Water as a Public Resource: The Legal Basis

Charles F. Wilkinson

Follow this and additional works at: https://scholar.law.colorado.edu/water-as-public-resource-emerging-rights-and-obligations

Part of the Administrative Law Commons, Agriculture Law Commons, Animal Law Commons, Aquaculture and Fisheries Commons, Biodiversity Commons, Constitutional Law Commons, Courts Commons, Energy and Utilities Law Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Policy Commons, European Law Commons, Hydraulic Engineering Commons, Judges Commons, Jurisdiction Commons, Land Use Law Commons, Legislation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Property Law and Real Estate Commons, Public Policy Commons, Recreation, Parks and Tourism Administration Commons, State and Local Government Law Commons, Urban Studies and Planning Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

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.

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.
WATER AS A PUBLIC RESOURCE: THE LEGAL BASIS

Professor Charles F. Wilkinson
School of Law -- University of Oregon

WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS
University of Colorado
Boulder, Colorado
June, 1987
I. INTRODUCTION

A. Public Rights in Water: Recent Developments

B. Research Sources

1. General authorities on water law containing thorough selections on public rights.
   a. J. Sax and R. Abrams, LEGAL CONTROL OF WATER RESOURCES 30-153 (1986), casebook on water law; chapter one devoted solely to recreational use and public rights in water.

2. Specific authorities on public rights in water law.
   a. H. Althaus, PUBLIC TRUST RIGHTS 1-70 (U.S.
Dept. of Interior, Nov. 3 1978), an expansive treatment of the history of public rights in water.


3. Recent general-audience books on Western Water:


b. D. Worster, RIVERS OF EMPIRE: WATER, ARIDITY
II. TOWARD A WORKING DEFINITION OF THE PUBLIC INTEREST

A. The Elusive Concept of the Public Interest

In the search for the public interest, no one simple answer in any concrete situation ordinarily suffices. The changing nature of private interest and public emphasis necessarily dictates that the public interest is an ambiguous goal, always sought but never ultimately found. To some, the principal use of our rivers ought to be for development. To others, preservation of our limited natural resources is one of the highest endeavors of organized society and ought to be a major goal of water policy. In recent years the legislatures have begun to reflect these preferences for nonconsumptive uses; the amount of lands and, to a smaller degree, rivers set aside for recreation, preservation and non-economic purposes continues to grow. This is not to say the preservationists have "won" or should win. The Nation needs energy from water-driven projects, it needs food from irrigated agriculture, it needs water for municipal and industrial uses. But our society also needs to think; perhaps even "think like a river" and make the shift from nature domination to nature accommodation.

B. The Traditional Definition: Beneficial Use

Defining public rights as a beneficial use was the original
method of defining permissible water uses in western states. Initially the range of beneficial uses was limited to domestic, municipal, irrigation, livestock, industrial, power, and mining uses. One classic case representing the traditional view is *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913), where a federal appeals court refused to define recreation as a beneficial use, denying the resort town of Cascade, Colorado the right to keep a waterfall flowing to retain its scenic beauty.

C. Early Legislative Recognition of a Broader Set of Interests

Oregon became the first western state to recognize recreational and scenic values in 1915 when it set aside several waterfalls from appropriation. See O.R.S. 538.200. In 1928 California constitutionalized modern notions of public interest through the concept of reasonable use: "[T]he general welfare requires . . . that the waste or unreasonable use . . . of water be prevented, and that the conservation of such water is to be exercised . . . in the interest of the people and the public welfare." Cal. Const. art. X, § 2. Most western state constitutions recognize public rights in water (impliedly recognizing that extractive water development is in the public interest), either stating that water is the property of the public, (N.M. Const. art. XVI, § 2; Colo. Const. art. XVI, § 5; Wyo. Const. art. VIII, § 1), or declaring the appropriation of water to be a public use. (Cal. Const. art. 10, § 5; Idaho
Const. art. 15, § 1; Wash. Const. art. XXI, § 1). However, only the Alaska and California constitutions make strong, express provisions for the protection of fish and wildlife. Alaska Const. art. VIII, § 3, 13-14; Cal. Const. art 10A (added by initiative, 1980).

D. Current Recognition of Public Rights

States continue to move gradually toward greater recognition of public water rights, although in most cases they are junior to established uses. Several western states expressly include public rights in their statutory definition of beneficial use. In Colorado, beneficial use includes the appropriation of minimum flows "as required to preserve the natural environment to a reasonable degree." Colo. Rev. Stat. 37-92-103(4), upheld in Colorado River Water Conservation District v. Colorado Water Conservation Board, 197 Colo. 469, 594 P.2d 570 (1979). See also, Rev. Code Mont. 1983 § 85-2-102(2) (beneficial use means use of water for the public, including fish, wildlife and recreational uses); Wash. Ann. 90.54.020(1) (beneficial use includes "fish and wildlife maintenance and enhancement, recreation,... preservation of environmental and aesthetic values"). Most states also have provisions that the "public interest" must be considered in the granting of new permits and in transfer applications. See Section IX A, infra. For a discussion of how present definitions of beneficial use and restrictions on transfers eliminate incentives to convert water to new uses, see Tader, Reallocating Western Water: Beneficial
Some western courts have expanded the limited view of beneficial use as expressed in Empire. For example, the Idaho Supreme Court held that recreational and aesthetic values represent "an emerging recognition in this and other states of social values and benefits from water." State of Idaho, Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974). A few have adopted the public trust doctrine. See Section VIII, infra. See generally Sax, Legal Control of Water Resources 1-152 (1986).

E. Expanding and Specifying the Public Interest:
Efficiency and Environmental Concerns

There is increasing debate over the ways in which the promotion of efficiency and the protection of environmental values should be implemented in water allocation systems. Many writers have argued that public interest objectives should be spelled out with greater clarity in order to effectively achieve those objectives. See Butler, Defining a Water Ethic Through Comprehensive Reform: A Suggested Framework For Analysis, 1986 Ill. L. Rev. 439. According to Butler, the general objectives in a public interest statute should at least include: 1) reduction of waste, 2) political accountability of decisionmaking, and 3) weighing of nonefficiency concerns (values that are appropriately weighed into the public interest but which do not tend to make the decision more cost effective). One such attempt is the Alaska Water Use Act, which explicitly enumerates the elements
that constitute the public interest. See Alaska Stat. 46.15.0-80(a)-(b). These elements include the effect of appropriation on fish and wildlife, recreational opportunities, public health and access to public waters.

Putting a value on environmental gains and losses can be difficult, but failing accurately to value the complete water resource can result in pollution, inadequate protection of instream values, and inefficient use of water resources. See, e.g., Trelease, Policies for Water Law: Property Rights, Economic Forces and Public Regulation, 5 Nat. Res. J. 1, 18-23 (1965); Milliman, Can People Be Trusted With Natural Resources ?, 38 Land Econ. 199 (1962). Some feel that the key to improving the efficiency and equity of water use in agricultural production is through more realistic pricing of water resources. See Pierce & Furuseth, Constraints to Expanded Food Production: A North American Perspective, 26 Nat. Res. 15, 37 (1986). There is also growing pressure to increase the transferability of water rights in an attempt to foster economically efficient and socially beneficial uses of water. See e.g., Freyfogle, Water Justice, 1986 Ill. L. Rev. 481; T. Anderson, Water Crisis: Ending the Policy Drought (1983); Shupe, Waste in Western Water Law: A Blueprint for Change, 61 Or. L. Rev. 483 (1982).

III. THE ORIGINS OF PUBLIC VALUES OF WATER IN ANCIENT SOCIETIES

A. The Growth of Agricultural Civilizations in the American West
Neolithic subsistence agriculture in the American west dates to approximately 3000 BC. R. Dasmann, Environmental Conservation 58-85 (1978). When neolithic farmers began to settle in the river basins, new agricultural tools and new techniques of irrigation farming produced greater yields. This in turn removed the threat of starvation and created time for leisure and other tasks, resulting in the development and growth of civilizations. Id.

In the Southwest, American Indian civilizations, such as the Paiute in the prehistoric Owens Valley of California and the Papago or "Bean People" of the Sonoran desert, developed "irrigation cultures" without sacrificing their reverence for water as a sacred element in their religions. See, e.g., D. Worster, Rivers of Empire 32 (1985); C. Bowden, Killing the Hidden Waters (1977). The shallow irrigation ditches dug by the Hohokams with stone hoes between 1100 and 1300 AD survive to this day. Later Hispanic societies were premised on the community value of water. See generally M. Meyer, Water in the Hispanic Southwest 12-19 (1984).

B. Earlier Developments in the Old World

The desert was also the scene of early agricultural development in the old world, most notably China, India, and the Middle East in the Tigris, Euphrates and Nile river systems. Extensive canals and storage systems for irrigation were used in Egypt along the Nile at the time of Rameses II in the thirteenth century B.C. See M. Baker, The Quest for Pure Water: The History
of Water Purification from the Earliest Records to the Twentieth Century (1949). Yet where the Hohokam's land suffered from salt accumulation, the Egyptians employed a "symbiotic" water-to-land ratio to flush the salts away. Agriculture was limited to one third of the year and no substantial extensions of the cultivated areas were permitted. Worster, supra at 43.

The most elaborate water resource management and regulation in ancient society took place in the Yellow River Basin of China. Attempts to control "China's Sorrow"--the Yellow River--led to the construction of levees, the earliest public water works. Levees soon became implements of war between low lying feudal states, and a treaty banning such misuse of public levees was signed in 651 B.C. C. Greer, Water Management in the Yellow River Basin of China 25 (1979).

River management agencies in the Han Dynasty (B.C. 206 - 220 A.D.) were roughly comparable to administrative agencies in the contemporary west. To battle sedimentation, for flood control and the development of irrigation works, renovation and expansion of public water projects took place on a massive scale. Consolidation of power in a central government for the whole empire lead to a Ministry of Public Works. The Ministry controlled basin by basin water management and planning, while construction of projects was the responsibility of local agencies. A "Director of Water Conservancy" was to manage water for the public good. Id. at 31.

For other sources on water use in ancient societies, see K.
Butzer, Early Hydraulic Civilization in Egypt (1976); J. Needham, Science and Civilization in China (1971); J. Bennett, Anthropological Contributions to Cultural Ecology and Management of Water Resources (in Man and Water 43 (L. James ed 1974)).

IV. ROOTS OF AMERICAN LAW

A. Ancient Roman Rights In Rivers and Seashores

"Natural law" or lex naturae was borrowed from the Greeks by the Romans and stood for virtue or moral excellence; a universal order so great that the Roman institution of slavery was considered "contrary to natural right." H. Althaus, Public Trust Rights 1-70 (U.S. Dept. of Interior, Nov. 3 1978)(quoting T. Sandars, The Institutes of Justinian (4th ed. 1867)). The Roman law of public rights in running waters from the Institutes was part of the "laws of nature," distinct from laws that could be amended by consent of the people or by new legislation. Id. "By the law of nature these things are common to mankind--the air, running water, the sea and consequently the shores of the sea." Institutes 2.1.1. "All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men." Id. at 2.1.2.

The Institutes were one of four principal parts of the Corpus Juris Civilis, and functioned as a treatise with the force of law and constitution. See MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 Fla. St. U. L. Rev. 10
511 (1975). The Romans made a distinction between public and private rivers. Brooks and torrential rivers were subject to private ownership; apparently most others were not. Id. at 520 (quoting from the Digest, another component of Corpus Juris Civilis). The bed of a public river, or res publicae, was owned by the state. The bed of a private river belonged to private riparian proprietors, and the banks of all rivers could be owned by riparians. In a public river, the public had the right to use the water. MacGrady, supra, at 527-28; Althaus, supra, at 5.

There are several clear parallels between Roman and modern American trust principles. The state, as inherent owner of the beds of harbors, held ownership subject to perpetual use dedicated to the public. In regard to rivers and their banks, ownership rights of private proprietors were suspended, subject to the use of the public (unless the water "deserted its channel"). Althaus, supra at 5. The transfer to private ownership could only take place without substantial impairment to the public interest. See also Stevens, The Public Trust: A Sovereign's Ancient Perogative Becomes the People's Environmental Right, 14 U.C.D. L. Rev. 195 (1980).

B. English Common Law:

During the early centuries of the "Dark Ages," public rights in waters declined in both the British Isles and on the European continent, while private, exclusive rights to fish were frequently claimed and used by members of the aristocracy. Note,

Between the Norman Conquest in 1066 and the first Magna Charta in 1215, the nobility exploited fishery resources by attaching weirs to the beds of streams flowing over their land. The first Magna Charta—the "Great Charter of King John"—expressly prohibited weirs in rivers "throughout the country." Althaus, infra at 24 (quoting R. Thompson, An Historical Essay on the Magna Charta of King John (1829)).

Two doctrines of primary importance to public rights in water have evolved from English common law. One is that navigable waters in England were coextensive with tidewaters. See part VI, infra. The second is the public trust doctrine—that the shores and submerged beds of navigable waters were held in trust by the English Crown for the benefit of all people. The public trust rights of English common law which were later incorporated into early American law are found in Sir Matthew Hale's De Jure Maris and De Portibus Maris, both written in 1670 (cited in Selvin, The Public Trust Doctrine in American Law and Economic Policy, 1789-1920, 1980 Wisc. L. Rev. 1403-04, n.4.)

Rights known as jus publicum, or public rights, attached to ports, navigable waters, and tidal and properties. Such rights included unobstructed navigation, fishing, loading and unloading at ports or on the banks of navigable rivers, towing along navigable rivers, and the right of access to the sea over private property. The rights were vested in the public and could not be
restrained or diminished, even by the Crown. The Crown was permitted to grant tideland properties to private parties, but the public retained its rights of use and access. Selvin, supra, at 1403. See also 2 H. Bracton, On the Laws and Customs of England 39-40 (S. Thorne trans. 1968) (Crown considered to own public areas but public enjoyed right to use them; thus Crown's ownership could not be transferred or separated from the sovereign).

Police power in English common law encompassed the legitimate authority of government to act for the common good. The "public police"--Blackstone's "due regulation and domestic order of the kingdom,"--was the foundation for a judicial doctrine of public rights. 4 W. Blackstone, Commentaries 163; Schieber, Public Rights and the Rule of Law in American Legal History, 72 Cal. L. Rev. 217 (1984). The United States Supreme Court interpreted the English common law to uphold public rights, both in the public trust area and in the protection of the public interest. See e.g., Munn v. People of Illinois, 94 U.S. (4 Otto.) 113 (1877); Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892).

C. The Legacy of Roman and English Law

Justinian's and Bracton's writings have recently been criticized as their own idealizations that did not reflect Roman and English practice. See Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631, 643-44 n.75 (1986).

V. PUBLIC RIGHTS IN EARLY AMERICAN WATER LAW

A. The Westward Expansion: Early References to Public Rights in the Northwest Ordinance

The use of waterways played an important part in the exploration and settlement of the west. The Northwest Ordinance of 1787, providing that the "navigable water leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free," became a source of public rights to hunters over 125 years after its passage in Diana Shooting Club v. Husting, 156 Wisc. 261, 145 N.W. 816 (1914). Additionally, the provisions of the Northwest Ordinance have been incorporated in territorial acts, e.g., the Oregon Territorial Act, 9 Stat. 323, 329 (1848), and in statehood admission acts, 11 Stat. 383 (1859) (Oregon admission act providing that "all the navigable waters . . . shall be common highways
and forever free”). The impact of the Northwest Ordinance on the public interest in navigable streams was reaffirmed in *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921) (upholding the navigability of the Des Plaines River as an early fur trade route and enjoining the construction of a dam without the consent of Congress. For more on the Northwest Ordinance as a source of public rights, see Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 Wis. L. Rev. 335.

B. Public Rights From International Treaties

As westward expansion continued, treaties with foreign nations were made that guaranteed public rights through foreign land grants. The Treaty of 1803 for the Louisiana Territory and the Treaty of Guadalupe Hidalgo in 1848 (through which the United States acquired California and most of the Southwest) both stipulated that the United States recognized the validity of land grants made under previous rulers of these territories. Thus, United States courts have upheld Spanish, Mexican and French dedications of property to public purposes. See, e.g., *State v. Grubstake Investment Ass'n*, 297 S.W. 202 (Tex. 1927); MacGrady, *supra*, at 534-45.

Hispanic rights guaranteed by the Treaty of Guadalupe Hidalgo also served as an independent basis for guaranteeing public rights to navigable waters. See Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 Land & Water L. Rev. 467 (1973). A thirteenth century Spanish law, Las Siete Partidas, was recently applied to protect public rights that had applied to

VI. THE NAVIGATION SERVITUDE: THE DEVELOPMENT OF THE DOCTRINE

A. The Navigability Concept

The underlying rationale of the navigability concept traces its legal origins to Roman and English law. Under Roman law, navigable rivers were a class of watercourse that received a higher degree of regulation and protection. MacGrady, *supra*, at 529. The English Crown held title to the beds and waters in all navigable rivers, subject to the *jus publicum*. In the United States, ownership of rivers passed to the original states as the Crown's successors. When the states agreed to the Commerce Clause in the Constitution, however, the Clause was understood to allow for national regulation of waterways. See generally Bartke,
Navigation Servitude and Just Compensation -- Struggle for a Doctrine, 48 Or. L. Rev. 1 (1968).

B. The Test for Title Navigability

The English Common Law test of navigability was whether the water in question was effected by the ebb and flow of the tide; all inland waters above the influence of the tide were nonnavigable. The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). The American test is broader. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), redefined navigable waters as any waters that are navigable in fact. The current federal title test involves three main parts. First, navigability for title is determined as of the date of statehood. Second, the waterbody must be susceptible to navigation for commerce in its natural and ordinary condition at state-hood. Third, commercial navigation can be any "customary mode" of trade or travel, and does not require interstate commerce. See United States v. Holt State Bank, 270 U.S. 49 (1926); United States v. Utah, 403 U.S. 9 (1971).

C. The Navigation Servitude

The concept of title navigability also defines the basic reach of the navigation servitude--the rule of no compensation that allows the federal government to affect adversely private property without payment under the Fifth Amendment. The servitude extends to projects that affect watercourses navigable for title and, if Congress expressly so provides, to non-navigable tributaries where there is a reasonable relationship
D. The Public Trust Doctrine

The public trust doctrine was created to protect the public's right to navigation in navigable waters (those watercourses navigable for title). The debate began when mid-nineteenth century state legislatures granted exclusive privileges in and transferred title to submerged and waterfront lands in major metropolitan areas. State courts generally upheld the trusteeship power of the state legislature to improve public waterways for public use without requiring just compensation for damages to riparian owners. Selvin, supra at 1434.

In Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892), the Illinois legislature attempted to convey a portion of Chicago's harbor on Lake Michigan to the Illinois Central Railroad. The legislature subsequently invalidated the conveyance, and the Supreme Court upheld the state's action on the basis of the public trust doctrine. Illinois could make grants of public trust lands only for specific purposes and only if the grants did not "substantially impair the public interest in the lands and waters remaining." Id. at 453.

Illinois Central articulated the traditional definition of the public trust doctrine: that the state holds title to lands under navigable and tide waters, and the title is held in trust for the people of the state to enjoy for commerce, fishing and
navigation. The Illinois Central Court also declared the trust to be inalienable, and that the "state could no more abdicate its trust over property in which the whole people are interested, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." Id.

Initially invoked to prevent the alienation of navigable water courses, the public trust doctrine has collided with the prior appropriation system during the past decade. See United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W. 2d 457 (N.D. 1976). The larger potential of the public trust doctrine in water law was realized in National Audobon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal Rptr. 346, 658 P.2d 709 (1983), cert denied, 104 S. Ct. 413 (1983). In National Audobon, the California Supreme Court held that diversions of nonnavigable tributaries feeding Mono Lake are subject to the public trust doctrine. This conclusion was reached in spite of the state agency's 1940 permit to the City of Los Angeles to use water from the non-navigable streams feeding the lake. In an important qualification, the court rejected the notion that the public trust doctrine limits all appropriative water rights as a matter of "current and historical necessity." Id. at 446. Nevertheless, before the state can approve a diversion, it must "attempt, so far as is feasible, to avoid or minimize any harm to those interests." Id. at 426.

For other recent decisions, see United States v. State Water

VII. NAVIGABILITY AND THE CONSTITUTIONAL ALLOCATION OF REGULATORY AUTHORITY

A. The Distinction Between Navigability and Congressional Power under the Commerce Clause

In the early cases, the classification of waters as navigable was used as a measure of the federal government's regulatory authority under the Commerce Clause. The Court in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) interpreted the commerce clause as "comprehending navigation within the limits of every state." Under the federal commerce power, navigable waters became "the public property of the nation, and subject to all direct legislation by Congress." Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865).
The cases subsequent to Gilman upheld federal authority over water-courses not navigable for title—but the Court continued to use the rubric of "navigability." For example, the doctrine expanded into non-navigable parts of navigable rivers, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); to streams formerly navigable but no longer used for commerce, Economy Light and Power Co. v. United States, 256 U.S. 113 (1921); to streams that could reasonably be improved to a navigable condition, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); and finally to non-navigable tributaries to navigable streams where the navigable capacity of the latter is affected and where Congress has expressly exercised its power over the tributary. United States v. Grand River Dam Auth., 363 U.S. 229 (1960). See also Leighty, The Source and Scope of Public and Private Rights in Navigable Waters, 5 Land & Water L. Rev. 391 (1970).

The Court has now clarified that there is no correlation between the classic navigability concept and the reach of federal power. As Justice Rehnquist stated in Kaiser Aetna v. United States, 444 U.S. 164 (1979), "reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce:"

It has long been settled that Congress has extensive authority over this nation's water under the Commerce Clause. Early in our history this court held that the power to regulate commerce necessarily includes power over navigation. . . . [But], a wide spectrum of economic activities "affect" interstate commerce and thus are susceptible of congres-
sional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved. The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of a more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as "navigable water of the United States."

The modern scope of federal power over water is nearly unlimited. For purposes of obtaining a permit to discharge dredge and fill material into navigable waters under § 404 of the Clean Water Act, (33 U.S.C.A. §§ 1311, 1362 and 1444), the Corps of Engineers has defined navigable waters to include "freshwater wetlands." Freshwater wetlands are in turn defined by the Corps as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." In United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455 (1985), a private landowner sought to fill 80 acres of low-lying marshy land. The lower court held that frequent flooding by adjacent navigable water was essential to regulation by the Corps. The Supreme Court reversed and upheld federal authority, acknowledging the hydrological connection between wetlands and other bodies of water for the purposes of combatting water pollution under the Clean Water Act.

B. The Tenth Amendment: Expansive State Authority in the Absence of Federal Preemption

22
The supremacy clause of the U.S. Constitution, art. VI, cl. 2, requires states to comply with federal law when 1) a federal power has been validly exercised by Congress and 2) Congress intended to preempt state law. Thus, for example, the federal government can establish instream flows on the federal lands, even if a state does not recognize instream flows as a beneficial use. United States v. New Mexico, 438 U.S. 696 (1978).

However, Congress has traditionally deferred to state water law and the states are therefore able to exercise broad authority over water. Older cases suggesting that state power over water is based on waters within their borders (see, e.g., State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (1935)), are now best understood as recognizing expansive state jurisdiction under the Tenth Amendment unless preempted by Congress. See, e.g., United States v. New Mexico, supra; Hughes v. Oklahoma, 441 U.S. 322 (1979) (state authority over wildlife based on police power, not ownership). In California v. United States, 438 U.S. 645 (1978), the Court held that section 8 of the 1902 Reclamation Act, 43 U.S.C. §§ 372, 383 requires federal compliance with state water laws, including conditions imposed by state water agencies in federal permits.

VIII. MODERN PUBLIC RIGHTS: THE STATE PROVISIONS

A. The "Public Interest" Provisions

1. Appropriations

The laws of most states authorize the regulatory agency to reject applications not in the public interest. For example, N.M.
Stat. Ann. § 72-5-7 (1978) allows applications to be rejected if the approval would be "contrary to the public interest." Courts grant broad administrative authority to impose public interest constraints on water use. Early cases construed the provisions narrowly. See Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045 (1910); East Bay Municipal Utility District v. Department of Public Works, 1 Cal.2d 476 35 P.2d 1027 (1934); and Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

A major interpretation of a public interest provision was issued in Shokal v. Dunn, 707 P.2d 441 (Idaho 1985). The Idaho Supreme Court remanded a decision to grant an appropriation permit for a fish hatchery that would have lowered the flow in a 700 ft. stretch of Billings Creek from 125 cfs to 25 cfs. The Shokal court construed a vague public interest provision allowing the Water Resources Director to reject an application if an applicant's appropriation of water "will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use." I.C. § 42-203A(5)(e). The court interpreted the public interest to include: 1) fish and wildlife habitat, 2) protection of aquatic life, 3) recreation, 4) aesthetic beauty, 5) navigation; 6) water quality; 7) access to public waters; 8) minimum stream flows; 9) waste prevention; and 10) the promotion of conservation. The Shokal court also found that the statute was an affirmative duty to assess and protect the public interest, this duty being "related to the larger doctrine of the public
trust." The burden of proof is on the applicant to show that the project is in the public interest or has factors that outweigh it.

A major opinion from the First District Court of Appeals upheld the authority of the state water board to regulate beneficial uses to protect water quality in the San Francisco Bay and Delta. United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 277 Cal Rptr. 161 (1986). The court first stated that protecting the public interest is a primary duty of the Board. The court then determined that the public interest includes the protection of water quality, relying on the Water Quality Act, Cal. Water Code §§ 13000 et. seq. (West 1984), the Clean Water Act, 33 U.S.C. §§ 1251 et. seq., and the California "rule of reasonable use" derived from the state constitution.

Other significant opinions construing public interest provisions include: United States v. California, 694 F.2d 1171, 1177 (9th Cir. 1982) ["New Melones II"] (upholding the state Board's authority to restrict rights of contractors holding permits under federal reclamation law in order to protect water quality); Stempel v. Department of Water Resources, 82 Wash. 2d 109, 508 P.2d 166 (1973) (public welfare includes the pollution and health effects of an appropriation of lake water); People v. Shirokow, 28 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 (1980) (Board can require salvage through the eradication of phreatophytes); Bank of America National Trust and Savings Assoc. v. State Water Resources Control Board, 42 Cal. App. 3d 198, 116 Cal.

2. Transfers

Most permit states authorize denial of a change of use on public interest grounds. Several states apply the same public interest criteria to transfers that are used for evaluating new permit applications. See e.g., Mont. Stat. Ann. § 85-2-402; N.D. Cent. Code § 61-04-15.1(2); Idaho Code § 42-222(1). Alaska administrative rules require that a proposed change "will not adversely affect the water rights of other persons or the public interest." 11 Alaska Admin. Code § 93-930(C). Future developments under such public interest provisions may be presaged by an unreported trial court decision in New Mexico. In In the Matter of Howard Sleeper, et al, Rio Arriba County Cause No. RA 84-53 (C) (April 16, 1985), the court set aside an order of the State Engineer granting an application to change the point of diversion and the purpose and place of use of surface rights. The existing use was for irrigation and the purpose of the changes was to provide water for a planned ski resort and guest ranch. The court said:

Northern New Mexicans possess a fierce pride over their history, traditions and culture. This region of Northern New Mexico and its living culture are recognized at the state and federal levels as possessing significant cultural value, not measurable in dollars and
cents. The deep-felt and tradition-bound ties of Northern New Mexico families to the land and water are central to the maintenance of that culture.

While these questions seem, at first, far removed from the simple question of the transfer of a few acre feet of water, the destruction of the local culture by development which begins with small, seemingly insignificant steps.

I am persuaded that to transfer water rights, devoted for more than a century to agricultural purposes in order to construct a playground for those who can pay is a poor trade, indeed. I find that the proposed transfer of water rights is clearly contrary to the public interest and, on that separate basis, the application should be denied.

B. Interbasin Transfers

The decision in Sporhase v. Nebraska, 458 U.S. 941 (1982) made it clear that the demands of interstate commerce can override the desire of any single state to ban exports of water. However, states retain broad authority to condition the intra- and interstate movement of water through the application process. See generally MacDonnell & Howe, Area-of-Origin Protection in Transbasin Water Diversions: An Evaluation of Alternative Approaches, 57 U. Colo. L. Rev. 526 (1986).

C. State Instream Flow Programs

Minimum flow provisions allow state water boards to appropriate water to maintain a sufficient quantity within the stream for recreation, fish and wildlife, and aesthetic purposes. Most instream flow appropriations are relatively junior. Nevertheless,
such instream flow rights may restrict the ability of a senior consumptive user to transfer the use to a point upstream of the instream flow right, on the ground that the upstream transfer would infringe on the right of a junior appropriator to have maintained the stream conditions at the time of the junior’s appropriation. See, e.g., Farmer’s Highline Canal and Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954). On instream flows, see generally Tarlock, The Recognition of Instream Flow Rights: New ‘Public’ Western Water Rights, 25 Rocky Mtn. Min. L. Inst. 24 (1979).

D. State Wild and Scenic River Legislation

Some states, in addition to minimum instream flow programs, also have wild and scenic river designation laws. For example, the California Free Flowing Rivers Statute declares it is the policy of the state that “certain rivers which possess extraordinary scenic, recreational, fishery or wildlife values shall be preserved in their free flowing state.” “Free flowing” means existing or flowing without artificial impoundment, diversion or other modification. West Ann. Cal. Pub. Res. Code §§ 5093.50 to 5093.69. (1984). South Dakota law authorizes designation of “wild, scenic and recreational river areas,” S.D. Compiled Laws Ann. § 46A-1-16, while Oregon (Or. Rev. Stat. § 390.805-.925 (1985)), North Dakota (N.D. Cent. Code §§ 61-29-01 to 06 (1985)), and New Mexico (El Rio Chama Scenic and Pastoral Act, 1977 N.M. Laws ch. 42), authorize the protection of specific rivers.
IX. MODERN PUBLIC RIGHTS: THE FEDERAL PROVISIONS

A. Section 404 of the Clean Water Act

A change in the point of diversion often requires the deposit of dredge and fill materials in navigable waters and/or the construction of an impoundment. Because section 404 of the Clean Water Act, 33 U.S.C. § 1344, provides the Army Corps of Engineers with authority to regulate such activities, any application to change the point of diversion will have to accommodate the requirements of this section.

In Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985), the Corps denied Riverside District a nationwide permit under section 404 because the proposed reservoir would adversely impact critical habitat of the whooping crane, an endangered species. The 10th Circuit upheld the Corps' decision to require the district to proceed by an individual permit rather than a nationwide permit. The court reached this conclusion in spite of the Clean Water Act's policy of deferring to state water law, Section 101(g), 33 U.S.C. § 1251(g) (1982). The Riverside Irrigation court also read the Corps' jurisdiction under the Clean Water Act broadly: "[T]he statute focuses not merely on water quality, but rather on all of the effects on the 'aquatic environment' caused by replacing water with fill material . . . ." Id. at 512.

B. The Endangered Species Act

In addition to confirming the Corps' authority to condition permits under section 404 of the Clean Water Act, the 10th Circuit
in *Riverside Irrigation* addressed the issue of how the Endangered Species Act, 16 U.S.C. § 1531 et. seq. affects state created water rights. The court recognized the Corps' mandatory obligation under Section 7 of the ESA to "insure . . . the continued existence" of the whooping crane, 16 U.S.C. § 1536, and its duty to protect the crane from "downstream effects of changes in water quality." *Id.* at 512. The 10th Circuit also placed the burden of proof on Riverside District to demonstrate that the discharge of dredge material would not "destroy or adversely impact the critical habitat" of the whooping crane.

Another decision has held that the ESA requires "the Secretary [to] actively pursue a species conservation policy" and to give priority to the protection of the endangered cui-cui and the threatened Lahontan cutthroat trout in his operation of a reservoir feeding Pyramid Lake. *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984). The court upheld the Secretary's decision to devote all of the storage in Stampede Reservoir to provide instream flows in order to protect the covered species. See generally Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land and Water L. Rev. 3 (1985).

C. *Pacific Salmon*

Pressure to protect Columbia River Salmon and Steelhead has led to federal legislation to protect flows in the Columbia River. The Northwest Power Planning Council was established by the Northwest Power Act of 1980 to set energy and fisheries policy in the

D. Obligations To Governments Other Than the State of Transfer

1. Federal Reserved Water Rights

The reserved rights doctrine provides that when the United States withdraws land from disposition, and reserves it for a particular purpose, -- for example, the creation of a national park, forest, wilderness, etc. -- the government may impliedly reserve unappropriated water to the extent necessary to accomplish the primary purposes of the reservation. These rights sometimes set aside water for minimum instream flows and for ecosystem maintenance. In effect, the reserved rights doctrine superimposes federal water rights on top of an already existing state prior appropriation system. These rights, which are quite strictly construed by the courts, vest in the government as of the date of the reservation and are senior to the rights of future private

2. Indian Reserved Water Rights

Western water law must also account for water rights of Indian tribes. The Winters doctrine, closely related to the federal reserved water rights doctrine, provides that when the tribes ceded their aboriginal land to the federal government, they reserved sufficient water to meet their future as well as present needs. See Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963). Most Indian water rights will be quantified in state, rather than federal, courts. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). On Indian water rights, see generally F. Cohen, Handbook on Federal Indian Law, ch. 10 (1982 ed.).

The Western States Water Council recently reported that Indian water rights in the western states may approach forty five million acre-feet per year. See Western Governor’s Association, Indian Water Rights in the West (1984). This is a rough estimate,
but it demonstrates the central role that Indian water rights play in marketing decisions in numerous drainages across the west.

3. **Obligations to Downstream States**

In [*Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986), cert. granted], the states of Iowa, Nebraska and Missouri sought to enjoin a proposed water transfer from the Oahe reservoir in South Dakota to Wyoming for a coal slurry operation for Energy Transportation Systems, Inc. (ETSI). The states alleged that the proposed depletion of water would impair their rights to obtain sufficient quantities of water to meet beneficial uses and would injure fish and wildlife habitats. The court did not reach the hard question of exactly what obligation an upstream state owes to a downstream state. The court did, however, hold that state’s allegations of injury to fish and wildlife habitats and to beneficial uses did meet the injury in fact component of standing and that the injury was "fairly traceable" to the Corps’ granting of the permit. *Id.* at 277. The court also held that the downstream states had standing to bring this action even though South Dakota had already granted ETSI a state permit. "The fact that South Dakota granted ETSI the natural flow rights does not deny the states standing to challenge the contract allowing ETSI to withdraw water from the federal reservoir." *Id.* at 277 fn. 5.

The ETSI pipeline case suggests that there may be circumstances in which water transfer proposals must take into account the needs of downstream states on interstate streams. These obligations have not been firmed up in the case law, and probably are
relevant only to very substantial projects, such as the ETSI pipeline, but the rights of other states are yet another factor to include in the formula.

X. MODERN PUBLIC RIGHTS: RESTRICTIONS ON LAND MANAGEMENT PRACTICES

A. Public Lands


B. Private Lands

State regulation of forestry practices provides a mechanism to protect water resources on private forest lands. For example, the Oregon Forest Practices Act declares that it is public policy
to maintain water resources, habitat for wildlife and aquatic life, and to "protect soil, air and water resources, including but not limited to streams, lakes and estuaries. . . ." Or. Rev. Stat. 527.630(1)-(3). In several states, these statutes have been administered in an increasingly rigorous manner during recent years. See generally Cubbage & Ellefson, State Forest Practice Laws: A Major Policy Force Unique to the Natural Resources Community, 13 Nat. Res. Law. 432 (1984).

XI. CONCLUSION: A DEVELOPING MOVEMENT TOWARD COMPREHENSIVE WATERSHED PLANNING AND MANAGEMENT