

University of Colorado Law School

Colorado Law Scholarly Commons

Shifting Baselines and New Meridians: Water, Resources, Landscapes, and the Transformation of the American West (Summer Conference, June 4-6)

2008

6-5-2008

Rethinking Western Water Law: Instream Flows

Reed D. Benson

Follow this and additional works at: <https://scholar.law.colorado.edu/water-resources-and-transformation-of-American-West>



Part of the Administrative Law Commons, Animal Law Commons, Aquaculture and Fisheries Commons, Biodiversity Commons, Climate Commons, Energy and Utilities Law Commons, Energy Policy Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Policy Commons, Land Use Law Commons, Law and Politics Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Oil, Gas, and Energy Commons, State and Local Government Law Commons, Sustainability Commons, Urban Studies and Planning Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

Benson, Reed D., "Rethinking Western Water Law: Instream Flows" (2008). *Shifting Baselines and New Meridians: Water, Resources, Landscapes, and the Transformation of the American West (Summer Conference, June 4-6)*.

<https://scholar.law.colorado.edu/water-resources-and-transformation-of-American-West/22>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

RETHINKING WESTERN WATER LAW: INSTREAM FLOWS

Reed D. Benson

University of New Mexico School of Law

During the summer and early fall months when natural water supplies are low and demands are high, many rivers and streams in the American West are fully allocated to offstream human uses. As a result, instream flows are often inadequate to support fish, wildlife, water quality, recreation, and other public values. Shrinking/shifting water supplies and new demands will only increase the stress on western rivers and streams. Can the West maintain water existing uses, continue adding millions of new residents, and still have living, flowing rivers?

The challenges for protecting and restoring instream flows (a partial list):

Supply and demand:

- existing uses (primarily irrigation)—not much left for anything new
- growing cities, esp. in the major “urban archipelagoes,”
- new demands for other offstream uses, incl. irrigation water for biofuels
- traditional supply-side options (e.g new dams, groundwater) often unfeasible
- climate change will probably reduce supplies when they’re needed most

Laws and institutions:

- appropriation system permanently protects established, ongoing uses
- instream flow protections, where they exist, are very low in priority
- in practice, appropriation system encourages users to take more water, not less
- state laws and agencies narrowly limit private efforts to protect streamflows
- most places have no effective program to restore flows in depleted streams

What are things states could do to address some of the legal/institutional challenges?

Under existing law:

- give F&W, WQ agencies resources and direction to protect flows
- use public interest authority to prevent flow impacts from new/changed uses
- greater oversight of existing offstream uses by water resource agencies

Easing legal restrictions:

- remove substantive & procedural restrictions on state instream flow programs
- allow local governments (not just state agencies) to obtain flow protections
- allow private entity to hold a water right that’s been *changed* to instream flow

New program:

- substantial state funds to acquire water rights for conversion to instream flow

What will be needed to get western states to implement some of these measures?

Federal push (under laws such as Clean Water Act or Endangered Species Act)

Nonprofit entities (such as water trusts) to facilitate voluntary/transactional efforts

Local push (to reform and implement state laws) from entities such as:

- environmental groups
- sportsmen’s groups and other recreational users
- local governments
- individual landowners