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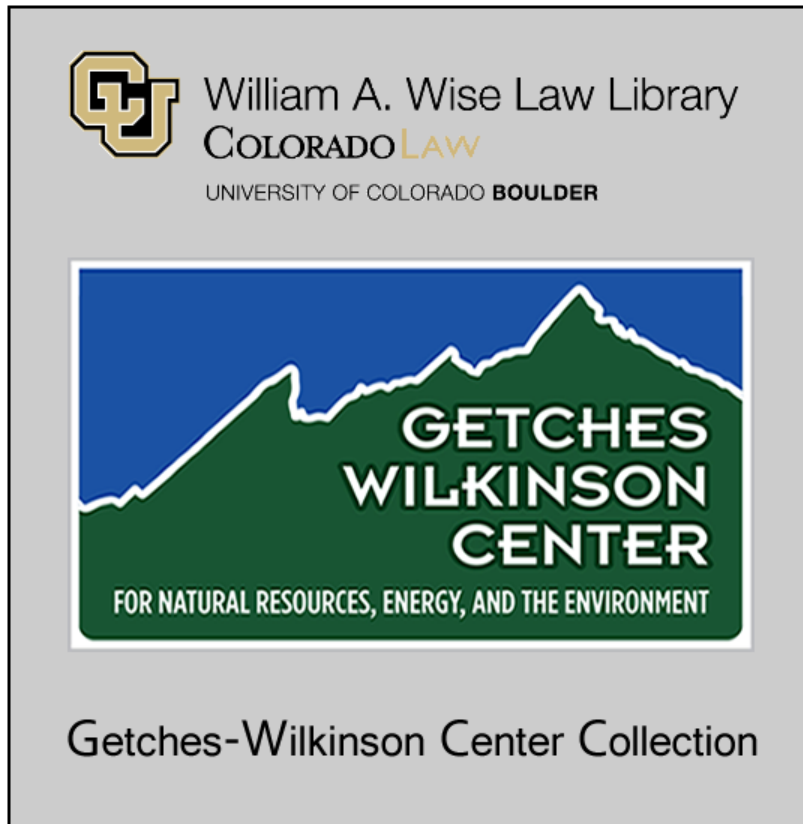
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**PROTECTING INSTREAM FLOWS IN
PRIOR APPROPRIATION STATES:
LEGAL AND POLICY ISSUES**

**Janet C. Neuman
Associate Professor
Northwestern School of Law of Lewis and Clark College
Portland, Oregon**

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**NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado**

- I. In spite of attempts to refine the prior appropriation doctrine to accommodate instream needs, depleted instream flows still represent a serious challenge to western water management, and expected western population growth will only add to this challenge.
- A. The prior appropriation doctrine encourages and rewards diversion and consumptive use of water, resulting in a failure to account for or protect instream flows during most of the first 100 to 150 years of western water law development.
 - B. Full appropriation or over appropriation is common (and longstanding) in many western surface waterbodies, as is overdraft of groundwater aquifers (which are often interconnected with surface waters).
 - C. Scientists and policy makers have only belatedly recognized the severe damage caused by insufficient protection of instream flows, and by other drastic alteration of natural flow regimes.
 - 1. More than 20 native western fishes have become extinct in the past century, and 100 more are considered threatened, endangered, or of special concern. (Western Water Policy Review Advisory Commission, *Water in the West: Challenge for the Next Century* (“Water in the West”) 2-13 (1998)). Many other aquatic and riparian species are also at risk.
 - 2. Particular impacts range from changes to the historic natural hydrograph, elimination of both riparian and aquatic habitat affecting all parts of the food web (due to channel and floodplain alteration, passage obstruction, impoundments, and changes in water quality and temperature), and introduction of out-competing non-native species, just to name a few.
 - 3. In addition to fish and wildlife impacts, insufficient instream flows also affect esthetics, recreation, and water quality generally.
 - D. As the West continues to grow at a rapid rate, demand for water will also increase, thereby exacerbating the problem of restoring depleted instream flows. (*Water in the West, supra*, at 2-14 to 2-18.)
 - 1. Population in the West has increased tremendously over the past 30 years, and this trend is expected to continue for the next few decades.

2. The West is growing at a rate faster than the rest of the country, and much of the growth is occurring in the most arid areas. (Id.)
3. An additional 28 million westerners are projected over the next 25 years. (Id.)
4. The trend toward increasing urbanization is also expected to continue, thus creating additional demands for municipal, industrial, and recreational water usage, and creating tension with agriculture, which is currently the single largest user of water in the West (about 78%).
5. Recent figures place total freshwater withdrawals in the West at approximately 179 million acre feet annually, about two thirds of that from surface water and one third from groundwater. Nearly half of that withdrawn (about 46%) is consumed in use. (Wayne B. Solley, Estimate of Water Use in the Western United States (Report to the Western Water Policy Review Advisory Commission, 1997) 2-5.) Any increase in withdrawals and consumption will further deplete already insufficient instream flows.

II. The time is right for an assessment of instream flow treatment throughout the West.

- A. Frank Trelease once said "If the people of the United States or of a state desire to keep water in a stream or to put it back in a stream a law can be framed that will do the job." (See David M. Gillilan & Thomas C. Brown, *Instream Flow Protection: Seeking a Balance in Western Water Use* (1997) 3 (quoting Trelease from a 1976 conference).) In fact, many such laws have been framed, but how well have they performed?
- B. The history of instream flow protections began with a few sporadic attempts early in the 20th century, with increasing activity in the last decade or two. (See generally Gillilan & Brown, *supra*, at 137.)
 1. In the early 1900s, the Oregon legislature withdrew from appropriation 31 streams that formed waterfalls in the scenic Columbia River Gorge. (See Janet C. Neuman & Cheyenne Chapman, *Wading into the Water Market:*

The First Five Years of the Oregon Water Trust, 14 J. Envtl. Law and Litig. 135, 137 (1999).)

2. In the 1920s, the Idaho legislature “appropriated” certain lake levels on scenic lakes in trust for the public, with the water right issued to the governor. (See Josephine P. Beeman, Instream Flows in Idaho, in *Instream Flow Protection in the West* (Lawrence J. MacDonnell & Teresa A. Rice, ed., 1993) (“Instream Flow Protection”).)
3. Oregon also adopted additional protections in the 1950s in the form of statutory authority to require minimum streamflows for fish and wildlife.
4. Beginning in the 1960s and 1970s, instream flow protection received greater attention throughout the West, with protection of specific flows in important waters, designation of wild and scenic rivers, inclusion of instream values in public interest reviews of water rights applications, and eventually official water rights treatment for instream uses in some states. (See Gillilan & Brown, *supra*, at 137-138.)

C. Current state legal protection of instream flows takes several forms.

1. Thirteen states recognize **instream water rights** in some form.
 - a. **Alaska:** Since 1980, state law has authorized reservations of water for instream purposes. Reservations may be requested by anyone, including private parties. The statute defines these reservations to be appropriations, and they receive priority dates, quantification, and certificates, so they are essentially instream water rights. (Alaska Stat. §46.15.145.)
 - b. **Arizona:** State law allows appropriations for “recreation, wildlife, including fish...” Dicta in a 1976 court decision said that water could be appropriated in situ, without a diversion, for fishing and recreational purposes. (Ariz. Rev. Stat. §45-151(A); *McClellan v. Jantzen*, 547 P.2d 494 (1976); Herb Dishlip, *Instream Flow Water Rights: Arizona’s Approach*, in *Instream Flow Protection*, *supra*.)

- c. **California:** In 1979, the California courts ruled that the state's water rights system did not recognize instream flow appropriations. (See *Fullerton v. State Water Resources Control Board*, 153 Cal. Rptr. 518 (1979) and *California Trout, Inc., v. State Water Resources Control Board*, 153 Cal. Rptr. 672 (1979).) However, since 1991, state law has allowed existing water users to dedicate all or part of their right to support instream uses by petitioning the state for a change of use. (Cal. Water Code §1707; Brian Gray, *A Reconsideration of Instream Appropriative Water Rights in California*, in *Instream Flow Protection*, *supra*.)
- d. **Colorado:** Since 1973, state law has authorized the Colorado Water Conservation Board to appropriate water for instream purposes. (Colo. Rev. Stat. §37-92-102(3).) Later revisions also authorized acquisition through other means besides new (and therefore junior) appropriations. Although the official position is that no private instream rights are allowed under state law, in fact some private instream rights (or reasonable facsimiles) have apparently been ratified by Colorado courts. (Steven O. Sims, *Colorado's Instream Flow Program: Integrating Instream Flow Protection into a Prior Appropriation System*, in *Instream Flow Protection*, *supra*.)
- e. **Idaho:** The legislature issued instream rights to preserve scenic lake levels in the 1920s (see above). In 1971, the legislature authorized the state parks agency to appropriate spring flows in trust for the people of the state. (Idaho Code §§67-4307 to -4312.) Although the state water resources agency at first refused to issue any springflow rights, the Idaho Supreme Court found the statute constitutional and confirmed the agency's authority to issue the

- rights. (State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924 (1974).)
- f. **Montana:** In 1969, state law authorized instream water rights in 12 blue ribbon trout streams (called "Murphy rights" after the sponsoring legislator). (Mont. Code Ann. §89-801.) Although these rights have apparently not been challenged, the statute allows the rights' priority to be altered if a court determines that the waters are needed for a more beneficial use. (Matthew J. McKinney, *Instream Flow Policy in Montana: A History and Blueprint for the Future*, in *Instream Flow Protection*, *supra*.)
- g. **Nebraska:** Since 1984, state law has authorized the state Department of Water Resources to issue instream appropriations. The parties currently authorized to request the instream rights are regional Natural Resource Districts and the state Game and Parks Commissions. (Neb. Rev. Stat. §46-2,116; David Aiken, *Nebraska Instream Appropriation Law and Administration*, in *Instream Flow Protection*, *supra*.)
- h. **Nevada:** State law recognizes recreational purposes as beneficial uses, and the Nevada Supreme Court held in 1988 that such use could occur in situ without a diversion. (Nev. Rev. Stat. §533.030(2); *State v. Morros*, 766 P.2d 263 (1988).)
- i. **Oregon:** State law provides for instream water rights in three ways. Minimum streamflows established under previous law (1955-1987) were converted to official instream water rights, with priority dates of when streamflows were set. (The earliest is 1958.) Three state agencies (Environmental Quality, Fish and Wildlife, and Parks and Recreation) were authorized to request new instream water rights, which thus have priority dates after 1987. And existing consumptive use rights can be sold, leased, or donated for

conversion to instream rights. (Or. Rev. Stat. §§537.332- to -.360.)

The state takes the position that instream water rights can only be held by the state in trust for the public, and not by private parties.

- j. **South Dakota:** A 1994 decision of the State Supreme Court seems to allow instream rights. (In re Water Right Claim No. 1927-2, etc., 524 N.W.2d 855 (S.D. 1994).)
 - k. **Utah:** Since 1986, and more broadly since 1992, state law has provided for the state Parks and Recreation agency and state Wildlife Resources agency to change water rights they hold to instream purposes, and to acquire existing water rights from other parties to convert them to instream purposes. State law does not authorize new instream appropriations. (Utah Code Ann. §73-3-3; Mark A. Holder, Instream Flows in Utah, in Instream Flow Protection, *supra*.)
 - l. **Washington:** Since 1989 (in the Yakima Basin only) and since 1991 statewide, state law has authorized acquisition of “trust water rights” by the state to grant water rights status to instream flows. (See Wash Rev. Stat. §§90.38.040, 90.42.040; Kenneth O. Slattery & Robert F. Barwin, Protecting Instream Resources in Washington State, in Instream Flow Protection, *supra*.)
 - m. **Wyoming:** Since 1986, state law has authorized instream rights, both through new appropriations by the State Game and Fish Department or through state acquisition, from willing parties, of existing water rights for conversion to instream purposes. (Wyo. Stat. Ann. §§41-3-1001-1014; Gordon W. Fassett, Wyoming’s Instream Flow, in Instream Flow Protection, *supra*.)
- D. Other states attempt to protect instream flows in some other manner, without giving them official status as water rights. (Note that there is some overlap

between these two lists, as some states have instream water rights as well as additional protective devices.)

1. The following states use **minimum streamflows or reservations of water instream** to protect instream flows from future appropriation or depletion below a set level.
 - a. **Alaska:** Since 1980, state law has provided for reservations of water for instream use. Either public entities or private parties may apply for reservations. The statute defines the reservations as appropriations, and provides for priority dates and certificates, so the reservations are essentially instream water rights. (Alaska Stat. §46.15.145.)
 - b. **Idaho:** Since 1978, state law has authorized the Department of Water Resources to set minimum streamflows. (Idaho Code §42-1501.)
 - c. **Kansas:** Since 1980, state statutes have provided for legislatively established minimum streamflows (called “minimum desirable streamflows”). Minimum flows are then withheld from further appropriation. Kan. Stat. Ann. §82a-703a et. seq.; Leland E. Rolfs, Minimum Desirable Streamflow in Kansas, in *Instream Flow Protection*, *supra*.)
 - d. **Montana:** Since 1973, state law has authorized the state Board of Natural Resources and Conservation to reserve up to 50% of the average annual flow of a stream for instream use, at the request of a federal, state, or local governmental entity. The flows are then reserved from further appropriation. (Reservations are not limited to instream flows, however, and can also be made for future consumptive purposes. Instream reservations are reviewed every 5 years, and others every 10 years.) (Mont. Code Ann. §§85-2-102(2)-436 to -437.)

- e. **Oregon:** From 1955 to 1987, Oregon authorized establishment of minimum streamflows to protect fish and wildlife values. However, all minimum streamflows were converted to instream water rights after adoption of the 1987 Instream Water Rights Law. The priority dates for these rights all fall between 1958 and 1987. (Or. Rev. Stat. §537.346(1).)
 - f. **Washington:** Since 1971, state law has authorized the Department of Ecology to establish minimum base flows in the state's perennial streams, on its own initiative or at the request of the Department of Fish and Wildlife. The flows are set by administrative rule. The rules have the effect of conditioning or preventing new appropriations. (Wash. Rev. Code §§90.22.010 to .910.) 1979 revisions to the statute declare that the minimum streamflows are effectively appropriations. (Wash. Rev. Code §§90.22.010 to .910.)
2. Many states account for instream values in their **public interest review** of new appropriations, and possibly of transfers as well.
- a. All western states except Colorado, North Dakota and Oklahoma review new applications to determine whether they are contrary to the "public interest." The North Dakota and Oklahoma attorneys general can intervene in private water adjudications if necessary to protect the public interest. (See Gillilan & Brown, *supra*, at 37.)
 - b. A number of states also conduct public interest reviews in "transfer" proceedings (changing type of use, place of use, or other components of a water right).
 - c. The extent to which protection of instream flows and values are accounted for in these public interest reviews varies widely.
3. Most of the western states conduct some sort of **water availability review** to determine if unappropriated water is actually available before granting

new appropriations. The states' processes, formulas, and burden of proof requirements vary widely, and thus the water availability reviews do not contribute significant instream flow protections in most places.

4. Another possible device for protecting instream values is the **public trust doctrine**. The following states have explicitly referred to the doctrine in the context of water allocation and use, either in statute or court decision.
 - a. **Alaska:** *Owsichek v. State Guide Licensing and Control Board*, 763 P.2d 488 (Alaska 1988) (held that state constitutional language reserving fish, wildlife, and water resources for common use imposes a public trust duty with regard to management of those resources).
 - b. **California:** *National Audubon Society v. Sup. Ct. of Alpine County*, 658 P.2d 709 (Cal. 1983), cert. denied, 464 U.S. 977 (1983) (held that the state must consider the public trust in water allocation, even after rights have been issued).
 - c. **Idaho:** (Now you see it, now you don't...) *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Idaho 1983) (holding that the public trust doctrine applied to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality, and that the doctrine takes precedence even over vested rights); *Shokal v. Dunn*, 707 P.2d 441 (Idaho 1985) (directing water resources department to apply public trust criteria to new water rights applications) But see Idaho Code ?? (limiting the scope of the public trust doctrine, and specifically prohibiting its application in water rights adjudications). (See Blumm et al. article)
 - d. **North Dakota:** *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W2d 457 (N.D. 1976) (resource allocation decisions, including water rights decisions, must take public trust interests into account).

- e. **Montana:** Montana Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984) (citing public trust principles to support public's recreational use rights on streams).
 - f. **Washington:** In the Matter of Appeal from Water Rights Decision of the Dep't of Ecology, Order on Motion for Summary Judgment, PCHB Nos. 986-96181 (July 16, 1996) (holding that the public trust doctrine applies to state water allocation).
5. Instream flows may be protected through **wild and scenic river designation**, or some other special designation process.
6. One state that is absent from the lists above is the state of New Mexico. New Mexico's legislature has rejected several attempts at legislation to protect instream flows, such as by declaring instream purposes to be beneficial uses, eliminating the diversion requirement to allow appropriation of water instream, or prohibiting new diversions in specified stream segments. Some minimal, though unofficial protection for water instream is provided by the water delivery requirements of various interstate water compacts, and perhaps by the local public interest review required by state law for appropriations and transfers. (See Tim DeYoung, Protecting New Mexico's Instream Flows, in *Instream Flow Protection, supra.*) However, in 1998, the New Mexico Attorney General issued opinions stating that water left instream is a beneficial use. (See Anita Miller, Recent Developments in Land Use, Planning, and Zoning Law, 30 Urb. Law 757 (1998).)
- E. **Anti-instream activity:** In Oregon, in the last few legislative sessions, there has been some political backlash against instream rights. Bills have been introduced to prohibit transferring agricultural water rights to any use other than another agricultural use, as well as to completely repeal the instream water rights law. (See Neuman & Chapman, *supra*, at 177-178.)

F. Instream flow protection is also available in some instances through application of federal law.

1. Federal reserved water rights may exist for instream flows.
 - a. The following are examples of instream flows or other in situ uses that have been successfully established by federal reserved rights.
 - (1) *Cappaert v. United States*, 426 U.S. 128 (1976) (reserved rights to maintain water level in underground pool in national monument to preserve endangered fish).
 - (2) *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), reh'g denied 752 F.2d 397 (9th Cir. 1985), cert. denied 475 U.S. 1010 (1986) (sufficient water to maintain a fishery).
 - (3) *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (sufficient water flowing through the reservation to support treaty hunting and fishing rights).
 - (4) *Potlatch Corporation et al. v. United States*, 1999 WL 778325 (Idaho 1999) (Snake River Basin Adjudication; federally designated wilderness areas in Idaho hold reserved water rights for streamflows) (Note: petition for rehearing granted and oral argument held Feb. 14, 2000.)
 - b. Other attempts to claim instream flows by way of federal reserved rights have not been successful. Examples include:
 - (1) *U.S. v. New Mexico*, 438 U.S. 696 (1978) (instream rights not allowed for national forests, as not necessary to support primary purposes of forests under enabling act).
 - (2) *In re Gen. Adj. Of Big Horn River System*, 753 P.2d 76 (1988) (purpose of reservation found to be only agricultural, no reserved rights awarded for instream flows).

- (3) In re SRBA, Case No. 39576 (Idaho Dist. Ct., Nov. 10, 1999) (Snake River Basin Adjudication; Nez Perce Tribe denied reserved water rights for off-reservation instream flows to support treaty fishing rights) (on appeal to the Idaho Supreme Court).
2. Federally designated wild and scenic rivers carry reserved water rights to protect flows, but these all have a fairly recent priority date (post 1986). (16 U.S.C. 1284(c).)
3. Federal land management agencies have also tried to protect instream flows by other means than claiming reserved water rights. At least in the case of the Forest Service, these attempts have met with resistance. (See, generally, Janet C. Neuman & Michael C. Blumm, Water for National Forests: The Bypass Flow Report and the Great Divide in Western Water Law, 18 Stan. Env. L. J. 3 (1999).)
4. Recent changes in federal law have revised the primary purposes and operating criteria for certain federal reclamation projects, mandating restoration of instream flows, such as the 1992 Omnibus Reclamation Projects Act which mandated flow restoration for fish and wildlife purposes for many reclamation projects, including the CVPIA and CUP, among others.
5. The Endangered Species Act and the Clean Water Act are providing impetus for restoring instream flows in many places throughout the West. Under the Supremacy Clause, the ESA and the CWA can take precedence over state law, and thus state water rights holders may be required to change the method or amount of their water use.
 - a. To avoid a "take" of a listed species under the ESA, a water user may be required to reduce water use, alter a diversion method, change the timing of use, or take other steps to keep water in the stream.

- b. The CWA may affect water use (and protect minimum streamflows) through 401 certification requirements (P.U.D. No. 1 of Jefferson Cty v. Wash. Dep't of Ecology, 511 U.S. 700 (1994)) or eventually through the TMDL process.
- c. Consumptive water users are very concerned about the impact of federal regulation under these two statutes on their water rights, and litigation will likely continue to sort out the balance.

III. How well have instream flows been protected, enhanced, and restored?

A. Westwide overview

B. Oregon Water Trust case study (see Neuman & Chapman, *supra*.)

- 1. The most significant legal, policy, and practical issues faced by the Oregon Water Trust in its first six years include:
 - a. Public vs. private holdship
 - b. Consistency in treatment between consumptive and nonconsumptive rights
 - c. Scientific methodology for determining value of acquisition
 - d. Relationship of flows to other water management issues
 - e. Money
 - f. Politics/attitudinal resistance

IV. Success in restoring instream flows requires both effective short term strategies and effectively "nesting" instream flow protection in a larger, longer term water management agenda.

A. In order to be effective in the short term within the existing system of prior appropriative rights, it is critical to choose strategies that will actually get water back into the river, free from call, during the periods of greatest need.

- 1. The only tools that can achieve this objective are those that can assure senior protected status for instream flows, including the following:
 - a. allowing conversion of senior consumptive rights to instream flows, either by the rights holders themselves, or in the

marketplace, and with solid protection for keeping those flows instream, either as an official senior water right, or using some other device.

- b. using existing legal sticks and carrots, such as waste enforcement or incentives for conservation, to free up water currently being used by senior water users, and again, protecting the saved water instream.
- c. working with the requirements of federal law, such as the Endangered Species Act, the Clean Water Act, federal reserved rights and tribal treaty rights, to restore flows instream. (This strategy is, of course, fraught with controversy and requires sensitivity to existing consumptive rights holders.)

B. However, for any of these short term strategies to be effective, larger issues also need attention, both immediately and over the long term. These larger issues include the following:

- 1. **Improved understanding of flow needs:** Accurate scientific information about instream flows will be crucial for long term success in flow restoration and protection. This is particularly true with regard to achieving ecological goals, as opposed to scenic and recreational goals, where it is easier to tell how much water is enough.
 - a. Information is needed in many areas, such as hydraulics, fish passage, and the interaction of quantity, quality, and temperature of water with habitat and life cycle needs. The needed information may often be quite site- and species-specific.
 - b. Although these areas involve scientific questions rather than legal questions, lawyers working on instream issues need the questions answered. Otherwise, any legal action taken to protect instream flows may falter on the science. Furthermore, as long as good information is lacking, interest groups on all sides of these issues

will continue to use the uncertainty to argue for their positions. Thus, interested lawyers and policy makers should encourage appropriate research efforts and support necessary funding.

2. **Water measurement and reporting:** In order to insure protection for instream flows within the prior appropriation system, it is necessary to measure and report streamflows, water diversions, and water use.
3. **Limited exemptions from water rights requirements:** The more competition there is for water, the tighter the management system needs to be. In addition to measurement and reporting, comprehensive management requires allowing fewer exempt water uses.
4. **Conjunctive management:** Protecting instream flows will often require understanding the relationship between surface water and groundwater. Matching the law to the hydrologic facts will become more important and ultimately inevitable.
5. **Integrated land and water use planning:** The impact of changing land use on water demand is obvious. For example, urban growth drives municipal water demand; rural subdivisions impinge on agricultural water use and create competing demands, changing western demographics create demands for scenic and recreational water use. In spite of the obvious connection, state and local governments have often been slow and reluctant to integrate land use planning and water management planning. Continued reluctance will only exacerbate the problem of meeting future demands.
6. **Water rights regulation and enforcement:** For a variety of reasons, some state water management agencies have not been very aggressive in terms of strictly enforcing the terms of consumptive water rights. For all of the reasons mentioned above, a stricter approach is warranted, not only to protect instream flows, but to tighten up the system generally to meet increasing demands.

7. **Market facilitation and incentives:** One way for prior appropriation states to provide for instream flow protection, perhaps with the least regulatory pain and disruption, is to encourage the market to address instream needs.