to provide that sufficient water remains in a stream, lake, or waterway to preserve the ecological and biological systems, to protect fish populations, or to provide for recreational opportunities. *Id.* § 13.05(a). While federal agencies often seek traditional diversionary rights, the tension between the federal and state government usually arises when the federal agencies are seeking non-diversionary rights, or instream, non-consumptive water rights to carry out particular federal purposes and the purposes or mechanisms for which a state may allow instream uses is incongruous with the federal purpose.

⁵¹ ALA. CONST. art. VIII, § 13; ARIZ. CONST. art. XVII, § 2; CAL. CONST. art. X, § 5; COLO. CONST. art. XVI, § 5; IDAHO CONST. art. 15, §§ 1–3; MONT. CONST. art. IX, § 3; N.D. CONST. art. XI, § 3; NEB. CONST. art. XV, §§ 5–6; N.M. CONST. art. XVI, §§ 1–3; OR. CONST. art. XI-D, § 1; TEX. CONST. art. XVI, § 59(a); UTAH CONST. art. XVII, § 1; WASH. CONST. art. XXI, § 1; WYO. STAT. ANN. § 97-8-001 (2005); *cf.* UTAH CONST. art. XX, § 1 (public trust limited to land including the beds of navigable

control and change water law within the state in ways that may be inconsistent with federal interests.

A. Definitional Limitations

1. Non-Consumptive Use and State Definitions of Beneficial Use

For many years, the criticism of state law was that it did not recognize non-consumptive water use as a valid water right.⁵² Today, nearly every western state water code contains provisions to protect non-consumptive water use, also referred to as instream flow.⁵³ States accomplished instream flow protection by adopting definitions of beneficial use that included non-consumptive water uses. In western water law under the prior appropriation system, “beneficial use” is the basis, measure, and limit of a water right.⁵⁴ A right to use water can be granted only if the use to which it will be put falls within the beneficial use definition adopted by the state.⁵⁵ Definitions of beneficial use vary from state to state, but the majority of western states have expanded their definitions of beneficial use to include non-consumptive uses such as fish and wildlife, wetland maintenance, instream flow, and recreation.⁵⁶ In Oregon, for example, beneficial uses include uses of water for “domestic, municipal, irrigation, power development, industrial, mining, recreation, wildlife and fish . . . and for pollution abatement.”⁵⁷ By defining beneficial use broadly, a state paves the way for establishing state-based instream flow rights for any potential water user, including the federal government. Thus, the first step for any federal agency is to determine if the definition of beneficial use includes the non-consumptive uses needed to protect federal interests.⁵⁸ If a particular state’s definition of beneficial use

waterways). In several states the recognition of public ownership is found in the state water code. *See* KAN. STAT. ANN. § 82a-702 (2005); NEV. REV. STAT. § 533.025 (2005); S.D. CODIFIED LAWS § 46-1-1 (2006).

⁵² *See* Eric T. Freyfogle, *Repairing the Waters of the National Parks: Notes on a Long-Term Strategy*, 74 DENV. U. L. REV. 815, 834 (1997).

⁵³ Steven J. Shupe, *Keeping the Waters Flowing: Stream Flow Protection Programs, Strategies and Issues in the West*, in *INSTREAM FLOW PROTECTION IN THE WEST* 1, 4 (Lawrence J. MacDonnell et al. eds., 1989).

⁵⁴ Robert E. Beck et al., *Elements of Prior Appropriation*, in 2 *WATERS AND WATER RIGHTS* CH. 12 § 12.02(c)(2) (Robert E. Beck ed., 1991); GILLILAN & BROWN, *supra* note 6, at 31–32; GETCHES, *supra* note 16, at 75–76, 97–100, 118–29.

⁵⁵ GILLILAN & BROWN, *supra* note 6, at 31.

⁵⁶ Shupe, *supra* note 53, at 6.

⁵⁷ OR. REV. STAT. § 536.300(1) (2005).

⁵⁸ In addition to the expansion of the definition of beneficial use, there are several mechanisms that states employ to address instream flow including minimum stream flow standards, state river programs that designate certain reaches of rivers as recreational or wild and scenic, public interest standards under existing administrative laws, instream flow water rights, conservation or waste prevention programs, water leasing, banking, or transfer programs, and mechanisms for private agreements including modified operations for state and federal water projects. OR. REV. STAT. §§ 390.805–390.925, 536.235, 537.332–537.360, 537.455–537.500, 537.348 (2005); OR. ADMIN. R. 690-076-0005 to 690-076-0035, 690-033-0000 to 690-033-0340 (2006); WASH. REV. CODE § 90.54 (2006) (Water Resources Act of 1971); *id.* §§ 90.42.030,

does not contain a use that includes the purpose of the federal reservation, the inquiry for the federal land manager ends here. State law simply does not provide for the type of right that will allow the purposes for which the federal land was set aside to be achieved. At this point, the manager may want to investigate other sources of state law or turn to mechanisms available under federal law to ensure that federal purposes are achieved.

Even today, in some states instream flow remains questionable under state law.⁵⁹ In New Mexico for example, the state water code does not recognize instream flow as a beneficial use and defines beneficial use to include only irrigation, mining, manufacturing, and possibly fishing and recreation.⁶⁰ However, in 1998, the New Mexico Attorney General, Tom Udall, issued an opinion concluding that existing consumptive uses could be transferred to instream flow based on New Mexico common law.⁶¹ Though the Attorney General's opinion moves in the direction of promoting instream flow under New Mexico law, that state has recognized very few instream rights. Similarly, North Dakota law does not clearly state whether instream flow is a beneficial use. In North Dakota, beneficial use is defined as the "use of water for a purpose consistent with the best interests of the people of the state."⁶² Under this definition, the state administrative agency is given considerable discretion to determine if a particular non-consumptive use is a beneficial use. For the federal land manager, the risks are higher when a state has not yet fully interpreted or developed its instream flow provisions. In states where the existence and scope of instream flow is questionable, or under debate, the federal manager may want to consider other sources of authority to achieve federal purposes.

The definitional problem becomes more pronounced when particular uses are at issue. For example, many state definitions include protecting fish and wildlife, but may not include protecting or maintaining scenic or recreational uses.⁶³ Definitions of beneficial use rarely include or can be

90.42.080(8)–90.42.100; GILLILAN & BROWN, *supra* note 6, at 138–45, 147–48, 157–64.

⁵⁹ Timothy J. De Young, *New Mexico*, in 6 WATERS AND WATER RIGHTS 831, 832 (Robert E. Beck ed., 1991); GILLILAN & BROWN, *supra* note 6, at 112, 116–17.

⁶⁰ State *ex rel.* State Game Comm'n v. Red River Valley Co., 182 P.2d 421, 434 (N.M. 1945).

⁶¹ 98-01 Op. N.M. Att'y Gen. 11 (1998) (limiting analysis to change applications, not applications for new appropriations, and requiring a measuring device to monitor the instream flow); *see also* Brief for Arizona Water Commission as Amicus Curiae Supporting Respondent at 27, United States v. New Mexico, 438 U.S. 696 (1978) (No. 77-510) (stating that the state supreme court decision did not "preclude or inhibit federal and state initiatives to secure minimum streamflows to protect recreational, wildlife and other values of the national forests"). This brief seems to imply the availability of instream flow protection under New Mexico state law.

⁶² N.D. CENT. CODE § 61-04-01.1(1) (2005).

⁶³ Although the phrase "beneficial use" is standard in western water appropriations law, its definition varies from state to state. Some states have no statutory definition of "beneficial use," leaving the phrase open to interpretation by agencies and courts. Other states have included detailed definitions in their statutory codes. Alaska defines beneficial use as:

a use of water for the benefit of the appropriator, other persons or the public, that is reasonable and consistent with the public interest, including, but not limited to, domestic, agricultural, irrigation, industrial, manufacturing, fish and shellfish processing,

interpreted to include general ecosystem needs for water. Rather, the instream flow right is related to a single type of species such as fish, or more

navigation and transportation, mining, power, public, sanitary, fish and wildlife, recreational uses, and maintenance of water quality.

ALASKA STAT. § 46.15.260 (2004). Arizona does not explicitly define beneficial use, but states that “[a]ny person, the state of Arizona or a political subdivision thereof may appropriate unappropriated water for domestic, municipal, irrigation, stock watering, water power, recreation, wildlife, including fish, nonrecoverable water storage . . . or mining uses, for his personal use or for delivery to consumers.” ARIZ. REV. STAT. ANN. § 45-151 (2001). California’s water code states that beneficial use includes, but is not limited to, “domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.” CAL. WATER CODE § 13050(f) (West 1992). Colorado defines beneficial use as

the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife, and also includes the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes. For the benefit and enjoyment of present and future generations, “beneficial use” shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

COLO. REV. STAT. § 37-92-103(IV)(4) (2005). The Idaho Constitution recognizes agriculture, mining, milling, power, and domestic purposes as beneficial use, and statutorily excludes from the definition use of geothermal waters for any purpose other than heat. IDAHO CONST. art. XV, § 3; IDAHO CODE ANN. § 42-233(1) (2005). Montana defines beneficial use as agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, recreational uses, and water leases to provide instream flow for fish, wildlife, and parks. MONT. CODE ANN. § 85-2-102(2) (2005). Nebraska defines domestic, agricultural, manufacturing, and instream flow for recreation, fish, and wildlife as beneficial. NEB. REV. STAT. § 2-1586 (1997), § 46-2,108(2) (2004). Nevada does not explicitly define beneficial use, but states that domestic, municipal, quasi-municipal, industrial, irrigation, mining and stock-watering uses are “preferred,” and further defines recreation as a beneficial use. NEV. REV. STAT. §§ 533.030(2), 534.120(2) (2005). New Mexico does not define beneficial use in its constitution or statutes, but state case law has recognized the following uses as beneficial: irrigation, mining, manufacturing, possibly fishing and recreation. *Red River Valley Co.*, 182 P.2d at 434, 465. North Dakota defines beneficial use as “a use of water for a purpose consistent with the best interests of the people of the state.” N.D. CENT. CODE § 61-04-01.1 (2005). Oregon defines beneficial use as “uses of water for domestic, municipal, irrigation, power development, industrial, mining, recreation, wildlife, and fish life uses and for pollution abatement.” OR. REV. STAT. § 536.300(1) (2005). Utah does not define beneficial use, but states that in times of scarcity, domestic and agricultural purposes have preference over other uses, and provides that instream flows may be appropriated for fish, recreation, and environmental preservation. UTAH CODE ANN. § 73-3-21 (1989 repl.); UTAH CODE ANN. 73-3-3 (Supp. 2006). Washington defines beneficial use as “[u]ses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state.” WASH. REV. CODE § 90.54.020(1) (2004). See generally Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998) (discussing of western states’ definitions of beneficial use).

specific categories of uses such as wildlife protection. The preservation of the natural hydrograph to preserve the processes by which a river exists and persists does not technically fall within the definition of beneficial use.⁶⁴ Similar challenges arise under state law definitions of beneficial use for wilderness preservation, maintaining wetland or riparian vegetation, or channel maintenance—all purposes for which various federal lands have been set aside.⁶⁵ The challenge, therefore, lies in matching the particular federal purpose with each state's particular definition of beneficial use. While the expansion of the definition of beneficial use in the western states has been promising, the details of which particular uses count remain problematic for many federal land managers.

2. The Diversion Requirement

Even if a water use is defined as beneficial in some jurisdictions, an actual diversion is required to establish a water right. Because instream flow by its very nature lacks an actual water diversion, the traditional diversion requirement provides another definitional limitation.⁶⁶ While some states have dispensed with this requirement,⁶⁷ others have retained or left unclear the need for a physical diversion. For example, in 2000, the Idaho Supreme Court denied an instream flow claim for Minidoka National Wildlife Refuge asserted under state law for the protection of wildlife habitat, stating that Idaho law “generally requires an actual diversion and beneficial use for the existence of a valid water right.”⁶⁸ In Colorado, state law recognizes an instream flow right for recreational purposes.⁶⁹ The state water court in granting recreational instream flow addressed the diversion requirement under Colorado law by categorizing the right as a “recreational in-channel diversion.”⁷⁰ Interestingly, the recreational instream channel diversions are expressly unavailable under state law to federal entities.⁷¹ Thus, state law may define beneficial use in a way that incorporates fish and wildlife habitat or other uses that evoke non-consumptive uses, but if a diversion is still required, then an instream flow right is impossible to achieve.

Another example where the question of diversion arose involves the U.S. Forest Service and a state-based water right for Cherry Creek in the

⁶⁴ See SANDRA POSTEL & BRIAN RICHTER, RIVERS FOR LIFE: MANAGING WATER FOR PEOPLE AND NATURE 103–11 (2003) (discussing how western states have generally protected instream flows for the benefit of “certain fish species rather than whole ecosystems”).

⁶⁵ GILLILAN & BROWN, *supra* note 6, at 120, 214.

⁶⁶ GETCHES, *supra* note 16, at 92.

⁶⁷ *Id.* at 95.

⁶⁸ State v. United States, 996 P.2d 806, 811 (Idaho 2000).

⁶⁹ COLO. REV. STAT. § 37-92-102 (2005).

⁷⁰ Reed D. Benson, “Adequate Progress,” or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws Since 2000*, 36 ENVTL. L. 1283, 1293 (2006); see also Kenneth W. Knox, *Colorado Whitewater Courses and Water Rights*, 30 WATER REPORT, 1–2 (Aug. 15, 2006).

⁷¹ See COLO. REV. STAT. § 37-92-102(5) (2005) (specifying that any county, city, town, home rule city, home rule county, special district, water conservation district, or water conservancy district may apply for a “recreational in-channel diversion”).

Tonto National Forest.⁷² The Arizona Court of Appeals recently upheld a decision by the Arizona Water Resources Department granting a state-based instream flow right to waters in Cherry Creek.⁷³ Phelps Dodge Corporation had challenged the agency's determination arguing, among other things, that a diversion was required to perfect a water right under Arizona's prior appropriation code.⁷⁴ The court ultimately held that it was not necessary to divert water to perfect an instream right under Arizona law given the Arizona legislature's designation of fish, wildlife and recreation as beneficial use.⁷⁵ In addition, the court concluded that instream flow rights can be held in Arizona by non-state entities like FS.⁷⁶ The time and energy spent on the question of whether a diversion is required, even in a state where instream flow is defined broadly, may make federal land managers hesitant to rely solely on state law.

3. Standards for Establishing Instream Flow

Another definitional hurdle involves the standards under state law for establishing an instream flow right. The state's standard for setting the volume of the instream flow may differ from the amount necessary to achieve the federal purpose. Under Colorado's instream flow statute, for example, water can be appropriated for instream use to the extent necessary "to preserve the natural environment to a reasonable degree."⁷⁷ For Black Canyon of the Gunnison National Park, the minimum amount to meet the federal purpose of preserving the "spectacular gorges and additional features of scenic, scientific, and educational interest"⁷⁸ is arguably greater than what can be allowed under Colorado's statute. The amount of water that would protect the environment of the canyon to a reasonable degree may be less than the amount of water that would preserve specific characteristics of the canyon for future generations. Thus, the standards for establishing instream rights under state law are distinct from the standards and considerations an agency is obligated to use pursuant to its enabling legislation. To achieve their purposes, federal agencies may need to secure water rights for uses such as scenic or scientific integrity, channel maintenance, aesthetics, and preservation of riparian corridor. Often these uses fall outside the definition of beneficial use under state law.⁷⁹

⁷² Phelps Dodge Corp. v. Ariz. Dep't of Water Res., 118 P.3d 1110 (Ariz. Ct. App. 2005).

⁷³ *Id.* at 1112.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1113.

⁷⁶ *See id.* at 1112 (affirming the grant of a water right permit to FS).

⁷⁷ COLO. REV. STAT. § 37-92-102(d)(3) (2005).

⁷⁸ Proclamation No. 2033 *reprinted in* 47 Stat. 2558 (1933).

⁷⁹ Gillilan, *supra* note 12, at 563–66 (discussing bar on agency ownership of water rights in some states, the use of the word "minimum" in instream flow legislation, and use of reservations rather than enforceable water rights).

4. Non-Consumptive Use and Groundwater

Finally, in many western states it is unclear whether the beneficial uses defined for surface water apply to groundwater resources. As a result, the availability of a non-consumptive right to protect the in-place use of groundwater can be problematic.⁸⁰ Under Colorado law, instream flow provisions relate only to surface water and sources of surface water.⁸¹ At Great Sand Dunes National Park in Colorado, this limitation under state law served, at least partially, as the motivation to secure water rights for the park under substantive federal law.

In Oregon, the definition of instream flow includes water within the natural stream channel or lake bed or place where water naturally flows or occurs.⁸² Technically, this definition could be read to include water naturally occurring as a groundwater source. However, groundwater is managed separately.⁸³ The management structure may be interpreted to preclude application of the instream flow provisions to groundwater.⁸⁴ By contrast, the state engineer in Nevada recognized the role that groundwater levels play in the maintenance of spring flows on the surface. At Moapa National Wildlife Refuge, the state engineer granted FWS a water right to maintain surface flows from springs and issued an order to monitor groundwater pumping that may impact those surface flows.⁸⁵ To the extent a federal land

⁸⁰ See GLENNON, *supra* note 2, at 29–30 (discussing perpetuated misunderstanding of hydrology leading to regulatory confusion and inconstancies).

⁸¹ See *Santa Fe Trail Ranches v. Simpson*, 990 P.2d 46, 53–55 (Colo. 1999) (discussing the water right recognized in Colorado to use surface water); *see also* Colo. Water Conservation Bd. v. City of Central, 125 P.3d 424, 434 (Colo. 2005) (discussing Colorado's surface water law).

⁸² OR. REV. STAT. § 537.332(1) (2005).

⁸³ *Id.* §§ 537.505–537.795, 537.992.

⁸⁴ In Oregon, many instream flow rights were converted from minimum perennial streamflows. *Id.* § 537.346. In processing these transfers to instream flow rights, the Water Resources Department considers whether the instream flow would pass through an area of natural loss and become groundwater. OR. ADMIN. R. 690-077-0075(2)(b)(D)–(c)(B) (2006). These provisions show the distinction in Oregon law and regulation between surface and groundwater sources.

⁸⁵ See Nev. Dep't of Conservation & Natural Res., Div. of Water Res., Certificate of Appropriation of Water No. 15097 (Jan. 5, 1999), available at <http://water.nv.gov/scans/certificates/15000/15097c.pdf>. Moapa Valley National Wildlife Refuge was established Sept. 10, 1979 through the purchase authority of the Endangered Species Act of 1973, 16 U.S.C. § 1534 (2000), to protect the endangered Moapa dace (*Moapa coriacea*), a small fish endemic to Moapa Valley's geothermal springs. Moapa Valley NWR Home Page, <http://www.fws.gov/desertcomplex/moapavalley/index.htm> (last visited Nov. 12 2006). In 2002, the Nevada state engineer issued Order No. 1169, which recognized that groundwater pumping from the deep carbonate aquifer underlying Moapa Valley's alluvial aquifer could adversely affect the springs, and held in abeyance all applications for new water appropriation from that aquifer pending further study. Nev. Dep't of Conservation & Natural Res., Div. of Water Res., Order No. 1169, Order Holding in Abeyance Aquifer System Groundwater Applications 7 (Mar. 8, 2002), available at http://www.nature.nps.gov/water/Water_Rights/Rulings_Decrees/NV_Order_1169.pdf; *see also Minutes of the Senate Committee on Natural Resources*, 73d Sess. 6–7 (Nev. Mar. 16, 2005), available at <http://www.leg.state.nv.us/73rd/Minutes/Senate/NR/Final/3704.pdf> (proceedings outlining implementation of Order No. 1169, its purpose and timetable).

manager seeks to protect *in situ* groundwater use, the manager needs to fully understand the extent to which state instream flow programs extend to groundwater sources.

B. Structural Limitations

In the last several decades, western states addressed many of the definitional limitations for establishing instream flow by modifying state water codes and administrative rules to include various non-consumptive uses in the definition of beneficial use. Too often, however, even in states where instream flow is recognized as a beneficial use, *structural limitations* to instream flow rights exist. These structural limitations include priority dates, mechanisms for converting diversionary rights to instream flow, and perhaps most importantly, control and enforcement of instream flow rights.⁸⁶

These structural limitations are easy to see in several representative state instream flow programs. In comparing the state programs below, consider specifically how a federal land manager might use state law to protect instream flow for a particular federal reservation.

1. States Where Federal Agency Cannot Hold Instream Flow Rights

The first structural limitation involves states where a federal agency simply is not allowed to hold an instream flow right. States with this kind of structure to their instream flow program include, among others, Oregon, Washington, Colorado, and Idaho. While these states share a common structural limitation, the details of each states instream flow program are unique. As a result, a federal agency that manages lands throughout the West must become familiar with each state's water law provisions.

a. Oregon

Oregon currently has three primary mechanisms for protecting non-consumptive water use.⁸⁷ First, under the Instream Water Rights Act of

⁸⁶ Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 215, 218 (1997) (noting priority and bureaucratic difficulty in adjusting instream rights); see also ANNEAR ET AL., *supra* note 5, at 69–75 (discussing various state programs for conversion of instream rights as well as limits on federal and state ownership of those rights).

⁸⁷ The state of Oregon, the first state to have a minimum stream flow program, adopted its program by legislation in 1955. In 1987, the state converted all existing minimum instream flows to water rights pursuant to the Instream Water Rights Act of 1987. However, there are still several minimum flow standards being administered around the state. See Act of May 26, 1955, ch. 707, § 10(3)(a), 1955 Or. Laws 928 (directing the State Water Resources Board to consider the policy declaration that “all of the waters within this state belong to the public for use by the people for beneficial purposes without waste” when formulating the state's water resources program); Instream Water Rights Act of 1987, ch. 859, § 8, 1987 Or. Laws 1758 (codified at OR. REV. STAT. § 537.346(1) (2005)); OR. ADMIN. R. 690-077-0054(1)(b) (2006); see also Reed D.

1987,⁸⁸ the Oregon legislature recognized instream flow as a beneficial use and minimum flow standards throughout the state were converted to instream water rights.⁸⁹ In addition, certain state agencies can recommend and in some instances apply for new instream flow rights.⁹⁰ Second, the Oregon Water Resources Department operates a purchase, lease or donation program for instream flow rights.⁹¹ Under this program an individual can acquire an existing water right and convert it to an instream right. However, once the right is converted to non-consumptive use, the Oregon Water Resources Department holds the right.⁹² The Oregon Water Trust, a nonprofit organization, facilitates these transactions,⁹³ including Oregon's water leasing provisions which allow short term or permanent leases for a transfer to an accepted public use.⁹⁴ Water users can defend a claim of abandonment for non-use with a short term or permanent lease agreement.⁹⁵ Finally, Oregon has a Conserved Water Program⁹⁶ where water users can submit a water conservation plan to the Oregon Water Resources Commission. Water users get to retain up to seventy-five percent and no less than twenty-five percent of what is saved for additional uses.⁹⁷ The retained conserved water and the water dedicate for instream use receive priority dates either the same as the original right or one minute junior.⁹⁸ In Oregon, a federal agency can hold and exercise a traditional diversionary right to water for a broad range of uses including fish and wildlife.⁹⁹ Under Oregon's existing system for non-consumptive water rights, a federal agency cannot own or hold an instream flow right; only the state can hold instream

Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L.J. 197, 209–11 (2002) (discussing evolution of Oregon law as affecting the Klamath Basin); Joseph Q. Kaufman, *An Analysis of Developing Instream Water Rights in Oregon*, 28 WILLAMETTE L. REV. 285, 302–06 (1992) (detailing the evolution of Oregon water rights and inducements leading to the changes); Jesse A. Boyd, Comment, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 NAT. RESOURCES J. 1151, 1180–88 (2003) (discussing Oregon water rights evolution as part of survey of western states water rights); RICK BASTASCH, WATERS OF OREGON: A SOURCE BOOK ON OREGON'S WATER AND WATER MANAGEMENT 91 (1998).

⁸⁸ OR. REV. STAT. §§ 537.332–537.360 (2005).

⁸⁹ OR. REV. STAT. § 537.346 (2005); Sterne, *supra* note 86, at 212.

⁹⁰ OR. REV. STAT. §§ 537.336, 537.348 (2005), *amended by* Act of May 25, 2001, ch. 205, § 2, 2001 Or. Laws 483 (effective Jan. 2, 2008) (precursor was minimum instream flows)

⁹¹ OR. REV. STAT. § 537.348 (2005), *amended by* Act of May 25, 2001, ch. 205, § 2, 2001 Or. Laws 483 (effective Jan. 2, 2008).

⁹² OR. REV. STAT. § 537.341 (2005).

⁹³ See Oregon Water Trust, <http://www.owt.org> (last visited Nov. 10, 2006).

⁹⁴ OR. REV. STAT. § 537.348 (2005).

⁹⁵ *Id.* § 537.348(2).

⁹⁶ *Id.* § 537.465.

⁹⁷ *Id.* § 537.470(3).

⁹⁸ *Id.* § 537.485; OR. ADMIN. R. 690-018-0012(2) (2006). The Water Resources Commission must set the priority date for any conserved water right at either the same time as the original right or one minute later. OR. REV. STAT. § 537.485(1) (2005). However, the priorities of the conserved water right don't have to be the same. The 75% could be the same as the original and the 25% one minute later or vice versa. *Id.* In contrast, if the applicant chooses the priority date for the conserved water then both priority dates must be the same. *Id.* § 537.485 (2).

⁹⁹ *Id.* §§ 536.007(6), 537.120–537.130, 537.332(5)(b), 537.334(1).

rights.¹⁰⁰ Thus, for a unit of the park system, refuge system, a national forest, or recreation area for which non-consumptive water rights are necessary to carry out federal purposes, those rights are not available to the federal government under Oregon state law.

b. Washington

The 1971 Water Resources Act¹⁰¹ authorizes the Washington State Ecology Department to establish minimum base flows at the request of the State Fish and Wildlife Agency or on the Department's own initiative.¹⁰² An administrative rulemaking process with public notice and comment establishes these flows.¹⁰³ Under these provisions, a stream can be closed to further appropriation when the minimum levels are reached.¹⁰⁴ New permits are also conditioned to require the diversion to cease when flows fall below an established minimum base flow.¹⁰⁵ The state administers these minimum instream flow designations based on the date of establishment, not the original priority date of the water rights.¹⁰⁶

Washington also created a trust water rights program in 1981 which allows for the temporary or permanent transfer of water rights to the state for instream flow.¹⁰⁷ In addition, under Washington's trust program, water rights that are otherwise subject to relinquishment under the state's waste provisions can be managed through the trust water rights program.¹⁰⁸ The state also administers the water leasing and water banking programs

¹⁰⁰ *Id.* § 537.341.

¹⁰¹ WASH. REV. CODE §§ 90.54.005–90.54.920 (2006).

¹⁰² *Id.* § 90.22.010. *See generally* Sterne, *supra* note 86, at 207–08 (examining the Washington State Ecology Department's authority to establish minimum base flows); Robert F. Barwin & Kenneth O. Slattey, *Protecting Instream Resources in Washington State*, in *INSTREAM FLOW PROTECTION IN THE WEST* 371, 371–89 (Lawrence J. MacDonnell et al. eds., 1989) (examining recent developments in state legislative and administrative actions to promote instream flows); JOSH BALDI, ROSS FREEMAN & KATHERINE RANSEL, *AM. RIVERS & WASH. ENVTL. COUNSEL, INSTREAM FLOW TOOL KIT: ADVOCACY GUIDE TO HEALTHY RIVER AND STREAM FLOWS IN WASHINGTON* 5–16 (2003), *available at* <http://www.wecprotects.org/Home/documents/streamtoolkit.pdf> (detailing the instream flow levels in Washington State, and the legislation enacted to establishing instream flow rules).

¹⁰³ WASH. REV. CODE § 90.22.020 (2006).

¹⁰⁴ *Id.* § 90.22.030.

¹⁰⁵ *See* WASH. ADMIN. CODE 173-500-060(5)(a) (2006) (stating that new permits “shall be appropriately conditioned to assure maintenance of [minimum] base flow.” Presumably that requires the permits to require appropriation to cease if water falls below the minimum base flow.).

¹⁰⁶ WASH. REV. CODE § 90.03.345 (2006); *see also* Pub. Util. Dist. No. 1 v. State Dep't of Ecology, 51 P.3d 744, 764 (Wash. 2002) (“[M]inimum instream flows under the state's water resources statutes constitute an appropriation, and have a priority date applicable to all water right holders and applicants in a water basin.”).

¹⁰⁷ *See* WASH. REV. CODE § 90.42.080(1)(a) (2006). Transferred water rights retains their original priority date. *Id.* § 90.42.040(3).

¹⁰⁸ *See id.* § 90.14.215 (stating that trust water rights held by the department of ecology are not subject to that chapter of water law).

through the trust water program.¹⁰⁹ Leases may be short term or permanent, but must be transferred to an accepted public use.¹¹⁰ Water rights placed in a temporary lease program are protected from claims of abandonment or forfeiture under state law.¹¹¹ Like Oregon, Washington state law authorizes the state to hold a trust water right.¹¹²

c. Colorado

Similarly, Colorado recognizes instream flow as a beneficial use,¹¹³ but provides that only the state, through the Colorado Water Conservation Board (CWCB) can hold and exercise instream rights.¹¹⁴ The recognition of recreational in-channel diversions allows municipalities, county water districts, sanitation districts and water conservation or conservancy districts to hold these functional instream flow rights. However, similar to Colorado's general instream flow provisions individuals, businesses, environmental organizations and the federal government are not listed as entities that can hold recreational in-channel diversions.¹¹⁵

d. Idaho

Idaho adopted its Minimum Stream Flow Act in 1978.¹¹⁶ Under this act, the legislature established minimum stream flow requirements for portions of the Lemhi and Snake rivers while allowing the director of the Idaho Department of Water Resources (Director) to approve applications for minimum stream flows throughout the state that are required for fish and wildlife concerns, recreation, and aesthetics—as well as transportation and navigation.¹¹⁷ The Idaho Water Resource Board (Board) is the only entity that may hold or apply to the Director for minimum instream flow appropriations.¹¹⁸ While other interested parties—

¹⁰⁹ *Id.* §§ 90.42.080(8), 90.42.100–90.42.130.

¹¹⁰ *See id.* § 90.42.080(3) (stating that trust water rights may be acquired by the state on a temporary or permanent basis); *id.* § 90.42.040(1) (stating that state's trust water rights must be held or authorized for use by the department for instream flows, irrigation, municipal, or other beneficial use).

¹¹¹ *See id.* § 90.42.040(6) (stating that WASH. REV. CODE § 90.14.140–90.14.230 have no applicability to trust water rights).

¹¹² *Id.* § 90.42.080(1)(a).

¹¹³ COLO. REV. STAT. § 37-92-103(4) (2005).

¹¹⁴ *Id.* § 37-83-105(2)(a)(II).

¹¹⁵ *Id.* § 37-92-103(7); *see also* Knox, *supra* note 70, at 2 (discussing entities precluded from holding these rights).

¹¹⁶ IDAHO CODE ANN. §§ 42-1501 to 42-1507 (2005).

¹¹⁷ *Id.* § 42-1503; *see also id.* § 42-1501 (“[T]he streams of this state and their environments . . . [should] be protected against loss of water supply . . . for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.”); Sterne, *supra* note 86, at 209 (discussing infirmity of Idaho's instream flow program).

¹¹⁸ *See* IDAHO CODE ANN. § 42-1503 (2005) (describing the process of applying for appropriations of minimum stream flows).

including private individuals and federal agencies—may request that the Board consider applying for an instream water right, those parties may not apply for the appropriation of a minimum stream flow in their own capacity.¹¹⁹ The Director may approve an application for minimum stream flow only by determining that the instream use will not interfere with any senior water uses, that the instream use is in the public interest, that the appropriation is the minimum amount necessary for the proposed instream use, and that historical records indicate that the minimum stream flow can actually be maintained.¹²⁰ In addition to the Director's approval, the state legislature must approve all minimum stream flow appropriations.¹²¹ When a minimum stream flow appropriation clears the administrative and legislative process, it receives a priority date corresponding to when the Director received the completed application.¹²²

2. States Where Federal Agency Can Hold an Instream Flow Right

In contrast to the state instream flow programs described above, several states allow the federal government to hold non-consumptive water

¹¹⁹ See *id.* §§ 42-1503, 42-1504 (describing who may request that the board apply for instream water rights).

¹²⁰ *Id.* § 42-1503. Upon receipt of an application for the appropriation of a minimum stream flow, the Director must forward a copy of the application to appropriate state agencies, publish notice of the application within the affected counties, hold a public hearing to gather information regarding the proposed appropriation, and enter a decision in writing. *Id.* The Board or any aggrieved party that testified at the appropriation hearing may appeal the Director's decision to state courts. *Id.* While minimum stream flow is a beneficial use, the Director may only appropriate the minimum amount necessary for the proposed instream use, not the ideal or most desirable amount. *Id.*

¹²¹ *Id.* Idaho, as of 1994, was one of the only states that required preliminary and final legislative review of administrative rules. Florence A. Heffron, *Legislative Review of Administrative Rules Under the Idaho Administrative Procedure Act*, 30 IDAHO L. REV. 369, 372 (1994). At least five states have found similar provisions allowing legislative vetoes of administrative rules to be unconstitutional under the Separation of Powers and Presentment Clauses of the constitution. *Id.* at 374–75. Idaho's constitution contains a separation of powers clause, IDAHO CONST. art. II, and a presentment clause, *id.* art. IV, § 10, arguably providing that administrative agencies created by constitutional powers are beyond the reach of legislative veto. Heffron, *supra*, at 373–74 (1994). The Idaho Supreme Court has upheld, however, legislative oversight and veto power over agencies created or empowered by the legislature. *Mead v. Arnell*, 791 P.2d 410, 420 (Idaho 1990). Legislative veto is limited to only those regulations that do not conform to legislative intent. *Id.* at 420. *Mead* leaves some room for questioning whether legislative oversight and veto of administrative actions is constitutional. A previous Idaho Supreme Court case ruled that from a procedural standpoint, determination of whether proper statutory interpretation was made in creating rules is a judicial, and not legislative, function. *Holly Care Ctr. v. Idaho*, 714 P.2d 45, 51 (Idaho 1986); see also Heffron, *supra*, at 377 (interpreting that the court in *Holly Care Center*, although deeming the legislature's expression of an opinion as to legislative intent to be constitutional, established that interpretation of legislative intent was fundamentally a judicial power). *Holly Care Center* creates even more speculation over how the legislature exercises oversight over administrative rules and procedure. See also *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954–59 (1983) (holding unconstitutional a one-house legislative veto of an Immigration & Naturalization Service decision to suspend a deportation order).

¹²² IDAHO CODE ANN. § 42-1505 (2005).

rights under state law. These states include, among others, Nevada, Alaska, and Arizona, among others. From the perspective of the federal agency, these states represent real opportunities to use state law to achieve federal purposes. Both of the state programs described below represent significant progress in the last twenty years of instream flow protection. In addition to these programs, federal agencies can hold rights to varying degrees under similar provisions in Wyoming, Montana, and Nebraska.¹²³

a. Nevada

Nevada does not explicitly allow instream uses of water within its statutory scheme.¹²⁴ Despite this, in 1988 the Nevada Supreme Court suggested that water rights may be perfected without actual diversion for certain beneficial uses.¹²⁵ In *State v. Morros*,¹²⁶ the Nevada Supreme Court heard a challenge to non-diversionary water rights granted by the Nevada state engineer to BLM for recreation, wildlife, and livestock watering purposes.¹²⁷ While the court acknowledged that applications for permits to appropriate water are supposed to include a description of the diversion point and necessary works,¹²⁸ the court held that appropriations were limited by their beneficial use and not by an absolute diversion requirement.¹²⁹ Potential non-diversionary beneficial uses include recreational purposes¹³⁰ as well as wildlife purposes that include establishing and maintaining wetlands, fisheries, and other wildlife habitats.¹³¹ Nevada law, however, remains somewhat unclear since the water

¹²³ ANNEAR, ET. AL, *supra* note 5, at 72–74.

¹²⁴ See Ross E. de Lipkau & Marshall Hill Cassas, *Nevada*, in 6 WATERS AND WATER RIGHTS 789, 794 (Robert E. Beck ed., 1991 ed. 2005 repl. vol.) (stating that, while Nevada has not specifically recognized instream flow as a beneficial use, such uses have been recognized by the state engineer as beneficial).

¹²⁵ *State v. Morros*, 766 P.2d 263, 266 (Nev. 1988). See generally Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. DENV. WATER L. REV. 148, 177–78 (2001) (noting that Nevada's recent departure from strict enforcement of beneficial use precepts requiring diversion and forecasting continued change).

¹²⁶ 766 P.2d 263 (Nev. 1988).

¹²⁷ *Id.* Since *Morros*, Nevada has codified some laws governing non-diversionary water rights. See, e.g., NEV. REV. STAT. § 534.090(4) (2005) (describing the right to use underground water, subject to abandonment). See generally Harrison, *supra* note 125, at 177–78 (noting Nevada's recent departure from strict enforcement of beneficial use precepts requiring diversion and forecasting continued change).

¹²⁸ See NEV. REV. STAT. § 533.490 (2005) (declaring watering of livestock a beneficial use and clarifying what information is required to apply for a permit); *id.* § 533.335(5)–(6); *Morros*, 766 P.2d at 266 (specifying what information must be included in water appropriation permit applications, including a description of the place of diversion and a description of the proposed works).

¹²⁹ *Morros*, 766 P.2d at 266. In reaching its conclusion, the court relied upon NEV. REV. STAT. § 533.035 which reads “beneficial use shall be the basis, the measure and the limit of the right to the use of water.” NEV. REV. STAT. § 533.035 (2005).

¹³⁰ NEV. REV. STAT. § 533.030(2) (2005) (Implying that a physical diversion is not required for appropriation in “Notes to Decisions”).

¹³¹ *Id.* § 533.023. Before obtaining a right to water from a spring or water which has seeped to

code still requires a description of the diversion point and necessary works in any application to appropriate water.¹³²

b. Alaska

In 1980, the Alaska legislature enacted legislation granting any person, defined to include the federal government, the ability to secure an instream flow right for “(1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and (4) sanitary and water quality purposes.”¹³³ Water rights secured under Alaska’s statute must be in the public interest as determined by the Alaska Department of Natural Resources.¹³⁴ In addition, water rights granted under these provisions are reviewed every ten years to determine if they still meet the standard of need that must exist for the reservation.¹³⁵ Despite the promise of the Alaska statute for individuals and federal agencies, the legislature built in significant limitations. First, the statute and implementing regulations require layers of administrative review, including a ten year review of all established instream flow rights. Interestingly, the intensity of this review exceeds the review required for the standard consumptive right under Alaska law.¹³⁶ Second, the administrative regulations give the Department of Natural Resources the discretion, during a ten year review process, to revoke the instream flow right.¹³⁷

3. Priority Dates for State Instream Flow Rights Versus Federal Reserved Rights

Even when a state’s instream flow program allows the federal government to hold an instream flow right, other structural limitations arise. One of the most significant limitations involves the priority dates for instream flow rights.¹³⁸ In the western prior appropriation system, the mantra remains first in time, first in right. The first water user to put water to a defined beneficial use takes her water in its full quantity before later users have their water rights satisfied. Because instream flow is a newly defined use under the various state water codes, instream rights are invariably late in the priority system.¹³⁹ The details of priority dates point to

the surface, an applicant for a diversionary permit must ensure that wildlife customarily using the water will still be able to access it. *Id.* § 533.367. The state engineer can waive this requirement for domestic uses. *Id.*

¹³² *Id.* § 533.335(5)–(6).

¹³³ ALASKA STAT. § 46.15.145(a) (2005); *see also id.* § 46.15.260(7) (allowing federal government to hold an instream flow right).

¹³⁴ *Id.* § 46.15.145(c).

¹³⁵ *Id.* § 46.15.145(f).

¹³⁶ ALASKA ADMIN. CODE tit. XI, §§ 93.040, 93.142 (2006); Sterne, *supra* note 86, at 228–29.

¹³⁷ ALASKA ADMIN. CODE tit. XI, § 93.147(e).

¹³⁸ Sterne, *supra* note 86, at 215, 218; CONGRESSIONAL BUDGET OFFICE, 109TH CONG., HOW FEDERAL POLICIES AFFECT THE ALLOCATION OF WATER 10 fn.33 (2006).

¹³⁹ *See* Sterne, *supra* note 86, at 215 (showing that none of the instream rights established by

one of the fundamental dilemmas for a federal agency when evaluating options under state law.¹⁴⁰ For a federal land manager, the choice to pursue a state-based right rather than assert a federal reserved right highlights the difficulty of the priority dates for new instream flow rights. Under the federal reserved water rights doctrine, federal reservations are entitled to the minimum amount of unappropriated water available at the time of the reservation to meet the primary purposes of the withdrawal.¹⁴¹ Because the amount of available unappropriated water in various basins in the West is severely limited, a 2006 priority date for a new state instream flow right is less likely to produce actual “wet water” than a water right with a priority date based on the date of reservation. Unless federal agencies seek state instream flow rights as soon as the reservation is made, the state-based right will always be junior to the federal reserved rights claim. Under these circumstances, a federal reserved water right with an earlier priority date will result in more consistent availability of “wet water” for the federal lands. Moreover, some western states have prioritized certain future uses over instream flow rights.¹⁴² Some commentators have argued that federal agencies need not be concerned with who owns the water, but with how the water is used.¹⁴³ In terms of enforcement, however, the question of ownership becomes important. The ability to enforce a particular flow, particularly in a dry year, impacts whether a federal agency is able to carry out its federal purposes.

For federal lands that sit high in the headwaters of various basins, a junior priority date may be acceptable. With no senior users above the federal land, a junior right keeps water in the system as well as a senior right. In contrast, for federal lands at the downstream end with many senior users above, accepting a junior priority date often means significantly less water. The national wildlife refuge system, in particular, faces this dilemma because much of the land they manage is in the lower portions of a watershed. In fact, FWS manages a number of refuges in the West that sit downstream from massive irrigation and reclamation projects, such as the Klamath Basin refuges in Oregon, Stillwater in Nevada, Deer Flat in Idaho, and Imperial and Havasu in Arizona.

state agencies or legislatures in the Northwest carry priority date earlier than 1925 and the vast majority post date 1955).

¹⁴⁰ High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235, 1244–45 (D. Colo. 2006). See generally Roderick E. Walston, *The Reserved Rights Doctrine: Case Study Involving Black Canyon of the Gunnison National Park*, 133 J. CONTEMP. WATER RESOURCES & EDUC. 29, (2006), available at <http://www.ucowr.siu.edu/updates/133/6.pdf> (describing the origins and nature of the reserved rights doctrine).

¹⁴¹ United States v. New Mexico, 438 U.S. 696, 698–700 (1978); Cappaert v. United States, 426 U.S. 128, 138–40 (1976), modified, 455 F. Supp. 81 (D. Nev. 1978); Arizona v. California, 373 U.S. 546, 595–601 (1963), modified, 376 U.S. 340 (1964), and modified, 383 U.S. 268 (1966), and modified, 466 U.S. 144 (1984), and modified, 503 U.S. 392 (2000), and modified, 531 U.S. 1 (2000).

¹⁴² See OR. REV. STAT. § 537.352 (2005) (future municipal and hydropower uses take precedence over instream rights); see also MONT. CODE ANN. § 85-2-316 (2005); Sterne, *supra* note 86, at 215–16.

¹⁴³ Freyfogle, *supra* note 52, at 832, 834.

4. Ownership Enforcement of an Instream Flow Right

For the federal land manager questions of ownership and enforcement present some of the toughest dilemmas. These structural constructs raise two fundamental issues. The first issue concerns whether a federal agency must hold or own the water right in order to carry out the federal purpose. The second issue involves whether a federal agency can enforce a state-based water right if it does not own or hold that right.¹⁴⁴

In Oregon, the Water Resources Department is responsible for holding and enforcing all instream flow rights.¹⁴⁵ Washington, Idaho, and Colorado all place similar requirements on the state ownership of instream flow rights.¹⁴⁶ In Oregon, although a federal agency can recommend an instream flow right to protect federal lands, if the state grants the right, it is held and enforced by the state agency.¹⁴⁷ Because the federal government would have no ownership or permittee rights, it is impossible for the agency to seek enforcement of the right unless an arrangement was made between the state and federal government. Left unable to enforce an instream flow, the federal agency risks exposure to claims of failing to carry out its duties to protect or achieve the particular purpose of the reservation. Federal ownership of the water right,¹⁴⁸ or at least federal authority over the interest in a water right, allows the federal agency to enforce the instream flow right whether through administrative or judicial proceedings.¹⁴⁹

The relationship between ownership, control, and enforcement is central to the recent decision on the water rights for Black Canyon of the Gunnison National Park where the district court viewed the ability to

¹⁴⁴ See generally Witte, *supra* note 18, at 5–13 (raising questions about the relationship of state held water rights and federal law).

¹⁴⁵ OR. REV. STAT. § 536.025(1) (2005).

¹⁴⁶ See WASH. REV. CODE § 90.22.010 (2006) (giving the department of ecology the power to establish minimum water flows when it is in the public interest to do so); IDAHO CODE ANN. § 42-1501 (2003) (requiring that minimum stream flows be established to protect wildlife, recreation, aesthetic, and transportation values when it is in the public interest to do so); COLO. REV. STAT. § 37-92-102(3) (2005) (vesting in CWCB the exclusive authority to appropriate “such waters of natural streams and lakes as the board determines may be required for minimal stream flows”).

¹⁴⁷ See Sterne, *supra* note 86, at 217.

¹⁴⁸ The nature of property rights in water is not yet settled. Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 4–8 (2002). Landowners claim that their rights under water allocation and supply contracts are absolute property rights, and that governmental interference with those rights in the name of conservation is a taking which must be compensated. *Id.* However, the government’s position is that water rights are usufructory, subject to limitation by a variety of factors, and not property in the context of the takings clause of the Fifth Amendment. *Id.*; see also *Tulare Lake Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001) (rejecting assertion made by the United States that the Endangered Species Act’s restriction of contractual water rights is not a compensable taking of property). The foremost limitation on property rights in water is the public trust doctrine, which designates water as a public resource to be used to benefit the public interest. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 475 (1989); see also Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 739 (1986).

¹⁴⁹ Sterne, *supra* note 86, at 220.

enforce a water right to preserve the canyon as central to the duty of NPS to manage that resource. The state of Colorado and the U.S. Department of the Interior entered into a settlement agreement regarding instream flows for the Black Canyon of the Gunnison National Park.¹⁵⁰ In 1933, President Hoover set aside and reserved Black Canyon near Montrose, Colorado. The purpose of the reservation was to preserve and protect the unique scenic, scientific, and educational features associated with the canyon.¹⁵¹ To carry out the federal purpose associated with this national park unit, NPS determined that instream flows were necessary, including peak flows, to maintain the hydrologic processes that formed the canyon and to preserve the canyon's scenic value.¹⁵² Colorado law recognizes instream flow as a beneficial use but provides that only the CWCB can hold and enforce instream flow rights.¹⁵³ In 2001, the United States agreed to amend its claim for a federal reserved water right then pending in Water Division 4 in

¹⁵⁰ Press Release, U.S. Dep't of the Interior, Interior Department Announces Major Agreement for Gunnison River Water in Colorado (Apr. 2, 2003), <http://www.doi.gov/news/030402.htm> (last visited Nov. 12, 2006); *see also* Gail A. Norton, Guest Commentary, *A New Path for Western Water Issues*, DENVER POST, Apr. 20, 2003, at E4 (describing the agreement between the state of Colorado and the Interior Department regarding instream water flows in Black Canyon of the Gunnison National Park); *cf.* Ted Williams, *Water Wrongs: The Federal Government is Giving Away Our Western Rivers*, FLY ROD & REEL, Feb. 2003, at 14 (describing the political history of the settlement agreement and its negative effect on sportsmen).

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WHEREAS it appears that the public interest would be promoted by including the lands hereinafter described within a national monument for the preservation of the spectacular gorges and additional features of scenic, scientific, and educational interest; Now, THEREFORE, I, HERBERT HOOVER, President of the United States of America, by virtue of the power in me vested by section 2 of the act of Congress entitled "AN ACT For the preservation of American antiquities," approved June 8, 1906 (34 Stat. 225), do proclaim and establish the Black Canyon of the Gunnison National Monument and that, subject to all valid existing rights, the following-described lands in Colorado be, and the same are hereby, included within the said national monument: . . . Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof. The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this monument as provided in the act of Congress entitled "AN ACT To establish a National Park Service, and for other purposes," approved August 25, 1916 (39 Stat. 535-536), and acts additional thereto or amendatory thereof. IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed. DONE at the City of Washington this 2d day of March, in the year of our Lord nineteen hundred and thirty-three, and of the Independence of the United States of America the one hundred and fifty-seventh. HERBERT HOOVER.

Proclamation No. 2033, *supra* note 78 (establishing Black Canyon of the Gunnison as a National Monument); Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, 16 U.S.C. § 410fff (2000) (re-designating Black Canyon of the Gunnison as a National Park).

¹⁵² *See generally* United States v. Colo. State Eng'r, 101 P.3d 1072, 1074-78 (Colo. 2004) (upholding the water court stay order delaying quantification of the United States' water right in the Black Canyon).

¹⁵³ COLO. REV. STAT. § 37-83-105 (2005).

exchange for a state-based instream flow right to be held by CWCB.¹⁵⁴ The claimed federal reserved right carried a priority date of 1933. The state instream flow right carries a priority date of 2003.¹⁵⁵

In addition to the issues regarding priority dates, the settlement agreement also raised questions about how the state instream right would be enforced.¹⁵⁶ In response to concerns that NPS was giving up its ability to enforce the instream flow right, the parties entered into an enforcement agreement that allowed the federal agency, here NPS, to enforce the instream right in a court of competent jurisdiction in the event that the CWCB did not. While this enforcement agreement represented a step toward solving one of the primary structural problems for federal agencies under state instream flow law, it raised several unresolved questions, including whether the state administrative agency has the authority under existing statutes to allow the federal government to enforce the instream flow right. The 2003 settlement agreement stated that NPS "shall have authority to enforce and protect the instream flows *consistent with state law* should the CWCB fail to do so."¹⁵⁷ Under Colorado's existing statute the legislature has made clear that only the state agency can hold and enforce water rights.¹⁵⁸ Thus, the enforcement agreement may be inconsistent with state law, specifically the delegation of authority by the state legislature to the state administrative agency.

Moreover, in states where only state administrative bodies can hold and enforce water rights, like Colorado, statutes and rules frequently give considerable discretion to the state water agency to limit the exercise of instream flow rights under certain circumstances.¹⁵⁹ In most states, the state agencies that manage instream flow may chose, in the exercise of their

¹⁵⁴ *In re The Application for Water Rights of United States*, 101 P.3d 1072, 1076 (Colo. 2004); Agreement, Black Canyon of the Gunnison National Park 1–2 (Apr. 2003), available at <http://ugrwc.org/NewFiles/bc1603.jpg> [hereinafter April 2003 Settlement Agreement]. The decision of the Secretary to exchange a federal reserved water right for a state-held instream right was challenged in the U.S. District Court in Colorado. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235 (D. Colo. 2006) (holding that the settlement was invalid because it disposed of a federal property interest, among other things).

¹⁵⁵ April 2003 Settlement Agreement, *supra* note 154, at 1; see also Proclamation No. 2033, *supra*, note 78. When the United States significantly decreased the amount of water it claimed for Black Canyon, several environmental groups sued the United States in federal court asserting that its decision violated the federal Administrative Procedure Act. The water court stayed its proceeding until resolution of the federal case. *High Country Citizens' Alliance v. Norton*, No. 1:03cv1712 (D. Colo. Sept. 5, 2003).

¹⁵⁶ April 2003 Settlement Agreement, *supra* note 154, at 2.

¹⁵⁷ *Id.* (emphasis added). The U.S. District Court in Colorado recently found the settlement agreement invalid. *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1253.

¹⁵⁸ COLO. REV. STAT. § 37-92-102(3) (2005).

¹⁵⁹ OR. REV. STAT. §§ 536.700–536.780, 537.354 (2005) (instream flow allocations are subject to emergency water shortage measures giving preference of use of rights for human consumption and stock watering). *But cf.* WASH. REV. CODE § 43.83B.410(1)(a)(iii) (2006) (while emergency withdrawals of surface and ground waters are allowed during drought emergencies, those withdrawals may not reduce flows or levels below essential minimums necessary to assure the maintenance of fisheries requirements, and to protect federal and state interests including "power generation, navigation and existing water rights").

discretion, to waive an instream flow right in a particular year. In some instances, the state agency can subordinate or extinguish state-based rights.¹⁶⁰ Thus, without an enforcement agreement or similar mechanism, state law may allow the state agency who holds the right, not the federal agency with the congressional mandate to protect the land, to make the final decision to enforce the instream flow right. Under this scenario, the federal agency may be exposed to claims of failure to meet its statutory obligations to carry out federal purposes similar to the claims raised by the plaintiffs in the Black Canyon litigation. In the absence of some kind of enforcement mechanism the federal agency may be unable to ensure that water reaches federal land when necessary to achieve legitimate federal purposes.

The 2003 settlement agreement and accompanying enforcement agreement for the water rights at Black Canyon were challenged in federal court. Ultimately, the district court invalidated the settlement agreement finding that the Department of the Interior violated the National Environmental Policy Act, improperly delegated authority over park resources to the state, illegally relinquished a United States property interest and acted in an arbitrary and capricious manner in entering into the settlement agreement.¹⁶¹ In reaching his decision, Judge Brimmer was particularly concerned with the very structural problems identified in this Article, including the different priority dates and the availability of enforcement.¹⁶² Moreover, the court interprets NPS's obligation to carry out the congressionally delineated purposes for Black Canyon very seriously and finds that the agency failed to uphold that obligation in the context of this settlement agreement.¹⁶³ The court recognizes that an unquantified federal reserved water right constitutes a property interest of the United States that vested when the reservation was made.¹⁶⁴ The district court's decision indicates the lines that federal agencies must be within when confronted with the structural limitations of state instream flow provisions.

Although federal agencies cannot hold instream rights in some states, other states have made significant advances. In Arizona, Alaska, Nevada, and Wyoming, to a limited degree, the United States can hold state-based instream flow rights. In August 2005, the Arizona Supreme Court upheld the decision of the Arizona Water Resources Department to permit an instream flow right to FS for Cherry Creek in Tonto National Forest.¹⁶⁵ Another promising example involves the Clarks Fork River in Wyoming, designated as a Wild and Scenic River in 1990.¹⁶⁶ Here, the state allowed FS to hold a

¹⁶⁰ Witte, *supra* note 18, at 14; *see also* ANNEAR ET AL., *supra* note 5, at 97 (citing South Carolina's Drought Response Act of 1985, which allows the state agency to specify non-essential water uses and mandate their curtailment in drought management areas).

¹⁶¹ *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1242–49 (D. Colo. 2006).

¹⁶² *Id.* at 1252–53.

¹⁶³ *Id.* at 1246.

¹⁶⁴ *Id.* at 1239–40; *see also* Robert H. Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. REV. 387, 395–99 (articulating a duty to assert and pursue federal reserved water rights).

¹⁶⁵ *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 118 P.3d 1110, 1111 (Ariz. Ct. App. 2005).

¹⁶⁶ U.S. Nat'l Park Serv., Wild & Scenic Rivers Council, Clarks Fork of the Yellowstone River

uniquely created right called a “wild and scenic water right” under state law to avoid the use of federal mechanisms, such as the reserved water rights doctrine. The right was designed to protect the water associated with the Wild and Scenic designation.¹⁶⁷ This “wild and scenic water right” differed in several significant ways from a typical state instream flow right. Most notably, the right was not restricted to a minimum, or base flow, for fish. Rather, the state permitted a dynamic hydrograph that approximated the timing and quantity of the natural hydrograph.¹⁶⁸ This approach maintains the form and function of the stream channel and floodplain. Thus, it preserves the wild and scenic character of the river.

In both Alaska and Nevada, federal agencies hold state established instream flow rights as any other water user does. In May of 1989, the BLM secured an instream flow right in Alaska for Beaver Creek, a National Wild River in the White Mountains National Recreation Area.¹⁶⁹ FWS holds water rights to maintain spring discharge levels under Nevada’s water code.¹⁷⁰ Despite these promising examples, significant challenges lie ahead. While the establishment of these rights under state law represents an important step forward, the real test will be how the state responds when the federal agency seeks to enforce a state instream flow right.

C. Administrative Limitations

In some states, the water code provides definitional and structural mechanisms to protect federal interests, but questions arise in the administration of the instream flow program. Often the state lacks the funding, staff, or political will to establish and enforce instream flow rights.¹⁷¹ For example, Alaska’s state water code defines instream flow very broadly and allows for any person, including the federal government, to hold an instream flow right.¹⁷² Rather than assert federal reserved water rights,

Wyoming, www.nps.gov/rivers/wsr-yellowstone.html (last visited Nov. 12, 2006).

¹⁶⁷ B.L. LAMB ET AL., PROCEEDINGS OF THE INTERNATIONAL IFIM USERS’ WORKSHOP, JUNE 1–5 (U.S. Geological Survey & Co. State U., CD-ROM, var. p, Proceedings No. 21197, 2003).

¹⁶⁸ *Id.*

¹⁶⁹ Alaska Dep’t of Natural Res., Land Admin. Sys., Alaska DNR Case Abstract, www.dnr.state.ak.us/las/ (select “case abstract” and file type “LAS” then search for file number “11997”) (last visited Nov. 11, 2006); see Alaska Dep’t of Natural Res., Water Rights & Reservations of Water, http://www.dnr.state.ak.us/mlw/mapguide/water/wr_start_tok.cfm (select search by “Customer Last Name or Business Name” and enter “USDI Bureau Land Management”) (last visited Nov. 12, 2006) [hereinafter Rights & Reservations] (showing water right application status of applications made by BLM with links to the case abstract of each application).

¹⁷⁰ See State of Nev., Department of Conservation and Natural Resources, Division of Water Res., Water Rights Database, <http://water.nv.gov/Water%20Rights/PermitDB/> (A “permit search” for “USFWS” under “Owner Name” yields well over a dozen certificated and vested water rights).

¹⁷¹ Sterne, *supra* note 86, at 204–05, 216, 218–19; Neuman, *supra* note 63, at 989–90.

¹⁷² See Water Use Act, ALASKA STAT. § 46.15.145(a) (2004) (allowing the state, an agency or political subdivision of the state, an agency of the United States, or a person to apply to reserve sufficient water to maintain a specified instream flow or level of water at a specified point on a

FWS took advantage of Alaska's instream flow statute. FWS filed nearly 200 instream flow claims, primarily for lakes in the Arctic, Yukon Flats, and Kodiak national wildlife refuges, to protect water resources as required by the Alaska National Interest Lands Conservation Act.¹⁷³ Despite these numerous filings for state instream flow rights, the state administrative agency responsible for processing permits has acted on only a small number of the total number of applications and only one of the federal government's applications.¹⁷⁴ The state has granted twenty-four instream flow rights, to the Alaska Department of Fish and Game.¹⁷⁵ The state of Alaska has granted one instream flow right to a federal agency—BLM for Beaver Creek, discussed earlier.¹⁷⁶ The state has not yet taken final action on other pending

stream or body of water, or in a specified part of a stream). Despite the state of Alaska encouraging federal agencies to seek water rights under state law rather than through the assertion of federal reserved water rights, the state, in its challenge to the subsistence hunting regulations, argues that the United States has not established its entitlement to reserved rights because it has not sought to quantify the rights. Agencies are put in an extremely difficult position when a state encourages the assertion of state-based water rights, fails to act on any of the applications filed by the federal agencies, and then claims the United States has no reserved rights for lack of assertion and quantification. *Cf. id.* (stating that "[t]he state, an agency or a political subdivision of the state, an agency of the United States or a person may apply to the commissioner to reserve sufficient water to maintain a specified instream flow . . . for (1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes"). *But cf. id.* § 46.15.169 (stating that the state does not commit to any specific federal reserved water rights by allowing federal agencies to apply for water rights). *See generally* Alaska Dep't of Nat. Res., Fact Sheet: Federal Reserved Water Rights (Jan. 2000), http://www.dnr.state.ak.us/mlw/factsht/wtr_fs/fed_rsv.pdf (last visited Nov. 12, 2006) (defining federal reserved water rights and determining how much land in Alaska may have those rights).

¹⁷³ Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2000). *See generally* U.S. Fish & Wildlife Serv., Alaska, Water Resources, <http://alaska.fws.gov/water/rights.htm> (last visited Sept. 6, 2006) (stating service policy and current water right applications); U.S. Fish & Wildlife Serv., Alaska, Water Resources: Arctic National Wildlife Refuge, http://alaska.fws.gov/water/arctic_water_rights.htm (last visited Sept. 6, 2006) (describing water rights applications at Arctic National Wildlife Refuge); U.S. Fish & Wildlife Serv., Alaska, Water Resources: Yukon Flats National Wildlife Refuge, http://alaska.fws.gov/water/ykflats_water_rights.htm (last visited Sept. 6, 2006) [hereinafter Yukon Flats] (describing water rights applications at Yukon Flats National Wildlife Refuge); U.S. Fish & Wildlife Serv., Alaska, Water Resources: Kodiak National Wildlife Refuge, http://alaska.fws.gov/water/kodiak_water_rights.htm (last visited Sept. 6, 2006) (describing water rights applications at Kodiak National Wildlife Refuge); Rights & Reservations, *supra* note 169 (showing water right application status of applications made by the FWS).

¹⁷⁴ *See generally* Alaska Dep't of Natural Res., Land Admin. Sys., <http://www.dnr.state.ak.us/las/lasmenu.cfm> (under "Display Case File Information" and "File Type" select "LAS"; then under "File Number" type in "11997"; then click "Submit") (last visited Nov. 12, 2006) [hereinafter Beaver Creek] (the Alaska Department of Natural Resources case abstract on Beaver Creek); Rights & Reservations, *supra* note 169 (select "Customer Last Name or Business Name"; then enter "USDI Bureau Land Management"; then click "Start Search") (showing water right application status of all instream flow applications made by BLM with links to the case abstracts of each application).

¹⁷⁵ *See* Rights & Reservations, *supra* note 169 (select "Customer Last Name or Business Name"; then enter "DFG"; then click "Start Search") (showing water right application status of applications made by the Alaska Department of Fish and Game). *See generally* Yukon Flats, *supra* note 173 (describing water rights applications at Yukon Flats National Wildlife Refuge).

¹⁷⁶ *See* Beaver Creek, *supra* note 174 (the Alaska Department of Natural Resources case

applications from federal agencies, including the nearly 200 filed by FWS.¹⁷⁷ Many factors likely contribute to the delay, including lack of resources, lengthy administrative process, and a lack of urgency since these basins are not over-appropriated. Similar administrative challenges exist in other states. As of 2001, FS had filed applications for water rights based on state law in Colorado, Idaho, New Mexico, Nevada, and Arizona. With the exception of a recent long-fought victory in Arizona, the states have not granted FS those rights.¹⁷⁸

Regardless of the rationale for the delay, this administrative hesitancy leaves the federal agency without an adequate mechanism under state law to protect federal interests. State law may *allow* for the federal government to hold rights, but also may *allow* the state agency to avoid granting federal rights by leaving the decision to the discretion of the state engineer or other administrative decision maker. The state engineer or the director of water resources may be unwilling to exercise the available authorities in a manner that protects competing and controversial uses of water by federal agencies.¹⁷⁹ Until more is known about how these states will implement their instream flow programs, federal agencies should be cautious about relying solely on state law mechanisms.

Finally, once a federal agency establishes a water right under state law, the question becomes whether states have the capacity to enforce these state-based rights. For example, at Quivira National Wildlife Refuge (NWR) in Kansas, groundwater pumping affected established surface waters on the refuge.¹⁸⁰ FWS holds the water rights under Kansas state law.¹⁸¹ In response to the impact of groundwater on surface rights, the state initiated a series of negotiations with water users in the basin. Ultimately, the state designated an intensive groundwater user control area in a nearby basin. As a result of these state actions, the parties reached a series of voluntary agreements to protect the Quivira NWR water rights. FWS is waiting to see whether this voluntary program will protect FWS's senior state-based surface water right. If the voluntary program fails, the state will be in a position to enforce a federally-held, state-based right against state water users. In the end, as this example indicates, federal agencies must consider what

abstract on Beaver Creek); *see also* Rights & Reservations, *supra* note 169 (select "Customer Last Name or Business Name"; then enter "USDI Bureau Land Management"; then click "Start Search") (showing water right application status of applications made by the BLM with links to the case abstracts of each application).

¹⁷⁷ Rights & Reservations, *supra* note 169 (listing all pending and approved applications).

¹⁷⁸ Witte, *supra* note 18, at 2 (noting that, besides permits issued by Arizona, several states' applications have been "aggressively resisted as inconsistent with state law").

¹⁷⁹ *Cf. Cappaert v. United States*, 426 U.S. 128, 128 (1976), *modified*, 455 F. Supp. 81 (D. Nev. 1978) (under Nevada law the state engineer could have exercised his authority under the public interest standard in Nevada water law to enjoin the harmful groundwater pumping but instead overruled the federal agency's protest).

¹⁸⁰ John C. Peck, *Property Rights in Groundwater—Some Lessons from the Kansas Experience*, 12 KAN. J.L. & PUB. POL'Y 493, 499–501 (2002–2003).

¹⁸¹ *Id.* at 500.

remedies and forums are available if the state system fails to protect an established right on federal land.¹⁸²

D. Political Vulnerabilities

Water, especially in the West, involves politics. Conflict persists and with diminishing freshwater supplies and increasing demand for water, conflict is likely to continue and intensify. Western states have taken significant steps toward protecting instream flow rights and yet, despite increasing acceptance, meaningful instream flow protection remains controversial and limited throughout the West.¹⁸³ Western states face controversy and criticism when internal state parties seek instream flow protection. The level of concern only increases when a federal agency seeks instream rights for environmental purposes that differ from the state's traditional notions of beneficial use. Even in a state where definitionally, structurally, and administratively the federal government can hold and enforce an instream flow right, in reality the federal government's state-based instream flow rights face political vulnerabilities. These vulnerabilities fall into three main categories including 1) the future legislative and administrative prerogatives within the state, 2) chronic underfunding of state instream flow programs, and 3) the impact of an elected judiciary on the enforcement of federally-held state instream flow rights.¹⁸⁴

State instream flow programs fall within the state's legislative and administrative control and responsibility.¹⁸⁵ As a result, the state legislatures

¹⁸² Lois G. Witte, Still No Water for the Woods: ALI-ABA Federal Lands Law Conference (Oct. 19, 2001), http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf (last visited Nov. 12, 2006); ANNEAR ET AL., *supra* note 5, at 70–71.

¹⁸³ Peck, *supra* note 180, at 499–501; Sterne, *supra* note 86, at 222–23 (discussing opposition and concern about instream flow water rights).

¹⁸⁴ Because there are so few federally held state instream flow rights the analysis of these vulnerabilities looks at cases that do not involve federal rights, but do reveal the potential for political limitations.

¹⁸⁵ States acquire control over water resources upon entering the Union. *Shively v. Bowlby*, 152 U.S. 1, 49–50 (1894). Accordingly, states are generally free to choose how to regulate their water resources, but must hold state waters in trust for the people of the state. *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892), *aff'd*, 154 U.S. 225 (Ill. 1894). Most western states explicitly recognize the public interest in state waters in constitutional and statutory provisions. ALA. CONST. art. VIII, § 13; ALASKA STAT. § 46.15.030 (2004); ARIZ. REV. STAT. ANN. § 45-141 (2002); COLO. CONST. art. XVI, § 5; CAL. CONST. art. X, § 5; NEV. REV. STAT. § 533.025 (2005); N.M. STAT. § 72-1-1 (1978); N.D. CONST. art. XI, § 3; N.D. CENT. CODE § 61-01-01 (2005); OR. CONST. art. XI-D, § 1; OR. REV. STAT. § 537.110 (2005); S.D. CODIFIED LAWS § 46-1-1 (2004); WASH. CONST. art. XXI, § 1; WASH. REV. CODE § 90.03.010 (2006). While nearly all states recognize the public interest in ownership of water, few have explicitly applied the public trust doctrine to protect water resources. *See* ARIZ. REV. STAT. ANN. § 45-263 (2002) (denying the public trust doctrine's application to water rights). North Dakota and Nevada statutorily apply the public trust doctrine to water appropriation. N.D. CENT. CODE § 61-01-01 (2005); NEV. REV. STAT. § 533.030 (2005); *see also* *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1224 (9th Cir. 1989) (requiring a determination of harm to the public interest before a water right is granted). Similarly, the California Supreme Court ruled in the seminal case for the application of the public trust doctrine to water

and administrative bodies are free to alter state law, make decisions about enforcement, and prioritize particular uses during times of emergency or drought.¹⁸⁶ State administrative agencies often view their jobs as the protection of senior state-based diversionary rights, not instream flow rights. In some instances, assertions of instream flow rights resulted in administrative and legislative attempts to change state water law to limit instream flow protections.

In Colorado, CWCB, the state entity that holds instream rights under Colorado law, administratively waived enforcement of an established instream flow right.¹⁸⁷ The Colorado Supreme Court held that CWCB lacked authority to waive established instream flow rights.¹⁸⁸ In response, the Colorado state legislature amended the instream flow statute to give CWCB that discretion.¹⁸⁹ In addition to legislative changes in reaction to instream flow rights, the water code frequently gives the state agency responsible for administering the instream flow program considerable discretion.¹⁹⁰ Through the exercise of this discretion agencies can forego enforcement of an instream right in dry years or enforce based on administrative judgments about whether the right is necessary under the circumstances.¹⁹¹ The Colorado legislature responded to a judicial decision to enforce an established instream flow right by changing CWCB's authority to forego enforcement.¹⁹² Though this situation did not involve federal rights, it illustrates the problems a federal agency faces when seeking to secure instream flow under state law.

appropriation, requiring application of the public trust doctrine before further appropriation of water from Mono Lake. *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 732 (Cal. 1983).

¹⁸⁶ Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 889–91 (1998).

¹⁸⁷ *Aspen Wilderness Workshop v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1255 (Colo. 1995); see also Jane E. Lein, *Protection of Instream Flows: the Aspen Wilderness Workshop Decision*, 24 COLO. LAW. 2577, 2577–79 (Nov. 1995).

¹⁸⁸ *Aspen Wilderness Workshop*, 901 P.2d at 1253.

¹⁸⁹ COLO. REV. STAT. § 37-92-102(4)(a) (2005). For a full discussion of the litigation that led to this legislative change, see Gillilan, *supra* note 12, at 569.

¹⁹⁰ Sterne, *supra* note 86, at 219; see ALASKA STAT. § 46.15.020(a) (2004) (stating that the commissioner must exercise all powers and do all acts necessary to carry out the provisions and objectives of the chapter); ARIZ. REV. STAT. § 45-103(B) (2003) (stating that the director has general control over appropriation and distribution over water except as reserved to special officers); COLO. REV. STAT. § 37-80-102(1)(g), (k) (2005) (stating that the state engineer has the duty of rule-making for the division of water resources and authority to make and enforce such rules as necessary or desirable to perform the engineer's duties); IDAHO CODE ANN. § 42-1401(B)(1) (2005) (stating that the director must make recommendations on the extent of beneficial use and administration of each water right); NEV. REV. STAT. § 533.370 (2005) (giving the state engineer approval authority of applications based on the engineer's determination of whether delivery efficiency will be lessened and whether the applicant has proven his application in a way satisfactory to the engineer); OR. REV. STAT. § 537.110 (2005) (stating that all water within the state from all sources of supply belongs to the public); WASH. REV. CODE § 43.21A.064(4) (2006) (stating that the director must determine what waters are being utilized or may be utilized for beneficial purposes).

¹⁹¹ Sterne, *supra* note 86, at 219.

¹⁹² Gillilan, *supra* note 12, at 567–68.

In other states, there have been attempts to retroactively change state water law to address concerns of in-state water users. Changes to state law result in negative impacts to state-based rights held by the federal government. Traditionally, North Dakota determined priority based on when the water was actually diverted and put to beneficial use.¹⁹³ In 2001, the North Dakota legislature proposed a change to the requirements for establishing water rights so that the initial planning stages of a diversion, not the diversion itself, would establish the priority date.¹⁹⁴

In the context of a judicial determination that water rights for fish and wildlife required a diversion, a similar situation in Montana had the same effect.¹⁹⁵ Both federal and state agencies had purchased state-based diversionary water rights and had plans to convert them to the beneficial use of fish and wildlife as defined by state law.¹⁹⁶ Subsequently, the Montana courts ruled that a diversion was required for any pre-1973 water right, including those held for fish and wildlife purposes.¹⁹⁷ As a result, numerous rights held by federal agencies under state law were put at risk. Ultimately, the Montana Supreme Court reversed the lower court decision,¹⁹⁸ but this scenario demonstrates the risks for the federal land manager and for the taxpayer once federal funds are spent. The Montana Supreme Court ultimately held that no diversion was required to maintain a pre-1973 water right for fish and wildlife purposes.¹⁹⁹ Application of a contrary decision would have retroactively impacted a host of water rights held by the state and federal governments.

As water supplies grow increasingly scarce and economic pressures force states to adopt tighter water administration systems, legislatures will face increasing pressure to make cuts somewhere. Understandably, the pressure to diminish instream flow interests is far greater than the pressures to shut down diversionary water rights held by individual citizens, municipalities, irrigation districts, or water supply organizations within the

¹⁹³ Nancy Jean Strantz, *Rights to Ground Water in North Dakota: Trends and Opportunities*, 71 N.D. L. REV. 619, 631 (1995).

¹⁹⁴ S.B. 2182, 57th Legis. Assem., Reg. Sess. (N.D. 2001).

¹⁹⁵ See *In re Dearborn Drainage Area*, 766 P.2d 228, 235–36 (Mont. 1988), *rev'd*, 782 P.2d 898 (Mont. 1989), *and overruled by* 55 P.3d 396 (Mont. 2002) (noting the legislature's shift from appropriation rights to requiring diversion for future acquisitions of water rights); see also *In re Adjudication of the Existing Rights to the Use of All the Water (Existing Rights)*, 55 P.3d 396, 401 (Mont. 2002) (finding the appropriation doctrine to be flexible enough to not require diversion). For a full discussion of the Bean Lake decisions, see J. Vincent Jones, *The Bean Lake Saga: The End of the Diversion Requirement in Pre-1973 Water Appropriation Claims in Montana*, 7 GREAT PLAINS NAT. RESOURCES J. 64 (2003) (describing the historical background and facts behind the Bean Lake cases and analyzing their outcomes) and Alex C. Sienkiewicz, *Instream Values Find Harbor in Bean Lake III, Drown in Prior Appropriation*, 25 PUB. LAND & RESOURCES L. REV. 131, 145–46 (2004) (arguing that *Existing Rights* is an incomplete solution to prior appropriation by failing to promote conservation).

¹⁹⁶ See *In re Dearborn Drainage Area*, 766 P.2d at 230 (where Montana Fish and Game Department purchased land abutting a lake and agreed to stock the lake with suitable fish).

¹⁹⁷ See *id.* at 236 (stating that the prevailing legal theory under Montana law pre-1973 was that some form of diversion or capture was necessary for an appropriation).

¹⁹⁸ *Existing Rights*, 55 P.3d at 407.

¹⁹⁹ *Id.*

state. The temptation may be greater if the instream right at stake is viewed as benefiting the distant federal government or constituencies outside the state's legislative concern and authority.

The risks associated with the political vulnerabilities are significant for a federal land manager, particularly in the context of a general stream adjudication. Assume that a federal agency secures an instream flow right under a state water code. Based on this right, the agency determined it would forego the assertion of a federal reserved water right²⁰⁰ in a state-initiated general adjudication.²⁰¹ Once the United States is joined, the federal government must assert all claims under state and federal law. Once the adjudication is final and a decree issues, the federal government may be precluded from asserting those rights at a later time.²⁰² After the decree is finalized, imagine that the state legislature decides to suspend the exercise of instream flow rights due to drought conditions in the state.²⁰³ In this scenario, the federal agency may no longer be able to assert and enforce its state-based right as it was defined under state law. Moreover, the assertion of any federal reserved water rights may be precluded.

In addition to changes to instream flow programs, state legislatures also control the purse strings. Many state instream flow programs remain

²⁰⁰ *Winters v. United States*, 207 U.S. 564, 576–78 (1908); *Arizona v. California*, 373 U.S. 546, 601 (1963), *modified*, 376 U.S. 340 (1964), *and modified*, 383 U.S. 268 (1966), *and modified*, 466 U.S. 144 (1984), *and modified*, 503 U.S. 392 (2000), *and modified*, 531 U.S. 1 (2000) (extending implied reservation of water doctrine to non-Indian federal lands); *Cappaert v. United States*, 426 U.S. 128, 138 (1976), *modified*, 455 F. Supp. 81 (D. Nev. 1978); *United States v. New Mexico*, 438 U.S. 696, 698–702 (1978).

²⁰¹ 43 U.S.C. § 666 (2000) (granting a limited waiver of sovereign immunity that gives state courts jurisdiction over the United States as a defendant in state-initiated general stream adjudications).

²⁰² See also Janet C. Neuman & Michael C. Blumm, *Water for the National Forests: the Bypass Flow Report and the Great Divide in Western Water Law*, 18 STAN. ENVTL. L.J. 3, 17 (1999) (referencing the Bypass Flow report, which noted that final decrees in adjudications are res judicata and therefore claims to the use of water must be asserted in proceedings or are effectively lost); Robert H. Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. REV. 387, 391 n.9 (1986) (discussing how federal reserved rights function much like appropriative rights once created, and how the McCarran Amendment waived federal immunity in certain stream adjudications); cf. *United States v. Bell*, 724 P.2d 631, 632 (Colo. 1986) (affirming lower court decision to allow the United States to modify its reserved rights claim because no final judgment had been issued in the earlier proceeding); *United States v. Jesse*, 744 P.2d 491, 503–04 (Colo. 1987) (holding that the federal government is not collaterally estopped from asserting reserved rights as the issue was not actually litigated previously). See generally *Nevada v. United States*, 463 U.S. 110, 145 (1983) (holding that the United States was precluded from asserting tribal claims after resolution through the *Orr Ditch* decree).

²⁰³ This factual scenario raises a series of interesting issues that are significant, but outside of the scope of the Article, such as, whether federal courts provide the better forum for these issues. See Freyfogle, *supra* note 52, at 834 (“Given the hostility of many state courts to federal reserved water rights, litigation should typically occur in federal courts, in districts where judges do not have known hostilities to either environmental protection or assertions of federal power.”); David E. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?*, 20 STAN. ENVTL. L.J. 3, 32 (2001) (describing state court efforts to “thwart most federal attempts to assert instream flow rights under the federal reserved water rights doctrine”).

chronically underfunded by state legislatures.²⁰⁴ As a result, any state-based water rights held by the federal government face constant threat from the state budgetary process. If the federal agency relies on the state to establish and enforce instream rights, but the state legislature never funds the program, the federal lands are caught in a state battle of budget priorities. This is not to say, however, that federal agencies do not experience the same budgetary problems at the national level. But, significant questions arise as to whether a state can use the internal budget process where federal interests are not directly represented to the disadvantage of federal agencies.

Finally, decisions to recognize instream flow that may have negative impacts on traditional water users within the state can have consequences for administrative decision makers and elected judges. The dynamic between positive instream flow rulings and the impact to the state decision maker played out in at least two western states. Elected state court judges, who have made decisions in favor of federal rights, have been subjected to the politicized nature of water rights. In at least two situations, state court judges have lost reelection after authoring decisions in favor of water rights for the federal government.²⁰⁵ Both of these cases involved claims under federal law, not the assertion of state-based water rights. Perhaps water rights under state law for federal lands would fair better. Nonetheless, federal agencies must consider whether a state court judge facing reelection will recognize and, more importantly, enforce a state-based water right held by the federal government.

Given the potential consequences for state decision makers when federal rights are upheld, federal agencies must consider the risks of asserting state or federal water rights in state court unless required by the initiation of a general stream adjudication. The water rights for Deer Flat National Wildlife Refuge in Idaho provide an illustrative example of the consequences for federal rights adjudicated in state courts. As discussed

²⁰⁴ Scott B. Yates, Comment, *A Case for the Extension of the Public Trust Doctrine in Oregon*, 27 ENVTL. L. 663, 670 (1997); Mary Ann King, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 520 (2004); Janet C. Neuman & Cheyenne Chapman, *Wading into the Water Market: The First Five Years of the Oregon Water Trust*, 14 J. ENVTL. L. & LITIG. 135, 172 (1999).

²⁰⁵ See Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 122–23 (2001) (discussing a judge's decision to reserve water for wilderness, which ultimately cost the judge her state supreme court seat in an election); see also Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173, 222 (2002) (noting that the author of the Idaho Supreme Court opinion “made her a reviled figure in Idaho” and lost her seat on the court); *City & County of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 995 (Colo. 1954) (stating that when considering conflicting water rights claims, a court cannot be concerned with “the alarming prophecies of partisans in the Press”); *In re SRBA*, No. 24546, 1999 Idaho LEXIS 119 (Idaho 1999), *rev'd*, *Potlatch Corp. v. United States*, 12 P.3d 1260, 1270 (Idaho 2000) (designation of wilderness area impliedly reserved entire amount of unappropriated waters constituting natural flow within the designated areas and statutory disclaimer did not apply to tributaries of Snake River within Hells Canyon National Recreation Area).

earlier, the state of Idaho only allows the state to hold a right after legislative approval.²⁰⁶ The Deer Flat National Wildlife Refuge,²⁰⁷ established by executive order in 1909, needed to secure instream flow to maintain a series of islands in the Snake River that serve as a refuge and breeding ground for migratory birds.²⁰⁸ This series of islands holds particular value as migratory waterfowl habitat because the surrounding water provides isolation from predators during nesting and breeding season.²⁰⁹ Thus, in order to carry out the federal purpose of maintaining the islands for migratory bird habitat, FWS needed to secure a non-consumptive water right to keep water flowing around the islands. Based on the structure of Idaho state law, FWS could not secure and hold a water right under state law to achieve the purposes at Deer Flat Refuge.²¹⁰ Consistent with FWS policy, the United States asserted a federal reserved water right on behalf of the refuge in the Snake River Basin Adjudication (SRBA). The SRBA court denied the federal right and the Idaho Supreme Court ultimately upheld that decision.²¹¹ Because the federal government cannot hold rights under state law, federal law was the appropriate tool for achieving federal purposes at Deer Flat National Wildlife Refuge.²¹² In the end, the political nature of water allocation in the West remains an important consideration for the federal land managing agency in making a determination about the use of state law mechanisms to protect instream flow.

V. RECOMMENDATIONS

To fulfill our national interest in preserving our federal parks, refuges, recreation areas, and forests for future generations, state and federal leaders must come to terms with protecting instream flow on federal land. Without water, these specially designated areas fail to achieve the purposes set forth by Congress. The lessons learned throughout the development of water law in the West remain pertinent today—a delicate balance exists between state and federal authorities and between consumptive and non-consumptive uses. Relationships between the state and federal government matter, and facilitating a sense of trust and understanding is critical. The federal government needs to understand the position of the states in controlling and administering a water allocation system in each state. States need to appreciate that the federal land manager must make decisions that best meet the congressionally mandated purposes for the land. Because of the

²⁰⁶ IDAHO CODE ANN. §§ 42-1501 to 42-1507 (2005).

²⁰⁷ Exec. Order No. 1032 (1909).

²⁰⁸ See *Fish & Wildlife Serv. v. State*, 23 P.3d 117, 124–25 (Idaho 2001).

²⁰⁹ Bruce W. Zoellick et al., *Isolation of Snake River Islands and Mammalian Predation of Waterfowl Nests*, 68 J. WILDL. MANAGE. 650, 658–61 (2004).

²¹⁰ See IDAHO CODE ANN. § 42-104 (2005).

²¹¹ *Fish & Wildlife Serv.*, 23 P.3d at 120, 129.

²¹² The United States did not appeal the Idaho Supreme Court's decision to the U.S. Supreme Court. The failure to appeal, while arguably within the prosecutorial discretion of the United States, raises serious questions about the obligations of the federal government to protect the property interests of the United States.

relationship between the federal and state governments over water, federal agencies are in a unique position to utilize either state or federal law or some combination of both in achieving their purposes. But, in the end, the federal agencies are required to manage the land and waters to achieve their purposes. As professor Eric Freyfogle commented, “an effective strategy needs to recognize this political reality and somehow deal with it. Yet, there are ways of dealing with it that do not require the [federal government] to roll over and lie mute.”²¹³

This Article explores the devil in the details of state instream flow water rights for federal agencies. By examining specific areas where state law poses challenges for federal land and water protection, this Article intends to bring the perspective of the federal land manager to the discussion about the progress and setbacks of instream flow in the West. In summary, federal land managers face four categories of challenges under state law. First, in some instances, the state may not recognize a particular use as within the definition of beneficial use under state law. Second, even in states that define instream water rights broadly, the state may not allow the federal government to hold and enforce the water right. Third, in states that allow the federal government to hold and enforce an instream right, questions arise regarding administrative delay, state agency discretion and enforcement capacity within the state. Finally, political realities within the state may make it difficult to hold or enforce instream flow rights. In light of these challenges, this Article makes a five part recommendation for moving forward and achieving the appropriate balance between state control and federal purposes.

First, federal agencies are in a position to take the first step by developing revised policies that set out the relationship between state law and federal purposes. Clear guidance from the federal level will not only benefit the land manager who is trying to carry out the federal purposes on the ground, but will allow all parties to evaluate whether instream flow rights can be obtained and enforced under state law. The existing FWS policy provides a strong model. This policy directs managers to seek state-based water rights where those rights can achieve federal purposes. Where state law forecloses the achievement of federal purposes, the manager must turn to federal rights. These revised policies can also include criteria for evaluating state water law, mechanisms for interested parties to provide comments, standards for scientific input on quantifying instream flow, and methods for integrating water rights into the overall planning processes of the agencies. With regard to evaluating state water law, the policies can set criteria that address the scope, quantity, timing priority, duration, enforceability and permanence of water rights available under state law. These criteria would also be valuable because instream flow law varies from state to state and what may satisfy the federal criteria in one state may not in another. These criteria should be part of a policy that provides an opportunity for public comment and feedback. The adoption of specific

²¹³ Freyfogle, *supra* note 52, at 825.

policies might counteract the tendency for water rights decisions at the federal level to be made solely in the context of administrative discretion and often exercised under political pressure. By adopting an express policy, states may be more confident about federal agency motivations. In turn, this confidence may encourage states to implement stronger instream flow protection at the state level to avoid the assertion of federal rights.

Second, for their part, the western states need to demonstrate a commitment to protecting federal resources and need to eliminate provisions of state instream flow laws that function as limitations for the federal agencies. Without a firm commitment from the states to fix many of the challenges set forth in this Article, the prospects for federal resource protection under state law remain uncertain.²¹⁴ If states strengthen and modify instream flow programs to achieve federal purposes, the possibilities for federal agencies under state law become real and concrete. For too long, many states have advocated and pressured federal decision makers to seek water rights under state law rather than pursuing federal reserved water rights, without providing strong, meaningful, and enforceable mechanisms for protecting instream flow within their borders. In the absence of strong state instream flow laws, the pressure to use state law simply serves as a mechanism to keep federal lands from having *any* meaningful water rights. If states are serious about preferring state-based water rights over federal rights, then states must reform their own laws so that protecting federal purposes using state law is a viable option.²¹⁵

Third, until federal agencies update their policies and states reform their instream flow law, the federal government must maintain the ability to assert rights under federal law to achieve congressionally mandated purposes. Federal rights should not, and some would argue cannot, following the rationale set forth in *High Country Citizens' Alliance v. Norton*,²¹⁶ be relinquished or foreclosed by federal agencies until they achieve equivalent protection under state law. Many scholars have advocated for strong recognition and application of federal law mechanisms to secure water rights on federal lands and others have advocated for the elimination of these federal mechanisms.²¹⁷ This Article recommends that

²¹⁴ Bell & Johnson, *supra* note 23, at 82 ("In those instances where legitimate federal interests cannot be accommodated under state law, changes in state law should be considered.").

²¹⁵ Some states have expressed concern about recognizing and administering federal reserved water rights. These states may want to evaluate whether federal reserved water rights represent significant administrative problems if they are recognized and incorporated into the state's system. Based on examples where reserved rights are recognized and integrated into the state systems, it is worth considering whether it is possible to administer the state's water system recognizing and incorporating federal reserved water rights. In states where it is politically untenable to expand state instream flow law, recognition and incorporation of federal reserved water rights may be a more acceptable and narrow option.

²¹⁶ 448 F. Supp. 2d 1235 (D. Colo. 2006).

²¹⁷ Bennett W. Raley, *Chaos in the Making: The Consequences of Failure to Integrate Federal Environmental Statutes with McCarran Amendment Water Adjudications*, 41 ROCKY MTN. MIN. L. INST. 24, 24-2 (1995); Leshy, *supra* note 19, at 285; Gregory Hobbs, Jr., *Ecological Integrity, New Western Myth: A Critique of the Long's Peak Report*, 24 ENVTL. L. 157, 160 (1994); Walston, *supra*

federal agencies seek, to the maximum extent available, water rights using the state system. When state water law, however, contains no mechanism for the federal agency to meet its mandate and fulfill its statutory obligation, then the federal agency must turn to federal law. Any policy or rule should make clear that federal mechanisms for securing water rights are still viable if state law solutions fall short of achieving federal purposes. Federal land managers must evaluate the use of their federal authority to assert and establish water rights to carry out their primary purposes. If state laws do not allow federal managers to meet their obligations, these managers must be able to fall back on the authorities available under federal law to assert and enforce water rights.²¹⁸ Without maintaining this dynamic between state and federal law, states have little incentive to adopt robust instream flow programs that recognize federal purposes and federal land managers may fail to meet their obligations to use existing authorities to achieve federal mandates. Until more is known about how state instream flow programs will be implemented and administered, federal agencies take a risk substituting potentially less protective and unenforceable state-based water rights.

A system of turning to state law first while preserving authority under federal law provides several positive results. Any express policy preference for state-based rights supports the states' efforts to administer the allocation of water within state borders. Federal recognition of the possibilities under state instream flow law encourages state legislatures and administrators to support and enhance mechanisms for instream flow protection under state law. A preference for state-based water rights, however, only works and creates the appropriate incentives when the federal mechanisms remain viable options. The incentives to protect federal interest using state law may shift if there is no threat that federal law can operate to replace state mechanisms. The long term application of state instream flow law may ultimately depend on the continued viability of the various federal mechanisms to protect non-consumptive uses.

Fourth, federal and state entities should continue to explore creative and innovative solutions that engage both state and federal law. In fact, many of the most impressive and innovative solution in the last several decades have come from "outside the box" of traditional thinking about water rights claims.²¹⁹ Federal agencies and interested parties, however, should carefully evaluate these creative solutions to ensure that protection of federal interests has not been compromised. The criteria set out in the revised water rights policy discussed above could be developed to help evaluate new approaches and innovative solutions. For example, while many have described the 2003 settlement and enforcement agreements between the state of Colorado and the Department of Interior, with regard to the

note 140, at 29–33.

²¹⁸ *Federal "Non-Reserved" Water Rights*, *supra* note 14, 332 ("[C]ongressional intent to preempt state control over unappropriated water in the western states will be found . . . if application of state law would prevent the federal agency from accomplishing specific purposes mandated by Congress for the federal lands in question.").

²¹⁹ Getches, *supra* note 203, at 5.

water rights at Black Canyon of the Gunnison National Park, as the perfect solution to federal water rights,²²⁰ others claimed that the agreement deprived Black Canyon of more senior, permanent water rights to preserve the historic, scientific, and scenic resources of the park. The federal district court agreed with these allegations and found the settlement to be invalid under various provisions of federal law.²²¹ The court based its decision, at least in part, on issues of priority and enforceability—two of the central problems identified in this Article for federal agencies. These are the very kinds of concerns that the agencies could address in revised water rights policies.

By contrast, the federal legislation addressing the water rights for Great Sand Dunes National Park serves as a good model for integrating federal and state law.²²² The Great Sand Dunes legislation required the federal agency to use the procedure of state water law, but the legislation set out the substance of the water right in federal law. Because state substantive law did not contain the necessary right to protect the sand dunes, Congress used federal law to define the scope and nature of the right. To establish the right, however, NPS is required to use the state administrative process. The claims are currently pending in the Colorado Water Court. If successful, the Great Sand Dunes legislation model may emerge as an appropriate resolution of the tension between state water law and federal purposes.

Fifth and finally, the federal public lands are managed and the waters are protected for the benefit of the public. States and federal agencies must take the public's role, including non-water rights holders' role, in water resource protection seriously because of its unique legal, biological, spiritual, cultural, and hydrologic status. Many water users, including boaters, fishers, hunters, property owners, and others, lack specific water rights but maintain significant and legitimate interest in water allocation and instream flow protection. Federal and state agencies, legislatures, and courts need to carefully consider the role of the public in water rights adjudications and conflicts. All too often the resolution of water rights results in de facto basin management plans with impacts to all citizens, not just those who hold water rights. States can integrate the public by allowing non-water rights holders to participate in some form in general stream adjudications. Federal agencies can integrate the public by giving interested parties a voice, through the revised policy described above, in the process for determining mechanisms for protecting federal interests. Increasing public participation also impacts the political dynamics that can emerge as state and federal agencies exercise their respective discretionary authority over water rights.

²²⁰ Conference Report, *Are States Still in Charge*, American Bar Association Section of Environment, Energy and Resources, 22nd Annual Water Law Conference, 7 U. DENV. WATER L. REV. 544, 545 (2004) (reporting that Mr. Walston described the Black Canyon of the Gunnison Settlement as a way to accommodate federal, state and local interests).

²²¹ *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1253 (D. Colo. 2006).

²²² Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, 114 Stat. 2527 (codified as amended at 16 U.S.C. §§ 410hhh to 410hhh-9 (2000)); see also Leshy, *supra* note 19, at 288.

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The level of accountability for discretionary decisions increases when non-governmental entities are involved in the decision making process. More fully integrating the public in the debate over consumptive and non-consumptive uses of water may also lead to more lasting solutions that recognize the significance and vitality of our nation's flowing waters. As Professor Charles Wilkinson so beautifully articulated at this Symposium, there is "inspiration that we know rides in the rush of every freeflowing watercourse" and the progress that has been made is the result of "patient and committed citizens and professionals who know they are in it . . . for the long-term."²²³

²²³ Charles Wilkinson, *The First Half Century of Western Water Reform: Have We Kept Faith With the Rivers of the West?*, 36 *Envtl. L.* 1115, 1123 (2006) (Essay based upon professor Wilkinson's opening address at the Third Lewis and Clark Bicentennial Conference on Western Instream Flows: 50 Years of Progress and Setbacks, Apr. 20, 2006).