St. Mary's Law Journal

Volume 17 | Number 4 Article 7

1-1-1986

Environmental Significance of Instream Flows.

James W. Johnston

COMMENT

Environmental Significance of Instream Flows

James W. Johnston

I. INTRODUCTION

The preservation and enhancement of the natural environment is a recognized policy goal of the United States.[1] Recent developments in western water law which strive to protect fish and wildlife habitats, recreational uses, aquatic life, as well as numerous other environmental concerns have furthered environmental protection.[2] The concern for environmental protection of water is genuine, because as man continues to proliferate and prosper, so too do his demands on the environment.[3] Without proper regulations and management he may soon face ecological disaster.[4]

If environmental policies are to be incorporated into state water law, affirmative steps must be taken to reserve large quantities of water for the preservation of fish and wildlife habitats.[5] Environ-

---

1. *See* National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (1970). Congress has declared that the national policy should preserve productivity and enjoyable harmony with our natural environment. *See id.* § 4321. Congress recognizes that as man becomes more populous, it is important that he foster and promote the general welfare by restoring and maintaining environmental quality. *See id.* § 4331.

2. *See, e.g.,* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 695 (1972) (preservation and enhancement of environmental aspects is one of America's deep concerns); Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1095 (1979) (water management and its relation to natural environment is apparent); Comment, *Federal Protection of Instream Values,* 57 NEB. L. REV. 368, 368 (1978) (environmental concerns encompass preservation of both water quantity and water quality). *See generally* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 902 (value of water allocation for environmental uses is becoming more recognized and instream uses have gained legitimacy by legislative recognition in many western states).

3. *See* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 695 (1972) (citing ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY at V (1970)). As man becomes more populous and the need for water increases, pressure is put on riparian habitats because the demand for water and other natural resources deprives already existing ecosystems of their necessary water supply. *See id.* at 695; *see also* Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 600 (estuarial systems of Texas are threatened by man's actions through water pollution and diversion of water needed to maintain productive ecosystems); Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1095 n.3 (1980) (unregulated appropriation in Arizona has resulted in disappearance of many former habitats);.

4. *Cf.* National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 (1970) (United States Congress has recognized profound impact of man's actions on many environmental needs and has declared that it is national policy to promote and protect natural environment).

5. *See* Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C.D.L.

ments and ecosystems in nature are dependent on adequate flows of water in creeks and rivers, as well as minimum levels of water in natural lakes or ponds.[6] The environmental necessity of adequate water flows is not new to Texas, and for many years, Texans have undertaken efforts to preserve the environment through regulating the use of water.[7] While the efforts to preserve Texas' ecological balance through regulation of water use are praiseworthy, they are inadequate in comparison to methods of protection employed by other states.[8] Without immediate legislative action granting priority to environmen-

---

REV. 233, 233-34 (1980) (protecting ecological values, recreational opportunities and aesthetic qualities of lakes and streams requires leaving water in place). The public has insisted on protecting environmental concerns and has asked that courts step in and look over appropriation of limited water resources. *See id.* at 233-34.

6. *See* Avondale Irrigation Dist. v. North Idaho Properties, Inc., 577 P.2d 9, 12 (Idaho 1978) (adequate or minimum flows mean that flow of water in natural water courses or minimum levels of water in lakes or ponds which are required to protect "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality therein"); *see also* 16 U.S.C.A. § 1271 (1985) (Federal Wild and Scenic Rivers Act). The United States has recognized that many rivers should be preserved in their "free flowing condition" in order to protect the immediate environments for the "enjoyment of present and future generations." *See id.* § 1271; *see also* Sherton, *Preserving Instream Flows in Oregon's Rivers and Streams,* 11 ENVTL. L. 379, 381 n.10-11 (1981) (past water resources provided adequate water for instream, as well as consumptive uses, now values dependent on adequate streamflows are threatened). "Because of limited supplies and increasing demands . . . a water crisis is particularly evident for those uses such as fish, recreation, and pollution abatement that rely on sustianed stream flows." *Id.* at 381 n.10-11 (quoting Rousseau, *The Oregon Experience with a Minimum Streamflow Law,* 2 INSTREAM FLOW NEEDS 78 (1976)).

7. *See, e.g.,* TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986) (public policy of state to provide for development and conservation of water in "development of its forests . . . maintenance of a proper ecological environment of the bays and estuaries . . . and health . . . of marine resources"); *id.* § 11.147 (public interest considerations affecting issuance of appropriation permits which effect bays and estuaries and fish and wildlife habitats); *id.* § 16.012(b)(5) (executive administrator of Water Development Board is charged with duty of investigating effects on bays and estuaries of future water facilities and reservoirs); *see also* TEX. PARKS & WILDLIFE CODE ANN. §§ 25.001 to -.003 (Vernon Supp. 1986) (recreational uses of water are useful purposes and conservation and development of water related lands and water resources are public rights and duties).

8. *See* WASH. REV. CODE ANN. § 90.03.247 (West Supp. 1986) (duty of water rights agency to condition or deny future water rights permits to protect established minimum flows and levels which department of ecology recommends is necessary for environmental preservation); *compare* IDAHO CODE § 42-1501 (Supp. 1985) (minimum stream flow maintenance is necessary and desirable for public benefit and authority is granted to water rights agency to preserve such water through appropriate management of water rights permits) *with* TEX. WATER CODE ANN. § 11.147(e) (Vernon Supp. 1986) (water rights agency is to consider effects of permit issuance "on fish and wildlife habitats"). The legislature has failed to expressly authorize conditioning permits on minimum stream flows and has not indicated the slightest importance for such consideration. *See id.* § 11.147.

tal concerns in the regulation of water rights, the ecological future of Texas' fish and wildlife habitats may be jeopardized.[9]

The purpose of this comment is to explore the legal justification which could be used to protect instream flows, thus ensuring the preservation of the natural environment. The comment will also discuss the effect of the 1985 Texas Water Package and its partial adoption of these justifications. While the 1985 Water Package has made significant advances by expressing public interest elements representing environment concerns,[10] these advances cannot be viewed as providing the necessary protection for Texas wildlife habitants.[11] Furthermore, a proposal for a more comprehensive environmental protection policy will be advocated in order to provide a water plan for Texas reasonably sensitive to protecting the environment.[12]

---

9. *See* Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 598 (1973). The increased utilization of water throughout the state is expected to reduce instream flows to coastal areas. *See id.* at 598. This reduction of fresh water will severely alter the balance of fresh versus salt water mixed necessary for a productive environment. *See id.* at 598. Although many Texas' authors focus exclusively on the bay and estuary systems, it should be recognized that other environmental habitats may be affected by water use. *Cf.* Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C.D.L. REV. 233, 233 n.2 (1980). Professor Johnson states:

> Thousands of rivers, streams and lakes in the west are dried up completely by appropriations each year with disastrous consequences for fish and other living things which depend on water for survival. Countless other water bodies, so depleted by diversions, either annually or occasionally, are totally changed from their natural state and become an entirely different ecological habitat.

Id. at 233 n.2. The use of water in inland areas of Arizona has deprived that state of many of its environmental wonderlands. *See* Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1095 n.3 (1980) (damming, channelization, diversion, and unregulated pumping have destroyed many former habitats).

10. *See* TEX. WATER CODE ANN. § 11.147 (Vernon Supp. 1986). The Texas Water Commission must consider factors necessary to protect flows to Texas' bays and estuaries as well as consider harm to fish and wildlife habitat due to appropriation permits they may issue. *See id.* §§ 11.147(b),(c), (e).

11. *Compare* TEX. WATER CODE ANN. § 11.147 (Vernon Supp. 1986) (Texas Water Commission must only consider effects of appropriations on fish and wildlife habitats) *with* WASH. REV. CODE ANN. § 90.54.020 (Supp. 1986) (fundamental consideration will be quality of natural environment and its protection and enhancement) *and* KAN. STAT. ANN. § 82a-703b (1984) (all new permits subject to minimum stream flows which are set by state).

12. *See* Press Release of Sierra Club, Lone Star Chapter at 4 (September 9, 1985) (Sierra Club believes that new provisions in Texas Water Code affecting instream uses must be augmented to be environmentally sensitive).

II. DEVELOPMENT OF INSTREAM USES IN TEXAS WATER LAW

Instream uses are defined as "non-consumptive uses of water that are confined to the banks and bed of a stream or lake."[13] Non-consumptive uses are really the uses of water in its natural state or flow level.[14] The non-consumptive uses or instream uses include preservation of such environmental concerns as ecosystems, fish and wildlife habitats, recreation, and aesthetic beauty.[15] Insteam uses are distinguished from consumptive uses in that they do not divert and utilize water for a specific purpose, but actually preserve the water in its natural state to ensure the protection of the minimal flow.[16]

Minimum instream flows are the amount of water that flows in water courses or the minimum level of water in lakes[17] which preserve

---

13. *See* Tarlock & Rice, *Minimum Stream Flow Maintenance,* PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS, § 9, at 1 (1985); *see also* Note, *Protecting Streamflows in California,* 8 ECOLOGY L.Q. 697, 697 n.2 (1980) (instream uses are purposes for which water is left in its natural course). Water left instream for power generation is not considered an instream use, but is considered as offstream or other uses which generally require diversion from natural water courses. *See id.* at 697 n.2.

14. *See* Note, *Protecting Streamflows in California,* 8 ECOLOGY L.Q. 697 n.92 (1980).

15. *See, e.g.,* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 874 (water utilization for environment includes protection of fish and wildlife habitats and enhancement of aesthetic beauty); Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1107 (1979) (Arizona law has defined specific uses for unappropriated waters including purposes of preserving fish, wildlife and recreation) (citing ARIZ. REV. STAT. ANN. § 45-147 (1962)); Note, *In-Stream Appropriation for Recreational Use and Scenic Beauty,* 12 IDAHO L. REV. 263, 268 (1976) (recreation and scenic beauty are valid purposes and are considered beneficial uses of water in Idaho). Other purposes or instream uses may include more obscure uses such as the creation of a fire barrier. *See* Avondale Irrigation Dist. v. North Idaho Properties, Inc., 577 P.2d 9, 12 (Idaho 1978) (valid purpose for protecting stream flow includes establishment and maintenance of fire barrier in national forest).

16. *See* Tarlock & Rice, *Minimum Stream Flow Maintenance,* PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS, § 9, at 1-2 (1985) (instream uses are recognized for purposes of protecting stream flows in their natural state). *Cf.* Avondale Irrigation Dist. v. North Idaho Properties, Inc., 577 P.2d 9, 12 (Idaho 1978) (non-consumptive water rights limited to extent necessary to preserve some natural flow, however, water in excess of those amounts subject to appropriation).

17. *See, e.g.,* Avondale Irrigation Dist. v. North Idaho Properties, Inc., 577 P.2d 9, 12 (Idaho 1978) (minimum stream flow is amount of water and natural flow required to preserve fish habitat); Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1096 n.5 (1979) (minimum instream flows incorporates two concepts of instream flow and minimum flow and underlying purpose of both are environmental protection); Note, *Protecting Stream Flows in California,* 8 ECOLOGY L.Q. 697, 710 (1979) (instream flow requirements are those amounts of water necessary to preserve, restore instream uses).

and support various ecological systems. As consumptive uses of water increase, due to permits diverting or impounding water, instream uses are many times ignored. As a result, environments and ecosystems which are dependent upon adequate flows could disappear or be altered from their present state.[18] This deterioration of the natural environment may have devastating effects not only to Texas' natural scenic beauty, but to economic concerns as well.[19] This potential economic devastation is most threatening to Texas bays and estuaries which provide millions of pounds of commercial harvests of shellfish and fish each year.[20] In addition, water-related lands provide pleasure and recreation to thousands of Texas citizens by providing exciting areas for hunting and fishing.[21] If water is allowed to be taken from natural water courses without proper regulation and mangement, the future of Texas natural environments dependent on adequate instream flows may be doomed.[22]

---

18. *See, e.g.,* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 1 ECOLOGY L.Q. 695, 696 (1972) (appropriation permits and construction of water development projects can have significant effect on environmental concerns due to allocation of scarce water resources and environmental factors should be considered); Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1095 (1979) (increase demands of consumptive water use is beginning to abuse and destroy natural water related lands); Note, *Protecting Stream Flows in California,* 8 ECOLOGY L.Q. 697, 697 (1980) (diversions of water damages instream uses because they reduce amounts of water required to remain instream) (citing NAT'L WATER COMMISSION, WATER POLICIES FOR THE FUTURE 7 (1973)).

19. *See* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 370 (1985) (Texas allows appropriation of consumptive rights in perpetuity and continued extraction of water may lead to exhaustion of water irrespective of environmental concerns); *see also* Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 598 (1973) (changes, due to reduced volume of fresh water inflows in bays, will be severely harmful to ecological productivity).

20. *See* Hamilton, *Texas Commercial Harvests Statistics 1977-1982,* at 2 (Texas Parks and Wildlife Department, Coastal Fisheries Branch 1983). "The Texas coasts have averaged 110 million pounds — 90 million pounds of shellfish and 20 million pounds finfish. . . . [I]n 1981, the commercial harvests of fish and shellfish had a dockside value of $174.8 million." *See* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 367 (1985) (commercial fishing statistics reflect only part of economic worth of bays and estuaries since they do not include sports fishing and recreational hunting which coast provides).

21. *See* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 367-68 (1985) (sport fishing and hunting activities in coastal areas result in overall economic impact for state of $553 million).

22. *See id.* at 370 (doctrine of prior appropriation is on collision course in Texas with instream uses and conflict must be resolved before future diversion severely harms environmental interests).

A. *Historical Perspective*

The most crucial issue confronting any attempt to regulate the management of water is determining the ownership or right to the use of the water in question.[23] Originally, Texas followed the early common law doctrine of riparian water rights when determining the ownership and privileges associated with water.[24] The law of riparian rights provides that one who owns title to land that abuts a stream or river also owns a right to use a reasonable amount of that water.[25] As the riparian rights law was developing, the doctrine of prior appropriation emerged in western territories in order to facilitate the water needs of pioneers who came in search of gold and to settle vast arid lands.[26]

Due to the importance of water in western mining operations, disputes soon arose over the right to divert water by appropriation and

---

23. *See* Note, *The Plight of the Riparian Under Texas Water Law,* 21 HOUS. L. REV. 577, 578 (1984) (riparian land owners have certain rights to water and so do appropriators who divert water from riparian lands for beneficial use). There is inherent conflict between the holders of riparian and appropriative water rights under Texas law and it is important to resolve who owns vested riparian rights in order to determine public ownership of unappropriated waters. *See id.* at 579.

24. *See* Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water,* 33 TEXAS L. REV. 24, 28 (1955). Most states in the early nineteenth century welcomed the French law of riparian rights because, in many instances due to the revoluntary war, some American courts were forbidden to cite English authority. *See id.* at 28. The French law had adopted riparian law by stating: "Celui dont la propriate borde une eau courante . . . peut s'en servir a son passage pour l'irragation de ses proprietes" ("he whose property borders on a running watercourse . . . may supply himself from it in its passage for irrigation of his properties"). *See* Weil, *Waters: American Law and French Authority,* 33 HARVARD L. REV. 133, 134 (1919) (citing Napoleon Code art. 644 (1804)).

25. *See* Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 128-29, 81 S.W.2d 653, 655 (1935) (riparian right incident to real estate and right given by nature). The court stated:

> It has been said that the right of a riparian owner to the use of water bordering upon his land comes from the situation of the land with respect to the water, and the presumption that it was acquired with the view to the use and enjoyment of the natural advantages and benefits resulting therefrom.

Id. at 129, 81 S.W.2d at 655.

26. *See* Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water,* 33 TEXAS L. REV. 24, 27 (1954) (pioneers searching for gold developed prior appropriation law to meet their needs for water and mining). Early miners needed to govern acquisition of mining claims and claims to water necessary to operate mills and extract gold. *See id.* at 27. The California miners adopted a custom by which they recognized the rights to mining claims and diversions of water needed to perfect or stake a claim. *See* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 696 (1972).

the right to use water under riparian ownership.[27] In rejecting the claim of a riparian owner, the California Supreme Court upheld the social customs of California miners and declared that the miners' rights as prior appropriators of water should be protected.[28] As a result, a canal owner was not permitted an undiminished flow of water under a claim of riparian ownership which had previously been appropriated by the miners.[29] Prior appropriative rights came to be legally recognized as those acquired by permit from the sovereign which allow specific uses of the water without the riparian requirement of the ownership of land appurtenant to the water source.[30] The appropriation concept was well suited for the pioneering economy of western territories dependent on irrigation to be productive, and the first settlor to a valley could choose any land he wished and appropriate water from the nearest stream as needed to produce crops.[31]

---

27. *See* Irwin v. Phillips, 5 Cal. 140, 145-46 (Cal. 1855) (California miners brought suit against canal owner who attempted diversion of water for mining purposes as riparian owner). The California miners claimed that water rights customs of the territory protected them against subsequent appropriators since miners had use of the water first. *See id.* at 146.

28. *See id.* at 147. The California Legislature had adopted the English common law which recognized the law of riparian rights, but since riparian law could not be applied since neither party owned the land, the court was forced to look elsewhere. *See* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 696 n.5 (1972). The Supreme Court of California then looked to customs with reference to mining claims and established "appropriative rights" to water use, founded on the principle "first in time, first in right." *See id.* at 697; *see also* Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water,* 33 TEXAS L. REV. 24, 28 (1954) (California court cited no precedent because none existed). The social customs had been so fixed and followed throughout the state that they had to be protected. *See id.* at 28; *see also* Basey v. Gallagher, 87 U.S. 670, 681-82 (1874) (recognizing right to prior appropriation for irrigation purposes is recognized in Montana and other western territories and will not be defeated by riparian claims). The law of prior appropriation has been broadened in order to reflect social standards not only in the mining fields of California but the farming lands of Montana as well. *See id.* at 682-83.

29. *See* Irwin v. Phillips, 5 Cal. 140, 145-46 (Cal. 1855) (riparian ownership has no application to lands which belong to United States because riparian doctrine requires private ownership of land). At common law, one aspect of riparian ownership provided that the owner could prevent any diversion of water which deprived him of pure and natural condition of water he owned. *See id.* at 145-46. The miners, however, had a right to dig for gold throughout the territory and many had selected diversion points along the stream for mining purposes. *See id.* at 146. Necessity and propriety of a mineral region such as California demanded that already diverted waters must be protected and recognized as rights conferred by the United States with those whose diversions first in time being first in right. *See id.* at 146-47.

30. *See* First State Bank v. McNew, 269 P. 56, 65 (N.M. 1928) (allows purchaser of public land ability to take right to use water by appropriation and not as owner of real estate appurtenant to water).

31. *See* Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water,*

As a result of the demand for appropriation of water by western pioneers, the federal government, in 1866, statutorily confirmed appropriative water rights by mandating their recognition as "local custom and law."[32] As appropriation law developed, Congress passed the Desert Land Act in 1877.[33] The Act provided for the settlement of the desert lands throughout most of the western states by those persons who could convert unproductive land to farm land by utilizing appropriated waters for irrigation.[34] As a result of federal recognition of appropriative rights, the legal adoption of such rights soon spread throughout the western states of North and South Dakota,[35] Nebraska,[36] Washington,[37] Oregon,[38] and Oklahoma.[39]

---

33 TEXAS L. REV. 24, 28 (1954) (location of stream was immaterial to appropriator and subsequent settlors to second choice of both land and water).

32. *See* Act of Congress 1866, ch. 262, § 9, 14 Stat. 253 (codified as amended at 43 U.S.C. § 661 (1962)). The statute declares that all the public lands will recognize the law of prior appropriation as they may be "acknowledged by the local customs, laws, and the decisions of court" and that the federal government will protect and maintain those righs. *See* 43 U.S.C. § 661 (1982). The scope of this statute allows a purchaser of public land the ability to take a vested right to use water by appropriation only and not as the owner of land entitled to water rights incident or appurtenant as a part of real estate. *See* First State Bank v. McNew, 269 P. 56, 65 (N.M. 1928). The United States Supreme Court has held that the statute not only created appropriation rights, but that it recognizes pre-existing rights which the Congress confirmed by its enactment. *See, e.g.,* Broder v. Natoma Water & Mining Co., 101 U.S. 274, 276 (1879) (extended use of water and land improvements to effectuate that use not defeated by government grant of land to railroad company because the statute recognized "preexisting right of possession" to claim of water); Basey v. Gallagher, 87 U.S. 670, 683 (1874) (statute does not restrict the appropriators right to water, but enacted to recognize his existing rights to use water in beneficial purpose); Atchinson v. Peterson, 87 U.S. 507, 513-14 (1874) (owners of vested rights to use water which were recognized by local laws and customs will be protected by act of Congress in 1866).

33. *See* Desert Lands Act, ch. 107, 43 U.S.C. § 321 (1964).

34. *See id.* § 321. The statute contains the following clause:

> [A]ll surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supplies upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Id. § 321.

35. *See* Sturr v. Beck, 133 U.S. 541, 552 (1889). The Supreme Court upheld the application of the Territory of Dakota Statute which recognizes the validity of prior appropriation rights. *See id.* at 552. The Dakota statutes were in substance the same as found in the Act of Congress, 14 Stat. 253, § 9, as amended 43 U.S.C. § 661 (1866), in which the federal government recognized the water rights of prior appropriators in all western territories of the United States. *See id.* at 550.

36. *See* Crawford Co. v. Hathaway, 93 N.W. 781, 793 (Neb. 1903) (necessary for Nebraska to recognize rights of prior appropriators at least with respect to uses in soil or agricultural purposes).

37. *See* Isaacs v. Barber, 38 P. 871, 873 (Wash. 1894) (recognizes the rights of prior

B. *Texas Development of Appropriative Rights*

While still adhering to riparian rights system of water rights,[40] Texas law also recognized the utility of adopting the prior appropriation concept for the use and governing of the flow of its rivers.[41] Prompted by drought conditions during the late nineteenth century, the Texas Legislature passed the Irrigation Act of 1889 which declared unappropriated waters in all arid regions to be the property of the state, thus subjecting these waters exclusively to appropriations granted by the state.[42] The Irrigation Act had the effect of restricting

---

appropriators as they exist in custom or locality and to same extent as federal government has acknowledged them); Tenim Ditch Co. v. Thorpe, 20 P. 588, 589 (Wash. 1889) (irrigator had vested rights to appropriated water upon public lands owned by United States as part of Washington Territory).

38. *See* Carson v. Gentner, 52 P. 506, 507 (Ore. 1898) (at least to the extent that federal government has acknowledged appropriative rights, State of Oregon will uphold customs of appropriating water on government lands).

39. *See* Gates v. Settlers' Milling, Canal & Reservoir Co., 91 P. 856, 856 (Okla. 1907) (Oklahoma, although blessed with moisture, allows diversion and appropriation of water based on priority of right at least with respect to arid regions).

40. *See* Haas v. Choussard, 17 Tex. 588, 590 (1856) (court allowed plaintiff to recover damages due to defendants damming and unhealthy backlog of water onto plaintiff's abutting land). The court stated that:

> [Plaintiff] had a right to the use of the water adjacent to his lots, as it flowed in its natural channel; a right inherent to and inseparably connected with the land itself."

Id. at 590.

41. *See In re* Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438, 439 (Tex. 1982) (generally legislature considered ordinary flow of rivers subject to legislative appropriation) (citing Walker, *Legal History of the Riparian Right of Irrigation in Texas Since 1836,* PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS, 41, 47 (1959)).

42. *See* Irrigation Act of 1889, 1888 Tex. Gen. Laws, ch. 88, at 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898), *amended by* Irrigation Act of 1895, Tex. Gen. Laws, ch. 21, at 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898) ("storm and flood" waters as well as other public water subject to appropriation if they will not affect vested riparian water rights owners); *see also In re* Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe River Basin, 642 S.W.2d 438, 440 (Tex. 1982) (severe drought began in Texas in 1883 and Governor Ross called on 21st Legislature to adopt Irrigation Act). Texas needed to adopt prior appropriation system of water rights and Governor Lawrence S. Ross made this clear in his address to the legislature in 1889. *See id.* at 440 n.2; *see also* Motl v. Boyd, 116 Tex. 82, 90-91, 286 S.W. 458, 463 (1926) (Texas recognized law of appropriative rights with respect to public lands before legislature enacted the Water Appropriations Act of 1889). The Water Appropriations Act of 1889 was the first legislation to authorize appropriation of "storm and flood waters" and any other waters, appropriation of which would not affect riparian rights. *See id.* at 124, 286 S.W. at 474; *see also,* Irrigation Act of 1889, 1888 Tex. Gen. Laws, ch. 88, at 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898), *amended by* Irrigation Act of 1895, 1895 Tex. Gen. Laws, ch. 21, at 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898) (purpose of Act to encourage irrigation and provide for acquisition of appropriate rights to use state water).

the application of the common law riparian rights concept by applying the concept only to water rights granted by the sovereign before 1895.[43] Today, Texas makes appropriations of (1) flood waters,[44] (2) waters in streams appurtenant to land originally granted by Spain and Mexico,[45] and (3) ordinary flows and underflows of streams appurtenant to land granted by Texas after July 1, 1895.[46] Since the passage of the Water Rights Adjudication Act of 1967,[47] which provides for strict inventory and accounting of surface water use, the riparian rights in water courses have been greatly restricted. No riparian right will be recognized on lands which title has passed from the sovereign after 1895.[48] Further, the riparian rights which are vested have been limited to the amount of water which the riparian owner actually used between 1963 and 1967.[49]

Although the doctrine of riparian rights is less frequently asserted, once these rights are established they are equally enforceable as prior appropriative rights.[50] Today most, if not all, use of water is the re-

---

43. *See* Comment, *Riparian Rights Under the Texas Water Rights Adjudication Act—A Constitutional Analysis,* 9 ST. MARY'S L.J. 87, 87 (1977). Prior to 1895, Texas followed the doctrine of riparian rights of English common law, but with the Irrigation Act of July 1, 1895, the state adopted civil law which would not allow recognition of riparian rights in land granted by state after that date. *See id.* at 87.

44. *See* Motl v. Boyd, 116 Tex. 82, 124, 286 S.W. 458, 474 (1926) (legislature authorized appropriation of "storm and flood waters" so long as they do not prejudice existing and vested riparian rights).

45. *See* State v. Valmont Plantations, 346 S.W.2d 853, 878 (Tex. Civ. App.—San Antonio 1961) (Mexican and Spanish grants of land did not include riparian rights to use water and therefore waters are subject to appropriation), *opinion adopted,* 163 Tex. 381, 355 S.W.2d 502 (1962).

46. *See* TEX. WATER CODE ANN. § 11.001(b) (Vernon Supp. 1986) (Code does not recognize any "riparian right in the owner of any land the title to which passed out of the State of Texas after July 1, 1895").

47. *See id.* §§ 11.301 to -.321. The purpose of the Water Rights Adjudication Act was to authorize and provide for recordation of water rights claims unrecorded, to limited water claims not presently in use, and to adjudicate and administer surface water rights for the greatest possible use. *See id.* § 11.302.

48. *See id.* § 11.001(b) (Code does not recognize any "riparian right in the owner of any land the title to which passed out of the State of Texas after July 1, 1895").

49. *See id.* §§ 11.301 to -.341 (act also provides riparian owners have vested rights in water only to the extent that they factually exist and are being used); *see also In re* Adjudication of Upper Guadalupe River Segment of Guadalupe River Basin, 642 S.W.2d 438, 439 (Tex. 1982) (decision recognized riparian right for water use for purposes of irrigation and livestock maintenance, but right may be limited to amount of water actually used for such purposes between the years of 1963 to 1967).

50. *See In re* Adjudication of Upper Guadalupe River Segment of Guadalupe River Basin, 642 S.W.2d 438, 444 (Tex. 1982) (right of riparian, whose land was acquired by grant

sult of obtaining an appropriation permit from the state;[51] therefore, the prior appropriation system has become the most useful tool in establishing adequate water flows necessary for the preservation of the natural environment.[52]

III. JUSTIFICATION FOR THE PROTECTION OF INSTREAM USES

Maintaining and conserving the environment is the responsibility of the public and since the prior appropriation system controls public waters, it is the most effective means of ensuring environmental protection.[53] For many years predominant water law commentators have suggested several justifications by which the public can guarantee basic water supply needs for environmental protection.[54] Since it is the public who benefits from environmental protection, public rights should be asserted to reserve water in its natural state.[55]

---

before 1895, is right to use water for beneficial purpose and cannot be defeated by appropriators).

51. *See* TEX. WATER CODE ANN. § 11.001 (Vernon Supp. 1986) (riparian rights will not be recognized but to limited extent). Texas owns all public waters which may be appropriated to beneficial uses. *See id.* §§ 11.021,-.023.

52. *See id.* § 11.022 (right to use water is acquired by appropriation permits and may be used for specified beneficial purposes); *see also* Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights,* 25 ROCKY MTN. MIN. L. INST. 24-1, 24-3-4 (1979) (although originally not considered appropriate law for protection of instream use, prior appropriations law has developed into beneficial tool for environmental protection); Trelease, *Uneasy Federalism--State Water Laws and National Water Uses,* 55 WASH. L. REV. 751, 773 (1980) (devices for reserving minimum flow and instream flows are appropriations, control of appropriations, or prevention of appropriations).

53. *See* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 696 (1972) (California law establishing administrative appropriation of water rights can have major environmental impact); Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 875 (environmental conservation may best be accomplished by perfection of instream claims through prior appropriation system).

54. *See, e.g.,* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 876 (various theories in support of public claim of water for instream uses include state's proprietary ownership or trusteeship of its water resources); Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 696 (1972) ("administrative allocation of water resources" through water right permit system will significantly affect environmental conditions); Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights,* 25 ROCKY MT. L. INST. 24-1, 24-3 (1979) (law of prior appropriation allows private and public entities to acquire rights to instream uses).

55. *See* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 875 (public protection of instream uses will ensure broad distribution of benefits resulting from reserving water in place). Private appropriators have

Because the benefits of natural flow protections accrue to the public generally, it would be appropriate that rights to instream flows be asserted by public bodies or water allocation agencies.[56] The authority to regulate the use of water is inherent in the state's sovereign right of control over the natural resources within its border.[57] Texas, through power granted pursuant to its Water Code, has not hesitated to exercise its sovereign right to regulate and manage public water sources.[58] Similarly, various concepts have been expressed in constitutions and statutes of western states establishing and regulating property rights to water.[59] These declarations range from theories of state ownership to trusteeship, but essentially all are assertions of the state police

---

little or no incentive to appropriate water for instream flow in amounts sufficient for public benefit. *See id.* at 875. Private persons have more incentive to appropriate for irrigation or power generation which enable them to recapture benefits of water use through prices or otherwise. *See id.* at 875.

56. *See* Tarlock & Rice, *Minimum Stream Flow Maintenance,* PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS, § 9, at 2 (1985) (recognition of instream values is both technical and judgmental, and requires public policy making decisions normally not possible for private appropriators).

57. *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907). Justice Holmes stated:

> Each state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breath pure air. It may have to pay individuals before it can utter the word, but with it remains the final power.

Id. at 237; *see also* Alfred L. Snapp & Sons, Inc. v. Puerto Rico, 458 U.S. 592, 604 (1982) (Puerto Rico has a quasi-sovereign interest in health and well-being of its residents, which includes control of its natural resources); Sporhase v. Nebraska, 458 U.S. 941, 963 (1982) (states have traditionally had authority over natural resources within its boundaries which are essential to the very lives and well-being of its citizens).

58. *See* TEX. WATER CODE ANN. § 11.021 (Vernon Supp. 1986) (state owns water of "ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or any of the Gulf of Mexico and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed"); *see also In re* Adjudiciation of Upper Guadalupe River Segment of Guadalupe River Basin, 625 S.W.2d 353, 360-61 (Tex. Civ. App.—San Antonio 1981) (Texas Water Rights Adjudiciation Act is not unconstitutional because it is legitimate and valid exercise of state's police powers in interest of public welfare), *aff'd,* 642 S.W.2d 438 (Tex. 1982). Many western states have passed adjudication statutes similar to Texas based on their police powers over natural resources, with each withstanding constitutional attack. *See, e.g.,* Gin S. Chow v. City of Santa Barbara, 22 P.2d 5, 16-17 (Cal. 1933) (limitation of riparian rights due to conservation statute is proper exercise of police power to general welfare of community); Williams v. City of Wichita, 374 P.2d 578, 591 (Kan. 1962) (statutory scheme regulating water appropriations valid exercise of police power); *In re* Willow Creek, 144 P. 505, 514 (Or. 1914) (water rights are subject to reasonable regulations to preserve public welfare).

59. *Compare* COLO. CONST. art. XVI, § 5 (every natural stream declared property of people of state) *with* TEX. WATER CODE ANN. § 11.021 (Vernon Supp. 1986) (unappropriated

power.[60]

A. *Appropriative Rights*

The most common means of regulating the use of water in Texas and other western states is through the appropriative rights system.[61] The prior appropriative rights system allows the state to allocate reasonable amounts of unappropriated waters to those persons who intend to use the water for beneficial or economic purposes.[62] Water allocation agencies review applications for appropriations and grant rights to water use.[63] When water availability decreases, those whose rights which were filed "first in time are first in right."[64]

---

waters are property of the state); *see also* KAN. STAT. ANN. § 82a-702 (1984) (all water in Kansas declared "dedicated to the use of the people of the state").

60. *Compare* WYO. CONST. art. 8, § 1 (unappropriated waters of the state are property of the state of Wyoming) *and* N.D. CONST. art. II, § 3 (water declared to be property of the state) *with* COLO. CONST. art. XVI, § 5 (unappropriated waters are public property held in trust by state) *and* N.M. CONST. art. XVI, § 2 (unappropriated waters declare public property owned by all citizens). Although the framers of the constitutional provisions, declaring ownership of public waters, intended a distinction between ownership and trusteeship, courts have blurred any distinction. *See* Trelease, *Government Ownership and Trusteeship of Water,* 45 CALIF. L. REV. 638, 642 (1957) (many constitutional provisions seem to vary as to who is owner of water); *see also* Light v. United States, 220 U.S. 553, 529 (1911) (holding that idea of sovereignty provides constitutional justification for regulation of natural resources).

61. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 45-101 to -276 (Supp. 1986) (water rights administration based on appropriation of rights for water use by permit and application of water to beneficial use); IDAHO CODE §§ 42-101 to -612 (Supp. 1985) (water rights established through appropriation permits in beneficial use requirements); TEX. WATER CODE ANN. §§ 11.001 to -.409 (Vernon Supp. 1986) (acquisition and management of water rights based on appropriations of water by permit for beneficial uses).

62. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 45-141 to -156 (Supp. 1985) (appropriation of water rights by state for beneficial uses allowed when unappropriated waters are available and use is reasonable); CAL. WATER CODE §§ 100-02 (Deering 1977) (state water must be put to beneficial and reasonable use and state may grant right to use water by appropriation in manner provided by Code); TEX. WATER CODE ANN. §§ 11.021 to -.025 (Vernon Supp. 1986) (state water may be acquired by appropriation when unappropriated water is available and any acquired right must be beneficially used in amount specifically appropriated).

63. *See* 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, 302 (1971) (clear majority of western states require surface water appropriators to make application with state agency for appropriation permits). The statutory procedures which prescribe method of application initiation and review are often the exclusive method of acquiring appropriation. *See id.* at 302.

64. *See id.* at 396 (essential element in doctrine of appropriation is fixed priority over rights to use of water). The date of particular appropriation establishes superiority of rights; the earlier dates being senior in right to later dated junior right holders. *See id.* at 396. Western minors soon learned that since there was not enough water for everyone that those "first in time are first in right." *See* W. GOLDFARB, WATER LAW 15 (1984); *see also* TEX. WATER

Many states have the power to appropriate instream water to public or private entities in order to protect environmental interests.[65] Other states withhold from any appropriation the minimum flow necessary to preserve the ecological balance of water sources.[66] By making determinations of the effect on minimum instream flows before granting a use permit, other states have effectively maintained control of environmental needs and protected the interest of the public.[67]

The use of permits in Texas may well be the key to protecting instream flows of water.[68] The permits are the means the Texas Water Commission grants use and ownership of Texas water.[69] Any permit granted by Texas is merely a license to use water and does not mature

---

CODE ANN. § 11.027 (Vernon Supp. 1986) ("As between appropriators, the first in time is the first in right").

65. *See* ARIZ. REV. STAT. ANN. § 45-141 (Supp. 1986) (Arizona Legislature has authorized appropriation for fishing or recreation to public or private entities); *see also* WASH. REV. CODE ANN. § 90.22.010 (Supp. 1986) (Department of Water may appropriate water to Department of Fisheries or Game Commission in order to establish minimum flows or levels).

66. *See* MONT. CODE ANN. § 85-2-316 (1985) (water may be reserved from appropriation in order to protect minimum flows and levels in designated areas); *see also* CAL. WATER CODE § 1255 (Deering 1977) (California Water Rights Board may reject water permit and reserve water for other beneficial uses). Although Texas does not have expressed reservation language, policy consideraions may require protection of resources through reservation. *See* TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986). "It is the public policy of the state to provide for the conservation and development of the state's natural resources, including: . . . (6) the maintenance of a proper ecological environment of the bays and estuaries of Texas and the health of released living marine resources." *Id.* § 1.003.

67. *See* IDAHO CODE ANN. §§ 42-203B, 42-1501 (Supp. 1985) (legislature grants water rights agency ability to subordinate all water rights which infringe on established minimum stream flows). The Supreme Court of Idaho has held that authority to reject environmentally damaging appropriations, as well as conditioning permits on instream uses, is valid exercise of duty of water rights agency. *See* Shokal v. Dunn, 707 P.2d 441, 448-49 (Idaho 1985) (public interest requires director of water resources to reject applications which unreasonably effect fish and wildlife habitats, recreation, or aesthetic beauty); *see also* UTAH CODE ANN. § 73-3-8 (Supp. 1985) (denial of appropriation permit if unreasonably affects natural stream environment or public recreation).

68. *See* TEX. WATER CODE ANN. § 11.135 (Vernon Supp. 1986) (issuance of permit restricts applicants right to use water only for "purposes stated in the permit").

69. *See id.* § 11.121 (permit required to take water). "Except as provided in section 11.142 of this Code, no person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water *without first obtaining a permit* from commission to make the appropriation." *Id.* § 11.121 (emphasis added). Section 11.142 provides that no permit is required for those persons impounding water for livestock purposes or for those persons drilling for and producing petroleum if they take their waters from the Gulf of Mexico. *See id.* § 11.142; *see also* City of Corpus Christi v. Nueces County Water Control & Improvement Dist. No. 3, 540 S.W.2d 357, 373 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (after passage of Irrigation Act of 1913, water appropriations by permit established authorizations for water rights obtained under state administration); *cf.* Irrigation

into a vested appropriation right until water is "beneficially used" for the purposes stated in the permit.[70] Common beneficial uses include the use of water for livestock watering, irrigation, or hydroelectric power.[71] Texas defines beneficial use in chapter 11 of the Texas Water Code[72] and describes the purposes or uses for which water may be appropriated.[73] Instream uses for preservation of the environment are not included within these purposes, and it may be possible to argue

---

Act of 1913, Tex. Gen. Laws, ch. 171, §§ 1-14, at 358, 16 H. GAMMEL, LAWS OF TEXAS 358, 1913 (water appropriations only made by permit issued from Board of Water Engineers).

70. *See* TEX. WATER CODE ANN. §§ 11.025 to -.026 (Vernon Supp. 1986). The section states:

> A right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation and all water not so used is considered not appropriated.

Id. § 11.025. Furthermore, section 11.026 states that "[n]o right to appropriate water is perfected unless the water has been beneficially used. . . ." *Id.* § 11.026; *see also* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873, 882 (Tex. 1984) (water commission may not grant permit to person who will not beneficially use water) (citing *In re* Adjudication of the Water Rights of the Upper Guadalupe River Basin, 642 S.W.2d 438 (Tex. 1982)); Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 648 (Tex. 1971) (duty of permit owner or appropriator to beneficially use water).

71. *See* TEX. WATER CODE ANN. § 11.023 (Vernon Supp. 1986) (purposes for which permit may be granted include: irrigation, navigation, mining recovery of minerals, hydroelectric power, and stock raising).

72. The Texas Water Code defines beneficial use as follows:

> 'Beneficial use' means use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.

Id. § 11.002(4).

73. The Water Code provides further for the purposes for which water may be appropriated. Section 11.023 provides:

> (a) State water may be appropriated, stored, or diverted for:
>
> (1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals; (2) industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric; (3) irrigation; (4) mining and recovery of minerals; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure; (8) stock raising; (9) public parks; and (10) game preserves.
>
> (b) State water also may be appropriated, stored or diverted for any other beneficial use.
>
> (c) Unappropriated storm water and floodwater may be appropriated to recharge underground freshwater bearing sands and aquifers in the portion of the Edwards Underground Reservoir located within Kinney, Uvalde, Medina, Bexar, Comal, and Hays Counties, if it can be established by expert testimony that an unreasonble loss of state water will not occur and that the water can be withdrawn at a later time for application to a beneficial use. The normal or ordinary flow of a stream or watercourse may never be appropriated, diverted or used by a permittee for this recharge purpose.
>
> (d) When it is put or allowed to sink into the ground, water appropriated under Subsec-

that instream flows are not a beneficial use. Furthermore, instream uses do not fit within the ordinary diversion requirement for water appropriation.

1. Beneficial Use Requirement

Texas Water Code section 11.025 sets out the "beneficial use" requirement for Texas appropriation rights which is essential for any valid appropriation claim.[74] Texas decisions base the validity of an appropriation on the reasonableness of the use.[75] In addition, the Texas Supreme Court has equated non-use of appropriated water with

---

tion (c) of this section loses its character and classification as storm water or floodwater and is considered percolating groundwater.

(e) The amount of water appropriated for each purpose meantioned in this section shall be specifically appropriated for that purpose, subject to the preferences prescribed in Section 11.024 of this Code.

(f) The water of any arm, inlet, or bay of the Gulf of Mexico may be changed from salt water to sweet or fresh water and held or stored by dams, dikes, or other structures and may be taken or diverted for any purpose authorized by this Chapter.

Id. § 11.023.

74. *See id.* § 11.025 (right to use water limited to amount being beneficially used); *see also* Lower Colorado River Auth. v. Tex. Dep't of Water Resources, 638 S.W.2d 557, 563 (Tex. App.—Austin 1982) (right to use water under appropriative system is limited to beneficial and non wasteful uses), *rev'd on other grounds,* 689 S.W.2d 873 (Tex. 1984). The right to use water will be limited to one or more of the prescribed purposes of § 11.023 of the Water Code. *Id.* at 562 (citing TEX. WATER CODE ANN. § 11.023 (Vernon Supp. 1986)).

75. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 647 (Tex. 1971) (permittee is limited to rights to appropriate water for reasonable uses); *see also* Johnson, *Legal Assurances of Adequate Flows of Freshwater into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 613 (1973) (Supreme Court of Texas has qualified every appropriative right to reasonable use limitation). This reasonableness is similar to standard applied to riparian right owners. *See* Schero v. Texas Dep't of Water Resources, 630 S.W.2d 516, 520 (Tex. App.—Waco 1982) (riparian owner's rights to water use are limited to the reasonableness of use, without waste, and any use not conforming to reasonableness may be prevented), *aff'd in part & rev'd in part, In re* Adjudication of Water Rights in the Llano River Watershed of Colorado River Basin, 642 S.W.2d 446 (Tex. 1982). Several western states require that any use which consumes excessive amounts of water is not beneficial use. *E.g., In re* Water Rights of Deschutes River, 286 P. 563, 577 (Or. 1930) (one is entitled only to such amounts of water reasonably necessary for useful purpose and cannot waste water for even useful purposes). A power company tried to obtain large amounts of water to carry off debris from a dam site, during a period of time when water was in great demand. *See id.* at 575; *see also* Tulane Irrigation Dist. v. Lindsay-Stratmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. Ct. App. 1935) (water used for beneficial purpose will not be reasonable if water in scarce supply and considered excess in view of actual needs). Appropriators in *Lindsay* wanted to use water to irrigate their land during the winter in order to kill gophers, but the court considered such use wasteful due to other beneficial uses and scarce water supply. *See id.* at 1007; *accord* Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 123-25 (1912). The excess use of water is often considered non-beneficial when there are competing demands for scarce water

waste which could result in permit cancellation.[76] The non-use waste equation could become significant if Texas is to appropriate instream flows for preservation of the environmental instream flows.[77] Instream uses will have to be recognized as a beneficial use and the fact that water is left in its natural state should not be classified as a non-use, resulting in waste.[78]

It may be argued, however, that the Water Code already defines instream uses as beneficial by using the terms "recreational and pleasure."[79] Unless adjudication frees available water, as a practical matter, an appropriation permit for instream flows is highly unlikely even

---

supply and other more efficient means are available for meeting those demands. *See id.* at 123-25.

76. *See* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 647 (Tex. 1971) (common to western states and appropriation law, non-use of appropriated waters is equivalent to waste); Lower Colorado River Auth. v. Texas Dep't of Water Resources, 638 S.W.2d 557, 565 (Tex. App.—Austin 1982) (ten years of non-use of appropriated right subjects permit holder to forfeiture of all rights and cancellation by state), *rev'd on other grounds,* 689 S.W.2d 873 (Tex. 1984). The cancellation of water permit for non-use is not an unconstitutional taking and does not require compensation. *See id.* 564-65; *see also* TEX. WATER CODE ANN. § 11.030 (Vernon Supp. 1986) (forfeiture of appropriation). The section states:

> If any lawful appropriation or use of state water is willfully abandoned during any three successive years, the right to use water is forfeited and the water is subject to appropriation.

Id. § 11.030.

77. *See* Lower Colorado River Auth. v. Tex. Dep't of Water Resources, 689 S.W.2d 873, 882 (Tex. 1984) (no person is granted right to waste water by non-use).

78. *See id.* at 882 (Texas Legislature recognizes importance of beneficial use, and no one is granted "the right to waste water by not using it"). *But see, e.g.,* Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use By Private Appropriators,* 21 ARIZ. L. REV. 1095, 1105 (1979) (Arizona recognizes beneficial use of preservation of wildlife and therefore problem of "recognizing use of water for environmental purposes is overcome"); Note, *Protecting Stream Flows in California,* 8 ECOLOGY L.Q. 697, 713-14 (1980) (California may appropriate water for instream uses in order to protect environment because California statute authorizes "enhancement of fish and wildlife" water use as beneficial); Note, *Appropriation by the State of Minimum Flows in New Mexico's Streams,* 15 NAT. RESOURCES J. 809, 814 (1975) (New Mexico legislature has power to define "beneficial use" and should do so in order to protect riparian environment and wildlife habitats); *accord* WASH. REV. CODE ANN. § 90.54.020(1) (1986 Supp.) (wildlife enhancement and maintenance are fundamental considerations which legislature has expressed as guidelines in water management).

79. *See* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986) (purposes for which unappropriated may be directed); *see also* Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use By Private Appropriators,* 21 ARIZ. L. REV. 1095, 1105 n.68 (1979). "Insofar as recreational uses include those activities which depend on or at least utilize riparian environments (bird watching, hunting, fishing, camping, for example), it is plausible to argue that 'recreation' uses must entail preservation of riparian habitats." *Id.* at 1105 n.68. *But see* Tex. Water Dev. Board, 31 TEX. ADMIN. CODE § 301.71 (Shepard's 1985) (defines "recreation use" as "the use of water impounded in or diverted or released from a

for the most beneficial use since unregulated flows in many Texas water courses are already at their full appropriation capacity.[80] However, large quantities of appropriated waters are unused because of "padding" and "pyramiding" water rights (creating records of water rights in excess of actual use)[81] and reassessment will make unused rights free to be appropriated for instream flows.[82]

It seems settled, however, that should the Texas Water Commission grant a permit for instream use, it would have a good chance withstanding any contentions that environmental protections are not beneficial.[83] Instream use would most likely be viewed as beneficial because the Water Commission has discretionary powers to uphold

---

reservoir or water course for fishing, swimming, water skiing, boating, hunting and other forms of water recreation. . . .").

80. *See* Johnson, *Legal Assurances of Adequate Flows of Freshwater into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 613 (1973) (unregulated flows of water, flows not released for storage facilities, in many streams are at their appropriative capacity). Since 1962, the Texas Water Commission could not have granted permits to appropriate water "from the Brazos River Basin and all other river basins south and west of that basin" unless additional storage areas could provide extra releases. *See id.* at 613; *cf.* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 376 (1985) (water scarcity grows as appropriative water permits "lock up" higher percentages of available water).

81. *See* W. GOLDFARB, WATER LAW 18 (1984) (very common in many appropriative right states is padding of water rights which creates rights to water not actually used).

82. *See* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873, 876 (Tex. 1985) (stacking or "double permitting" of water rights prohibited by Texas statute and permits must be cancelled for non-use before water can be appropriated to future uses); *see also* TEX. WATER CODE ANN. §§ 11.025, -.134, -.146 (Vernon Supp. 1986) (water not subject to appropriation until permit cancelled by non-use and water which is under state permit not considered unappropriated).

83. *See* Southern Canal Co. v. State Bd. of Water Eng'r., 159 Tex. 227, 233, 318 S.W.2d 619, 623-24 (1958) (judgments made by administrative agency, concerning applications for permits to appropriate water, upheld by judiciary if substantial evidence to support it); *see also* W. GOLDFARB, WATER LAW 19 (1984) (rarely will courts overturn water agency decision because fundamental principle of administrative law allows courts to overturn decisions only if they violate statutes and are clearly irrational or infringe on constitutional rights). *But see* Tulane Irrigation Dist. v. Lindsay-Stratmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. Ct. App. 1935) (although water is used for beneficial purpose, some uses will be considered non-beneficial and wasteful in times of scarce supply and other greater uses for water are determined to exist); *accord* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986) (public policy of Texas to give weighted priority to certain uses above others). *See generally* State v. Hidalgo County Water Control & Improvement Dist. No. 18, 443 S.W.2d 728, 739 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.) (determination of water rights for irrigation of Rio Grande waters, proper to utilize weighted priority system rather than strict compliance "first in time first in right").

permits which are given great deference by the courts.[84] If preservation of minimum instream flows can be considered a "beneficial use" by the courts, such characterization would support an appropriative right granted for instream uses.[85]

2. Diversion Requirement

Instream flows remain confined to natural banks of a stream or lake and in some jurisdictions an instream appropriation cannot be maintained if a physicial diversion of water is not made.[86] The requirement of diversion is a means of perfecting an appropriative right to water and imparting notice to others that a claim already exists.[87] Diversion is but an element of other appropriation requirements, such as a manifestation of an intention to appropriate and the beneficial use requirement.[88] Instream use, however, remains in the natural flow of a river or lake and by definition are not diverted from their natural course.[89] Once an instream use has been determined to be beneficial,

---

84. *See* Southern Canal Co. v. State Bd. of Water Eng'r., 159 Tex. 227, 231-32, 318 S.W.2d 619, 623-24 (1958) (judgments made by administrative agency concerning permits for appropriations given deference if substantial evidence supports it).

85. *See* State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 927-28 (Idaho 1974) (when preservation of water for instream use defined as "beneficial use," court less likely to disturb legislative intent and uphold appropriation for those purposes). The Supreme Court of Idaho suggested that without legislative expression defining beneficial use, such holding would not likely occur. *See id.* at 927-28.

86. *See* Fullerton v. State Water Resources Control Bd., 153 Cal. Rptr. 518, 524 (Cal. Ct. App. 1979) (physical act or diversion required unless legislation removes requirement); *see also* Reynolds v. Miranda, 493 P.2d 409, 411 (N.M. 1972) (physical diversions along with intent to apply to beneficial use necessary for valid appropriation).

87. *See* Tarlock, *Recent Developments in the Recognition of Instream Use in Western Water Law,* 1975 UTAH L. REV. 871, 877-88 (diversion requirement imparts "notice to others that claims to use existed against the stream") (quoting MEYER, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION LAW 7 (Nat'l Water Comm'n 1971)); *see also* W. GOLDFARB, WATER LAW 17-18 (1984) (generally actual diversion is necessary to perfect appropriative right). In Colorado, overt acts such as diversion serve to provide sufficient notice that appropriation and demand for water exists, and along with filing of a map and statement with the state engineer, serves to complete the requisites of manifestation of intent and application to beneficial use. *See* Denver v. Colorado River Water Conservation Dist., 699 P.2d 730, 748 (Colo. 1985).

88. *See* State of Arizona v. State of California, 298 U.S. 558, 560 (1936) (appropriation law requires that appropriator perfect his use by diverting water to a beneficial purpose and imparting notice to others that water is being applied to such beneficial use). Three traditional requirements exist for valid appropriation: (1) intent to appropriate; (2) an actual diversion; and (3) an application to a beneficial use. *See* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 877.

89. *See* State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 929 (Idaho

the justification for a requirement of actual diversion seems to diminish.[90] Other western states which require diversion for ordinary appropriations, exclude instream uses from this requirement, stating the diversion requirement is irreconcilable with non-consumptive instream uses.[91]

The Texas Water Code does not statutorily require a physical act of diversion with respect to an appropriation permit, but it has been suggested that section 11.134 of the Water Code implies such a require-

---

1974) (to require diversion of instream appropriation would be to nullify effect of statute authorizing appropriation). The court held that physical diversion would not be required since this would not effectuate legislative intent. *See id.* at 929; *see, e.g.,* Lionelle v. Southeastern Colorado Water Conservancy Dist., 676 P.2d 1162, 1168 (Colo. 1984) (two prong test required for appropriative right include (1) intent to appropriate specific amount of water for beneficial use and (2) overt manifestation of that intent or diversion sufficient to constitute notice to others); Reynolds v. Miranda, 493 P.2d 409, 411 (N.M. 1972) (man-made diversion is necessary element in order to claim water rights by appropriation in agricultural uses); Right Nahas Co. v. Hulet, 674 P.2d 1036, 1042-43 (Idaho App. 1983) (statutes regulating appropriations of water incorporates actual physicial diversion). *See generally* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 877-78 (diversion requirement gives "notice to others that claims to use existed against the stream") (citing MEYERS, HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION LAW 7 (Nat'l Water Comm'n 1971)).

90. *See* State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 933 (Idaho 1974) (Bakes, J., concurring) (absent statute requiring diversion, no diversion required on instream appropriation for beneficial purpose). Justice Bakes stated, quoting federal precedent: " 'If nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary,' and, 'Undoubtedly a landowner may rely upon an efficient application by nature, and need to no more than affirmatively to avail himself of it;'. . . ." *Id.* at 933 (Bakes, J., concurring) (quoting Empire Water & Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913)); *cf.* Note, *Protecting Stream Flows in California,* 8 ECOLOGY L.Q. 697, 717-18 (1980). California's legislature has not expressed requirements of diversion or manifestation of intent through physical acts, although the courts have required that such a requirement exists. Legislation regulating appropriations proscribes "proposed place of diversion" along with where "works" are to be constructed and this has been interpreted as intent to require diversion. *See id.* at 717-18.

91. *See* State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 930 (Idaho 1974) (Bakes, J., concurring) (Department of Parks is allowed to appropriate instream flows for recreation and preservation of aesthetics without actual physical diversion). The court reasoned that legislation allowing preservation of the scenic beauty of Malad Canyon was not intended to require actual diversion. *See id.* at 929. Justice Bakes in a concurring opinion stated that when "a beneficial use can be made of the water in its natural channel [the Idaho Constitution] should not require the superflous effort of construction of a diversion." *See id.* at 934 (Bakes, J., concurring); *see also* Stevenson v. Steele, 453 P.2d 819, 826 (Idaho 1969) (instream use of water in order to water livestock during winter months is a beneficial use requiring protection without the requirement of physicial diversion).

ment.[92] Should Texas courts interpret section 11.134 as requiring physical diversion, the courts should follow the lead of other appropriative states and exclude instream use from this requirement.[93] Once appropriations for instream flows are considered to be beneficial uses and the diversion exemption created, the permits which may then be issued and recorded will serve as notice to others that claims already exist for instream water.[94]

---

92. *See* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986) (Water Commission's actions with respect to application for appropriation). The section states:

(a) [A]fter the hearing . . . (b) the Commission shall grant the application only if:

(1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee; (2) unappropriated water is available in the source of supply; (3) the proposed appropriation (A) contemplates the application of water to any beneficial use; (B) does not impair existing water rights or vested riparian rights; and (C) is not detrimental to the public welfare; and (4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Subdivision (8)(B), Section 11.002, of this Code.

Id. § 11.134. Although section 11.134 does not express the requirement of diversion, other sections suggest that diversion is an intricate part of granting appropriative rights. *See id.* § 11.026. The statute provides that "no right to appropriate water is perfected unless the water has been beneficially used for the purpose stated in . . . a permit. . . ." *See id.* § 11.026. Professor Johnson suggests that this requirement in section 11.026 may not be fulfilled absent actual diversion. *See* Johnson, *Legal Assurances of Adequate Flows of Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 616 (1973); *see also* TEX. WATER CODE ANN. § 11.022 (Vernon's Supp. 1986) (acquisition of right to use water of state). "When the right to use water is lawfully acquired, it may be taken or diverted from its natural channel." *Id.* § 11.022. The need for diversion seems to be required for an appropriative right to be obtained in section 11.022; otherwise, the statutes allowing forfeiture for non-use may be applied. *See id.* §§ 11.171 to -.186 (forfeiture of rights upon showing of abandonment and non-use).

93. *See* California Trout, Inc. v. State Water Resources Control Bd., 153 Cal. Rptr. 672, 674 (Cal. Ct. App. 1979) (although California statutes define "enhancement of fish and wildlife" beneficial use and no statutes expressly require diversion, state of California cannot appropriate water for instream use without "some physicial act with respect to water"); Fullerton v. State Water Resources Control Bd., 153 Cal. Rptr. 518, 521 (Cal. Ct. App. 1979) (State of California cannot appropriate water for instream use as defined by California law because state would not divert or exercise physical control over water).

94. Issued permits serve notice to others that water is appropriated in Texas, because actual use and diversions play no part in determining amount of water available for appropriation. *Cf.* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873, 875 (Tex. 1984) (water agency takes into account uncancelled permits to determine amount of water which is unappropriated). The Texas Supreme Court concluded that regardless of amounts of water not diverted to their beneficial uses, a permit cannot be granted on already appropriated water which remains instream wrongfully. *See id.* at 875-76.

B. *Administrative Reservation or Withdrawal of Water Required for Instream Uses*

An alternative to recognizing and granting new instream uses and rights would be to grant the Texas Water Commission the power to deny new permits for water appropriations so as to reserve amounts of water to maintain adequate instream flows.[95] Most western states authorize their water agencies to reject applications for unappropriated water if the water resource agencies find that appropriations would not be in the "public interest."[96] In addition, to rejecting permits which could damage instream flows, agencies have been authorized to condition permits on the maintenance of minimum instream flows which advance public interest.[97] Thus, legislative definitions of public interest have become the standards by which the water agencies determine which use will be in furtherance of the greatest public benefit.[98]

The "public interest" was historically defined in the terms of "crude economic efficiency,"[99] but today many legislatures have in-

---

95. *See* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 877 (viable alternative to preserve environmental conditions other than granting instream appropriations, would be denying applications for out-of-stream appropriations and diversions).

96. *See, e.g.,* CAL. WATER CODE § 1255 (Deering 1977) (Water Rights Board shall reject application for appropriation when it decides such an appropriation would not be in "the public interest"); OR. REV. STAT. § 537.170(4) (Supp. 1985) (water allocation agency possesses right upon hearing all interested parties to deny application for water right if it proves detrimental to public interest); WASH. REV. CODE ANN. § 90.03.290 (1962) (if appropriation threatens or proves detrimental to public interest duty of supervisor to reject application). *But see* IDAHO CONST. art. XV, § 3 ("[t]he right to divert and appropriate waters of any natural stream to beneficial uses, shall never be denied"). Idaho's Supreme Court has allowed instream appropriations following legislative authorization. *See* State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 927-28 (Idaho 1974) (legislature has declared recreation and aesthetics as beneficial uses which water may be appropriated).

97. *See* CAL. WATER CODE § 1253 (Deering 1977) (allows appropriations for beneficial purposes subject to any terms and conditions which best conserve public interest).

98. *See* Johnson Rancho County Water Dist. v. State Water Rights Bd., 45 Cal. Rptr. 589, 596 (Cal. Dist. Ct. App. 1965) (defining characteristics of "public interest"). The court stated:

> 'Public interest' is the primary statutory standard guiding the [water agency] in acting upon applications to appropriate water. The [agency] is to consider the variety of beneficial uses which the particular water may serve and may subject the appropriation to conditions which will best develop and conserve the water in the public interest.

Id. at 596.

99. *See* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 702 (1972) (public interest was equated with economic interest and allowed determinations based on profitability of intended use); Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV.

cluded values such as fish and wildlife preservation and ecosystem maintenance.[100] The expansion of the public interest stems mainly from the incorporation of state environmental protection acts into administrative decisions.[101] Prior to the recent enactments found in the 1986 Water Code, Texas was without express authority to reserve water from appropriations based on public interest reasons.[102] Without express recognition under the Water Code authorizing the Water Commission to reserve instream flows on behalf of the "public interest," an effective method of preserving the ecological balance remains unavailable in Texas.[103]

871, 888-89 (originally public interest considerations would allow denial of appropriation permit if water projects that needed water seemed doomed for bankruptcy). When water projects became funded by public entities, the likelihood of financial stability increased and focus shifted to determinations of whether the appropriation would interfere with a more beneficial use. *See id.* at 889.

100. *See, e.g.,* ALASKA STAT. § 46.15.080 (Supp. 1985) (to determine public interest, commissioner must consider "the effect [of appropriation] on fish and game resources and on public recreational opportunities"); IDAHO CODE § 42-1501 (Supp. 1985) (legislature declared that it is in public interest "to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation value. . ."); WASH. REV. CODE ANN. § 90.54.020 (Supp. 1986) (one fundamental consideration will be quality of natural environment and its protection and enhancement whenever possible). *See generally* Robie, *The Public Interest in Water Rights Administration,* 23 ROCKY MTN. L. INST. 917, 920-21 (1977) (antiquated water law concepts exist and should be updated to broaden public interest considerations).

101. *See* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 702-03 (1972) (California's environmental quality act provided in all public decisions state must "take all action necessary to protect, rehabilitate, and enhance" environmental quality of California) (quoting CAL. PUB. RES. CODE § 21000(b) (West Supp. 1972)). The Environmental Protection Act requires governmental agencies to consider factors and/or alternatives to actions affecting environmental concerns. *See id.* at 703; *see also* CAL. PUB. RES. CODE ANN. §§ 21000-21001 (Deering 1976) (declarations of legislative intent and policy for protection of environmental quality). "It is the intent of legislature that all agencies of the state government . . . shall regulate . . . activities so that major consideration is given to preventing environmental damage." *Id.* § 21000; *see also* Friends of Mammoth v. Mono County, 502 P. 2d 1049, 1056, 104 Cal. Rptr. 761, 768 (Cal. 1972) (holding that legislature intended to include private activities for which governmental permits are required within Environmental Quality Act).

102. *Compare* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986) (action taken by commission on application for appropriation contemplates several things, none of which are "public interests") *with* CAL. WATER CODE § 1255 (Deering 1977) (denial of permit allowed by Water Rights Board when it decides appropriation is not in "public interest"); *see also* Johnson, *Legal Assurances of Adequate Flows of Freshwater into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 620 (1973) (Texas has no statutory authority to reserve water from appropriation process, however, authority may be implied within Water Code).

103. *Compare* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986) (commission may

1. Texas Authority to Reserve and Deny Applications for Environmental Protection

Texas, like many appropriation states, may deny appropriation permits if granting the permit is not in the public interest to grant, and should utilize this authority to protect minimum stream flows.[104] Legislation was proposed in 1969 which would sanction the reservation of water for estuarian purposes but the Texas Water Commission stated it already had such authorization under the then effective Texas Water Code.[105] The Water Code continues to require the commission to consider whether an appropriation is "detrimental to the public welfare."[106] The definition of "public welfare" has been expanded to apply to the preservation of environmental ecosystems in many western jurisdictions.[107] The Texas Supreme Court has held, however, that determinations on issues of "public welfare" are within the discretion of the Water Commission, and any denial based on this provision need only be supported by substantial evidence.[108] The question

---

deny application if "detrimental to public welfare," but no expansion on what considerations further "public welfare") *with* ALASKA STAT. § 46.15.080 (1985) (determining public interest requires consideration of " . . . effect on fish and game resources and . . . recreational opportunities") *and* IDAHO CODE ANN. § 42-203A(5)(e) (Supp. 1985) (public interest requires consideration of "affairs of people directly affected by the proposed use"). The Idaho Supreme Court has determined that "public interest" of section 42-203A(5)(e) requires consideration of affects on "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty . . . and water quality." *See* Shokal v. Dunn, 707 P.2d 441, 448-49 (Idaho 1985).

104. *See* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986) (Texas Water Commission may deny application in whole or in part when detrimental to "public welfare").

105. *See* Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 620-21 (1973). The commission takes the position that legislation expressing authority to reserve water for instream purposes is not needed because section 11.134 gives them a general grant of power broad enough to effectuate such reservation. *See id.* at 621.

106. *See* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986).

107. *See* Tanner v. Bacon, 136 P.2d 957, 964 (Utah 1943) ("anything not in the best interest of the public would be 'detrimental to the public welfare' "). The water allocation agency denied an application for appropriation because they determined that granting permit would be detrimental to "public welfare." *See id.* at 964. The decision was based on statutory preference for uses such as livestock watering and irrigation, and such denial would not have been possible without the preference for other uses. *See id.* at 963; *see also* Young & Norton v. Hinderlider, 110 P. 1045, 1050 (N.M. 1910) (holding that between competing uses of water for irrigation, denial of application acceptable because cost effectiveness of application "contrary to the public interest"); *compare* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986) (denial of permits allowed when "detrimental to public welfare") *with* UTAH CODE ANN. § 73-3-8(e) (Supp. 1985) (may deny permit when it "unreasonably affect[s] . . . natural stream environment, or will prove detrimental to the public welfare").

108. *See* City of San Antonio v. Texas Water Comm'n, 407 S.W.2d 752, 764 (Tex. 1966)

remains whether or not the "public welfare" consideration authorizes environmental protection or will it remain narrowly defined until there is an authorized expansion by the legislature.[109] Texas should respond by adopting expanded definitions of "public welfare" to allow for the protection of wildlife, recreation, and asthetic uses.[110]

2. Conditioning Permits on Future Instream Needs

The Texas Water Code authorizes the Texas Water Commission to deny appropriations of waters when it is not in the state's best interest to grant the appropriation and recognizes the commission's inherent power to condition appropriations on future instream needs.[111] This power is derived from section 11.134 which allows an appropriation

---

(when contemplating whether appropriation is not detrimental to public welfare, Water Commission must utilize their sound and reasonable discretion).

109. *See* Tanner v. Bacon, 136 P.2d 957, 963 (Utah 1943) (state water boards denial of appropriation permit was based on public welfare reasons because of existence of statutory preference for livestock watering over uses for power generation). In 1971, the Utah Legislature responded to the need for express recognition of instream uses for environment protection and authority for administrative denials based on environmental interests. *See* UTAH CODE ANN. § 73-3-8(e) (Supp. 1985) (authorizes denials in public interest which might unreasonably affect public recreation associated with natural stream environment). *See generally* Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law,* 1975 UTAH L. REV. 871, 888 (various western states expressly require recognition of instream values with authority to deny appropriative permits if these environments unreasonably affected).

110. *See, e.g.,* ALASKA STAT. § 46.15.080 (1983) (in determining "public interest," must consider "effect on fish and game resources and . . . public recreational opportunities"); IDAHO CODE § 42.1501 (Supp. 1986) (public interest elements are listed as "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transporation. . ."); UTAH CODE ANN. § 73-3-8(e) (Supp. 1985) (authorizes denial of appropriations if they unreasonably affect public interest in public recreation or natural stream environment).

111. *See* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986) (authorizes Texas Water Commission to deny applications which it determines is "detrimental to public welfare"); *see also* East Bay Mun. Util. Dist. v. Department of Public Works, 32 P.2d 1027, 1029 (Cal. 1934) (if statutory prerequisites are not met, application may be rejected entirely or permit may be issued with conditions); Kirk v. State Bd. of Irrigation, 134 N.W. 167, 169 (Neb. 1912) (if public welfare so demands, state may grant qualified right of appropriation in use of water); *accord* WASH. REV. CODE ANN. § 90.03.247 (West Supp. 1986) (if appropriations granted on streams to which minimum flow levels adopted, permit conditioned to protect levels and flows); *cf.* State v. Crown Zellerbach Corp., 602 P.2d 1172, 1175 (Wash. 1979) (statutory grant of power to obstruct, divert or change natural water flows necessarily encompasses authority to impose conditions on permits) (citing Southern Pacific Co. v. Olympia Dredging Co., 260 U.S. 205, 208 (1922) (interpreting act of Congress granting Secretary of War authority over construction involving certain waterways)). The Court stated "the power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval." *Id.* at 208.

to be denied in "whole or in part."[112] Section 11.134 gives the commission at least the implied authority to grant permits based on the satisfying of certain conditions.[113] The Texas Water Code also provides in section 11.135 that in each permit granted, the commission shall specify "other information the Commission may proscribe."[114] The commission has not hesitated to utilize this authority to condition permits in the past,[115] and this power could be effectively used to subordinate an appropriated right to the protection of instream flows based on public interest concerns which might arise in the future.[116] Furthermore, the possibility of conditioning permits based on the public interest is more viable when considering that the 1985 Water Package expressly allows conditioned permits for estuarian maintenance.[117] With the recognition of estuarian protection as grounds for conditioning permits it seems logical that the Water Commission should also be granted authority to provide for additional instream use protection.

---

112. *See* TEX. WATER CODE ANN. § 11.134 (Vernon Supp. 1986).

113. *See* Southern Pacific Co. v. Olympia Dredging Co., 260 U.S. 205, 208 (1922) (power to deny permits by administrative entity necessarily encompasses lesser power to condition approval of permit); *see also* Tex. Water Dev. Board, 31 TEX. ADMIN. CODE §§ 303.151 to -.152 (Shepard's 1985) (appropriation right granted by Commission may be conditioned subject to superior water rights holders, or conditions reasonably necessary to enforce water laws); *see also* Texas Water Rights Commission, Permit No. 2776 (Sept. 25, 1972) (permit granted conditioned and subject "as may be determined by the commission, to the release of water for the maintenance of Lavaca Matagorda Bay and Estuary System").

114. *See* TEX. WATER CODE ANN. § 11.135(b)(8) (Vernon Supp. 1986) (provision outlines written material which permit must contain such as specific purposes for which permit is granted); *cf.* South Texas Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.) (appropriation does not acquire ownership of water, but merely right to use water only for purposes stated in permit).

115. *See* Texas Water Rights Commission, Permit No. 2776 (Sept. 25, 1972) (permit granted conditioned and subject "as may be determined by the Commission, to the release of water for the maintenance of Lavaca Matagorda Bay and Estuary System").

116. *Cf.* WASH. REV. CODE ANN. § 90.03.247 (permit "shall be conditioned to protect minimum flows and levels" when state has determined and adopted approved levels to be maintained).

117. *See* TEX. WATER CODE ANN. § 11.135(b) (Vernon Supp. 1986) (Water Commission now has authority to condition new permits on stream flows necessary to maintain ecologically sound environment in bays and estuaries). The provision has similarity to other western legislation allowing conditioning on minimum flows. *See* IDAHO CODE ANN. § 42-203B (Supp. 1985) (conditioning allowed when permit effects minimum flow standards); *see also* WASH. REV. CODE ANN. § 90.03.247 (Supp. 1985) (Washington requires conditions be placed on permits that affect established minimum flow levels).

C. *The Public Trust Doctrine*

One theory entirely different from appropriative rights which may be used to ensure environmental protection of instream flows is the public trust doctrine.[118] The public trust doctrine invests the state with duties as trustee of public waters.[119] The doctrine has recently gained popularity among legal writers as a concept which may guarantee protection of fish and wildlife habitats.[120] The doctrine is based on a state's ownership of the beds of navigable waters and imposes a duty upon the state to protect public rights, navigation, commerce, and fisheries.[121] The doctrine has developed as a response to the state's continuing propensity to grant private parties rights in public waters thereby resulting in significant deprivation of public rights in

---

118. *See* Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983) (public trust interest which state must protect includes "navigation, fish and widlife habitat, aquatic life, recreation, aesthetic beauty and water quality); National Audubon Soc'y v. Superior Court, 658 P.2d 709, 727, 189 Cal. Rptr. 346, 364 (1983) (public trust doctrine must respond to water allocation and management and promote development of instream trust values).

119. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356 (1983) (holding that public trust doctrine encompasses values of ecology including scenic views, purity of air, nesting, and feeding by birds); Marks v. Whitney, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (California recognizes growing public interest in quality of environment within public trust).

120. *See, e.g.*, Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C.D. L. REV. 233, 266 (1980) (application of public trust will aid protection of future needs in "navigation, fishery, environmental quality and other public trust uses"); Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 376 (1985) (recent decisions have expanded public trust interests to protection of food supplies, spawning sites, nesting areas, and fish habitats); Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920,* 1980 WIS. L. REV. 1403, 1440 n.108 (West, Midwest, and Atlantic coasts have utiized public trust doctrine to protect fish and animal habitats). The California Supreme Court has recently held that it is the affirmative duty of the California Water Board to consider the public trust concerns before allocating any water resources that may be detrimental to the environment. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 727, 189 Cal. Rptr. 346, 364 (1983).

121. *See, e.g.*, City of Galveston v. Mann, 135 Tex. 319, 330, 143 S.W.2d 1028, 1033 (1940) (state owns lands underlying navigable waters and holds title in trust for public); Landry v. Robinson, 110 Tex. 295, 298, 219 S.W. 819, 820 (1920) (state holds title to soil under navigable waters in trust for public); City of Austin v. Hall, 93 Tex. 591, 597, 57 S.W. 563, 564 (1900) (Texas holds in trust for public, title to land underlying navigable waters). *See generally* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 376 (1985) (public trust imposes on sovereign right and duty to control overlying water courses for protection of public rights). The public trust emphasizes the historical issue of a state's fiduciary obligation as sovereign to protect the public rights of navigation, fisheries and commerce. *See id.* at 376.

important water courses.[122] Under the public trust doctrine, however, affected parties can petition state agencies to enforce public trust rights and seek judicial protection of their public rights to natural resources.[123]

By employing the doctrine of public trust, many states have provided for protection of wildlife food supplies, nesting areas, spawning sites, in addition to preserving the environment in its natural state.[124] Texas has failed to fully utilize the public trust doctrine to preserve the environment and instead has limited the doctrine's application to areas concerning navigation, commerce, and fishing industries.[125]

---

122. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 475 (1970). The modern public trust doctrine finds its roots in early English common law when the Parliament would try to restrict the sovereign's ability to alienate the crown's land to private parties without considering the consequences of its effect on public rights. *See id.* at 476. Whatever restraint may have been imposed on the King, it was nevertheless justified as being within the police powers of Parliament. *See id.* at 476. As a result, certain lands have traditionally been protected for benefit of the public such as navigation and fishing and these notions have been carried over into America as well. *See id.* at 475-76; *see also,* Arnold v. Mundy, 6 N.J.L. 1, 5 (1821) (early acknowledgment of public trust in New Jersey). The New Jersey Supreme Court stated that a sovereign could not "consistently with the principles of the law and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." *Id.* at 5. The United States Supreme Court invoked the public trust doctrine in a famous case which allowed the Illinois Legislature to revoke a patent of 1,000 acres of commercial waterfront of Chicago issued to Illinois Central Railroad. *See* Illinois Central RR. Co. v. Illinois, 146 U.S. 387, 452-53 (1892). The Court stated:

> [T]he state holds the title to the land under the navigable waters of Lake Michigan . . . and that title necessarily carries with it control over the waters above . . . but it is a title different in character from that which the state holds in lands intended for sale . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 452-53.

123. *See* National Audubon Soc'y v. Superior Court, 648 P.2d 709, 732, 189 Cal. Rptr. 346, 369 (1983) (plaintiff may challenge water agencies permits and licenses during agency proceedings or challenge actions in courts of law).

124. *See id.* at 719, 189 Cal. Rptr. at 356 (purpose of public trust is to be flexible and allow expansion as to protect lands that it encompasses, preserving them in their natural state). *See generally* Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920,* 1980 WIS. L. REV. 1403, 1440 n.108 (food supplies, nesting areas, spawning and fish habitats are all within protective interests of the public trust).

125. *See* Motl v. Boyd, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926) (Texas by statute owns title to water in navigable streams and holds title to its waters in trust for public); *see also* City of Galveston v. Mann, 135 Tex. 319, 329, 143 S.W.2d 1028, 1033 (1940) ("The rule has long

While the public trust doctrine appears to be an attractive alternative to protecting instream flows, doubt has been expressed concerning its effectiveness without legislative guidance on determining minimum stream flow requirements.[126] The public trust doctrine usually acts to reclaim a damaging appropriation.[127] For example, if the Water Commission grants a permit to take water that infringes upon public right to navigate freely on that water, the public trust doctrine requires the State to step in and reclaim that public right.[128] Since the

---

been established in this state that the state is the owner of the soil underlying the navigable waters," and that all such lands are held in trust for the benefit of all residents) (quoting Texas v. Bradford, 121 Tex. 515, 528, 50 S.W.2d 1065, 1069 (1935)); Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 609 (1973) (typical roles of public trust is to assure public rights and access to areas of "navigation, fishing and other purposes"). Furthermore, section 11.021 states:

> The water of the ordinary flow, underflow, and tides of every flowing stream, and lake, and every bay or arm of the Gulf of Mexico and storm water, flood water, and rainwater of every natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

Id. § 11.021(a).

126. *See* Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy,* 22 SANTA CLARA L. REV. 63, 65 (1982) (environmentalist should not search for remedies in "exotic common law jungles" such as the public trust doctrine, but should seek statutory principles for environmental protection). Walston suggests that if the public trust doctrine is used to protect important environmental resources, it will jeopardize long established water rights and place restrictions on water use which may result in confusion and uncertainty about future water supplies thus affecting important economic interests dependent on such water supplies. *See id.* at 64; *cf.* Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 623 (1973) (doubtful public trust doctrine will guarantee minimum stream flows into Texas bays and estuaries without legislative expression giving guidance to courts).

127. *See, e.g.,* Illinois Central RR. v. Illinois, 146 U.S. 387, 455 (1892) (state may reclaim rights granted to party under trust principle, but state may pay expenses due to conveyance to private ownership); National Audubon Soc'y v. Superior Court, 658 P.2d 709, 732, 189 Cal. Rptr. 346, 369 (1983) (under public trust state, retains supervisory powers over navigable waters and underlying beds and may prevent any party from obtaining vested appropriative right in water harmful to trust interests); City of Berkeley v. Supreme Court, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338 (1980) (public trust power allows revocation of previously granted rights, even when normally thought immune from trust doctrine); *see also* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 377 (1985) (necessity in many instances demands that appropriations of water be approved despite foreseeable harm to public trusts interests); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 473, 477 (1970) (public trust allows judicial intervention of governments' exercise over particular resources in order to restrain governments infringement of public rights to certain traditional uses, such as "recreation, navigation and fishery").

128. *See* Arnold v. Mundy, 6 N.J.L. 1, 5 (1821) (one of earliest American holdings relating to public trust) (court stated that sovereign could not "consistently with the principles of

public trust doctrine could be employed to serve as a justification for denying appropriation permits, Texas should expand its application to provide another avenue of protection for the environment and instream flows.[129]

IV. THE 1985 TEXAS WATER PACKAGE PROVISIONS EXPANDING PUBLIC INTERESTS IN INSTREAM USES

The Texas Legislature has enacted various legislation in recent years relating to the protection of instream uses, most notably in the protection of Texas' bays and estuaries.[130] Most recently, during the sixty-ninth regular session, lawmakers enacted legislation expanding upon these same concerns and focusing the Texas Water Commission's attention on other environmental interests.[131]

The significance of these new statutes has been magnified since most were conditioned to go into effect only if the Texas Constitution was amended to provide authority for state water development financing.[132] In November of 1985, the Texas voters amended the Constitu-

---

the law or nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting citizens of their common right").

129. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 727-29, 189 Cal. Rptr. 346, 364-66 (1983) (public trust doctrine requires duty of state to take into account trust interests such as preservation of instream values when planning and allocating water resources). California has extended trust principles for over a decade to include wildlife habitat and environmental preservation. *See* Marks v. Whitney, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (public recognition of environmental values requires application of trust principles for preservation of food habitats and ecological areas with scenic qualities). For a comprehensive study of Texas public trust doctrine and needed expansion of trust principles in water management, see Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365 (1985).

130. *See* TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986) (Water Code policy to provide proper ecological environment for Texas bays and estuaries); *id.* § 11.147 (outlines water commission's considerations when examining permits which effect bays and estuaries and instream uses).

131. *See id.* § 11.147 (commission must consider effects of all new permits on existing instream uses, water quality and fish and wildlife habitats); *id.* § 11.149 (applicants who wish to appropriate 5000 acre feet of water per year may be required to mitigate any adverse impacts that appropriation may have on fish and wildlife habitats); *id.* § 11.150 (commission must assess effects of any permit they issue on water quality of the state).

132. *See* Act of Sept. 1, 1985, ch. 133, § 6.05, 1985 Tex. Sess. Law Serv. 726 (Vernon) (Act takes effect only upon adoption of constitutional amendment proposed by H.J.R. No. 6, Sections 1 and 2 during 69th Regular Session, 1985); *see also* Tex. H. J. Res. 6, 69th Leg., 1985 Tex. Sess. Laws Serv. A-100 (Vernon) (resolution proposes constitutional amendment authorizing 980 million dollars in water development bonds for Texas). On November 5, 1985 the voters of Texas adopted the proposed constitutional amendment.

tion to authorize the state to issue 980 million dollars in Texas water development bonds, thus effectuating all conditioned provisions.[133] The bonds will allow Texas to pursue its constitutional policy of encouraging the funding and development of dams and reservoirs in order to enhance the public water supplies.[134] Whether the legislation has adequately addressed the importance of instream flow protection is subject, however, to serious doubt.[135] The legislation may have identified the need for instream flow protection, but it lacks the definitive guidelines necessary for requiring judicial or administrative protection of public interests and strict minimum flow maintenance.[136]

General guidelines in the Texas Water Code section 1.003 declare that it is the policy of the state "to provide for the conservation and development of the state's natural resources."[137] The policy considerations include "the conservation and development of [Texas'] forests[138] . . . and maintenance of a proper ecological environment of the bays and estuaries and the health of related living marine resources."[139] Conspiciously absent from the statement of purposes is that of the protection of "fish and wildlife habitats" other than those

---

133. *See* TEX. CONST. art. III, §§ 49-d-2, 49-d-5 (1985) (allows issuance of bonds for water development fund); TEX. CONST. art. III, § 49-d (1962, amended 1985) (provides for acquisition and development of reservoirs, treatment facilities for water and waste water, and financing of these projects); TEX. CONST. art. III, § 50-d (1984, amended 1985) (allows 200 million dollars to be deposited in agricultural water conservation fund when bonds are sold and proceeds are collected). The constitutional provisions also provide that if the legislature wishes to enact enabling legislation to effectuate these provisions, they will not be void because of their anticipatory nature. *See id.* § 49-d.

134. *See* TEX. CONST. art. III, § 49-d (1962, amended 1985) (policy of the state is to encourage development of dam and reservoir sites to hold water in trust for public). A long drought, ending in 1957, promoted the adoption of this amendment because of the effects future droughts may have on Texas economy which was growing. *See id.* § 49-d, interp. commentary (Vernon 1984).

135. *See* Press Statement of Sierra Club, Lone Star Chapter, at 3 (Sept. 9, 1985) (National Audubon Society and Texas Committee on Natural Resources oppose water package because not environmentally sensitive).

136. *Compare* TEX. WATER CODE ANN. § 11.147(c)(6) (Vernon Supp. 1986) (Water Commission must consider importance of other beneficial uses which are declared higher than instream uses) *with* WASH. REV. STAT. ANN. § 90.03.247 (West Supp. 1986) (minimum flow levels have been adopted in many streams of Washington, and *all* permits issued for appropriation must be conditioned to protect those levels) (emphasis added).

137. *See* TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986) (general provisions relating to state policy with respect to Texas' water).

138. *See id.* § 1.003(4).

139. *See id.* § 1.003(6).

related to the bays and estuaries.[140] Expressed provision for only one environmental purpose suggests a construction of the Water Code which excludes other important environmental concerns,[141] such as recreation or aesthetic concerns.

Although not stated in the purposes of the Water Code,[142] the Texas Water Commission, pursuant to the constitutional amendments in November, 1985,[143] has new public interests directives which may well guarantee future instream needs of Texas' bays and estuaries and may also provide for consideration of other natural wildlife habitats.[144] Under chapter 11 of the Water Code, the commission is charged with finding that no appropriation is "detrimental to the public welfare,"[145] and in so doing the commission is to "assess the effects, if any, of the issuance of a permit on the bays and estuaries of Texas."[146] This section lists several factors which the Commission must consider:[147] (1) the need for seasonal freshwater inflows which

---

140. *Compare id.* § 1.003 (only environmental interests which are mentioned in state policy declarations are "forests" and "bays and estuaries" and "related living marine resources") *with* CAL. PUB. RES. CODE ANN. § 21000 (Deering 1976) (policy declarations state that all state agencies must give "major consideration" to preventing environmental damage which may be caused by state action).

141. *Cf.* Hunter v. Fort Worth, 620 S.W.2d 547, 552 (Tex. 1981) (courts will not add words to statutes unless it is necessary to effectuate legislature's true intent). The *Hunter* court was interpreting language found in the Texas Business Corporations Act and found that a remedy for pre-dissolution claims existed under the statutes, but no similar provision encompassed post-dissolution claims. *See id.* at 552. The court noted that the exclusion of the provision was very significant to show legislative intent because it could have easily been included. *See id.* at 552. Since the provision was not included, it was ignored. *See id.* at 552; *see also* Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 540 (Tex. 1981) (words used in statute are presumed to be used for a purpose and those words excluded are presumed to be excluded for a purpose, and only when necessary will additional words be added to gain clear legislative intent).

142. *See* TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986).

143. *See* TEX. CONST. art. III, §§ 49-9, 49-d-2 to 49-d-5, 50-d (1985) (provisions relating to the issuance of water development bonds, on which new provisions of chapter 11 of Texas Water Code are conditioned) (codifying Tex. H. J. Res. 6, 69th Leg., 1985 Tex. Sess. Law Serv. A-100 (Vernon)); *see also* Act of Sept. 1, 1985, ch. 133, § 6.05, 1985 Tex. Sess. Law Serv. 726 (Vernon) (conditioned act only to take effect if constitutional amendment proposed in H.J.R. No. 6 is adopted).

144. *See* TEX. WATER CODE ANN. § 11.147 to -.150 (Vernon Supp. 1986).

145. *See id.* § 11.134(b)(3)(c) (commission can grant water permit only if unappropriated water is available, it is for a beneficial use, and "not detrimental to the public welfare . . .").

146. *See id.* § 11.147(b) (if permit "to store, take or divert water," commission shall assess effects on Texas' bays and estuaries).

147. *See id.* § 11.147(c).

will maintain the salinity levels of Texas' bays and estuaries;[148] (2) the ecology and productivity of each bay and estuary affected;[149] (3) the adverse effects to public welfare of the State of not ensuring beneficial inflows;[150] (4) the quantity of water requested, the proposed use, and value to others of that proposed use;[151] and (5) the adverse effects on public welfare in denying the permit in whole or in part.[152] Section 11.147 also provides that with any permit to "take, divert or store water," the commission must consider the effect of issuance upon "existing instream uses and water quality"[153] along with any affects on "fish and wildlife habitats."[154] These new provisions are legislative expressions of new public interest considerations for future water appropriations.[155]

These public interests' considerations seem sound considering the expressed motives of the legislature in the protection of the Texas' bays and estuaries.[156] The statutes specify public welfare interests in bays and estuaries although other instream uses such as effects on fish and wildlife habitats are addressed but are not further expanded.[157] The failure to include further consideration leaves their importance open to considerable skepticism.[158] Further, the commission need only "consider the effects" on instream flows when evaluating appro-

148. *See id.* § 11.147(c)(1).
149. *See id.* § 11.147(c)(2).
150. *See id.* § 11.147(c)(3).
151. *See id.* § 11.147(c)(4).
152. *See id.* § 11.147(c)(5).
153. *See id.* § 11.147(d).
154. *See id.* § 11.147(e).
155. *Cf.* Johnson Rancho County Water Dist. v. State Water Rights Bd., 45 Cal. Rptr. 589, 596 (Cal. Ct. App. 1965) (public interest is legislative standards which guide water agencies in making decisions relating to appropriation permits).
156. *See* TEX. WATER CODE ANN. § 1.003 (Vernon Supp. 1986) (public policy of state to conserve water as natural resource and maintain proper ecological environment of bays and estuaries); *cf.* National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970) (national policy to preserve productivity and enjoyable harmony with our natural environment). *See generally* Robie, *Some Reflections on Environmental Considerations in Water Rights Administration,* 2 ECOLOGY L.Q. 695, 695 (1972) (primary responsibility for implementing policy for protection of environment rests with "state and local governments").
157. *Compare* TEX. WATER CODE ANN. § 11.147(c) (Vernon Supp. 1986) (when assessing effects of issuance of permits upon bays and estuaries, commission to expressly consider factors such as effects on public welfare if permit granted or if permit denied) *with id.* §§ 11.147 (d), (e) (commission has no expressed factors to be weighed when considering effect of issuance of permit on "fish and wildlife habitats").
158. *See* Smith v. Baldwin, 611 S.W.2d 611, 615 (Tex. 1980) (when legislature has carefully employed term in one provision, it should not be implied where it is excluded); *cf.* Hunter

priations, not "assess the effects" as it must in those appropriations affecting bays and estuaries.[159] Without the more aggressive language such as "assess," the commission may just as easily "consider," then ignore.[160]

The major obstacle for the protection of instream values found in section 11.147, will be the section's cross-reference to preference declarations found in section 11.024, which relates to priority of beneficial uses; and section 11.033, which relates to municipalities' powers of eminant domain.[161] When there are competing uses for the same water, section 11.024 makes "bay and estuary" and "fish and wildlife" uses very low on the priority list.[162] Under section 11.033, even if a permit is obtained for instream use, it is subject to the right of any city or town to take away the appropriations for domestic and municipal uses without compensation.[163]

---

v. Fort Worth, 620 S.W.2d 547, 552 (Tex. 1981) (provisions that could have been easily provided for, but are not, will not be added unless necessary to effectuate legislative intent).

159. *Compare* TEX. WATER CODE ANN. § 11.147(b) (Vernon Supp. 1986) (must "assess" bays and estuary effects when commission is contemplating issuance of permit to appropriate) *with id.* §§ 11.47(d), (e) (commission to "consider" effects of issuance on instream uses in existence, along with effects on fish and wildlife habitats); *see also* Telephone interview with Ken Kramer, State Capitol Representative, Lone Star Chapter, Sierra Club (Feb. 10, 1986) ("assess" language has been interpreted by Water Commission in past to require action on commission's part before making decisions).

160. No affirmative steps must be taken in order to "consider effects," it is but a passive act, while "assessment" imparts duty, activity and is not considered passive.

161. *See* TEX. WATER CODE ANN. § 11.147(c)(6) (Vernon Supp. 1986) (for purposes of section 11.147, provisions conserving priority of uses and eminent domain, will be considered in assessing effects of permits on instream uses and bays and estuaries); *see also* Jarvis v. State Land Department, 479 P.2d 169, 174 (Ariz. 1970) (Arizona Supreme Court was construing application of priority list of beneficial uses similar to Texas). In resolving dispute, the Arizona court said "the creation of such a priority list clearly evidences a legislative policy that the needs of agriculture give way to the needs of [higher ranks]." *See id.* at 174. Suggestion has been made that absolute application of the statute should give way to being a general guideline. *See* Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use by Private Appropriators,* 21 ARIZ. L. REV. 1095, 1120 n.174 (1979) (author attempting to incorporate social utility and need for flexibility by analyzing *Restatement (Second) of Torts* § 850(A) (1966)).

162. *See* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986) (as tool in conserving state water legislature not only effectuated beneficial uses, but required preferences between uses). State public policy declares preferences in following order:

> (1) Domestic . . . uses . . . sustaining human life . . . and animals . . .; (2) industrial uses . . .; (3) irrigation; (4) mining . . .; (5) hydoelectric power; (6) navigation; (7) recreation . . .; and (8) other . . . uses."

Id. § 11.024.

163. *See id.* § 11.033 (right to take water for domestic and muncipal supply primary and fundamental and all political subdivisions and government agencies have this eminent domain

An important part of the public interest considerations in the Water Code involves the inclusion of the Texas Department of Parks and Wildlife into the water appropriation process.[164] The Department of Parks and Wildlife, at their option, may choose to make themselves a party to any hearing which they deem important to protect wildlife interests.[165] This potential intervention is important since the Parks and Wildlife Department has a recognized duty to the public to protect endangered species[166] and to establish wildlife santuaries as it deems necessary.[167] It is questionable, however, what affect further participation would have on the department's ability to make appropriations for instream flows since competing uses, as well as senior rights, possess higher priorities than those of fish and wildlife uses.[168]

The new Water Code provisions also authorize incorporation of

---

power). The state may have a duty to show that the water right being taken away is for "necessary" and "essential" purposes. *See id.* § 11.033.

164. *See id.* § 11.147(f) (Texas Parks and Wildlife Department, may be party to proceedings which they believe important to their environmental interests); *see also* WASH. REV. CODE ANN. § 90.22.010 (Supp. 1986) (Department of Fisheries has authority to apply for appropriation permits with Department of Waters when game agency decides this would be in best interest of state).

165. *See* TEX. WATER CODE ANN. § 11.147(f) (Vernon Supp. 1986); *see also* TEX. PARKS & WILDLIFE CODE ANN. § 12.024 (Vernon Supp. 1986) (wildlife department has duties to make recommendations to water commission to "protect fish and wildlife resources" or be party in hearings on applications).

166. *See* TEX. PARKS & WILDLIFE CODE ANN. § 68.001 (Vernon 1976) (management of endangered species require Department to engage in range of activities including "habitat acquisition and improvement"). The department has primary duty to protect the state's fish and wildlife resources, which includes providing recommendations to Texas Department of Water Resources relating to instream flows. *See id.* § 12.0011 (4) (Vernon Supp. 1986).

167. *See id.* § 81.201 (Vernon 1976) (Texas Department of Parks and Wildlife shall set aside streams and bodies of water to establish fish sanctuaries); *id.* § 81.401 (Vernon Supp. 1986) (department may acquire wildlife management areas). The section states: "The Department may acquire, develop, maintain and operate wildlife management areas and may manage, along sound biological lines, wildlife and fish found on any land the Department has or may acquire as a wildlife management area"). *See id.* § 81.401.

168. *See* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986) (conservation of water requires priority of rights and preference between competing uses, and uses for fish and wildlife fall at bottom of list). It has been the law in Texas for many years that "as between appropriations of water, the first in time is the first in right." *See* Bartely v. Stone, 527 S.W.2d 754, 759 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.). It is possible that a prior appropriator during the drought years may use all the water of his right, depriving subsequent appropriators altogether. *See id.* at 759. But the rights of municipalities or political subdivisions to take water necessary and "essential to domestic and municipal supply purposes" is primary, and fundamentally takes priority over even senior high priority uses like irrigation. *See* TEX. WATER CODE ANN. § 11.033 (Vernon Supp. 1986). *But see In re* Water Rights of Cibolo Creek Watershed of San Antonio River Basin, 568 S.W.2d 155, 157 (Tex. Civ. App.—San

other state agency activity into determinations on appropriative permits.[169] The Water Code establishes a new Water Development Board,[170] which with the help of the Texas Parks and Wildlife Department, has joint responsibility over the organization of environmental studies and data collections "necessary for water resources planning and management."[171] The executive administrator of the Texas Water Development Board has the duty to "investigate the effects of fresh water inflows upon the bays and estuaries of Texas."[172] This directive resembles legislation from other western states which requires the compilation of environmental impact statements which assess possible damages to the environment from state activity.[173]

Antonio 1978, no writ) (vested water rights may not be taken through eminent domain proceedings without compensation).

169. *See* TEX. WATER CODE ANN. § 11.149 (Vernon Supp. 1986) (Texas Parks and Wildlife and "Department" [sic] have joint responsibility in "collection" of "bay and estuary data" and "establishment of bays and estuaries councils"). Section 11.149 establishes an advisory council which are made up of representatives from "Parks and Wildlife Department, Texas Department of Health, General Land Office" and various representatives of conservation, environmental, hunting, and fishing organizations. *See id.* § 11.149(b). The executive administrator of the Water Development Board has duty to make investigations and studies concerning water resources, and especially "effects of freshwater inflows upon the bays and estuaries of Texas." *See id.* § 16.012 (details duties of executive administrator of Texas Water Development Board).

170. *See id.* § 6.051.

171. *See id.* § 11.149. The language of this provision seems erroneous because it uses the term "department" which is not defined. *See id.* § 11.001. The term seems to have been used by mistake since the Texas Department of Water Resources was abolished in September, 1985. *See id.* § 5.0121 (Vernon Supp. 1985) (application of sunset act to take effect in September, 1985 unless continued by legislative act). This ambiguity and uncertainty has caused some confusion in the ordinary operations of the Water Development Board. Telephone conversation with Ken Kramer, State Representative, Lone Star Chapter, Sierra Club (Feb. 10, 1986).

172. *See* TEX. WATER CODE ANN. § 16.012 (Vernon Supp. 1986).

173. *See, e.g.,* CAL. PUB. REV. CODE § 21100 (Deering Supp. 1986) (every state agency, board, and commission must include environmental impact statement in any report which affects environment); MONT. CODE ANN. § 75-1-201 (Supp. 1985) (all agencies should include with reports on agency actions, environmental impact statements, to assess agencies impact on environment); WASH. REV. CODE ANN. § 43.21C.030 (1983) (when agency activity affects environmental concerns, agencies' responsibility to report on environmental impacts). State interpretations of this legislation require all state agencies to assess environmental impacts and make reports. *See, e.g.,* Friends of Mammoth v. Bd. of Supervisors of Mono County, 502 P.2d 1049, 1054, 104 Cal. Rptr. 761, 766 (1972) (environmental quality act of California requires government agencies to make environmental impact report if their actions might affect environment); Montana Wilderness Ass'n v. Bd. of Natural Resources and Conservation of State of Mont., 648 P.2d 734, 744 (Mont. 1982) (function of environmental impact statement allows environment reports on potential impacts that state's action may have); Noel v. Cole, 655 P.2d 245, 248-49 (Wash. 1982) (environmental impact statement will be required when effect of administrative action on environment so agency may have full knowledge of facts).

Unlike other jurisdictions, Texas has unfortunately found it necessary to focus only on its bays and estuaries with very little significance placed on other fish and wildlife habitats.[174] For proper consideration of all impact uses and for the preservation of adequate instream flow needs, the commission should be charged with examining the impact on other habitats as well.[175]

The new provisions also provide for the reservation and automatic appropriation of water to the Parks and Wildlife Department from dams and reservoirs constructed with state funds that are within "200 river miles" on the coast line.[176] The Parks and Wildlife Department will receive five percent of "annual firm yield . . . for use to make releases to bays and estuaries and for instream uses."[177] Although the Parks and Wildlife Department holds the rights to use this reserved water, the department shares responsibility with the Water Development Board for the actual determination of the reserved waters' release and use.[178] These new provisions do not provide for the Parks and Wildlife Department to authorize additional appropriations if needed for instream uses[179] and doubt has been expressed if five percent will realistically be enough.[180] Furthermore, the statute only applies to those water projects started after September of 1985.[181] This time limitation restricts available reserved water for instream use assignment.[182] The Water Code provides for these appropriations with-

---

174. *See* TEX. WATER CODE ANN. § 11.149 (Vernon Supp. 1986) (data compilation and environmental studies to concentrate on "bay and estuary data collection program"). The advisory councils will include representatives of river authorities on reclamation districts only from those areas where their respective operations "in river basins or watersheds contributing to the bay or estuary." *See id.* § 11.149.

175. *See* National Environmental Protection Act of 1969, 42 U.S.C. § 4332 (1977) (Congress authorizes all agencies of federal government to include environmental impact studies with any proposal affecting quality of environment).

176. *See* TEX. WATER CODE ANN. § 16.1331 (Vernon Supp. 1986).

177. *See id.* § 16.1331.

178. *See id.* § 16.1331(b) (management of appropriated and reserved waters is joint responsibility of Parks and Wildlife Department and Water Development Board).

179. *See id.* § 16.1331 (Parks and Wildlife must adopt all rules necessary for managing water and releasing it for bays and estuaries and other instream uses).

180. *See* Press Release from Sierra Club, Lone Star Chapter, at 2 (January 21, 1985) (Sierra Club claims 5% of water from reservoirs built by state funds will not be sufficient to provide needed water to bays and estuaries).

181. *See* TEX. WATER CODE ANN. § 16.133(d) (Vernon Supp. 1986).

182. *See* Press Release from Sierra Club, Lone Star Chapter, at 2 (January 2, 1985) (requirement for reservation of water for instream uses would effect few reservoirs in Texas).

out actual diversion or a diversion requirement[183] although the water may be subject to future domestic or municipal use.[184]

The Water Code provisions go far in defining public interest requirements for the bays and estuaries but they do not define necessary public interest requirements for other instream needs.[185] Since the Texas Parks and Wildlife Department has taken a more predominant role within the water appropriation process, an improved and genuine interest in environmental protection with respect to instream flows may be possible.[186] Who, however, will guarantee this protection without expressed statutes requiring it?[187] The Texas Parks and Wildlife Department must have the authority to appropriate and reserve additional water for needs outside the bays and estuary system without the burden of competing with higher beneficial uses.[188] The Texas Legislature should amend the Water Code to provide for this authority.

There is one new provision which takes some steps that could possibly lead to mitigating damages to the environment if appropriations

---

183. *Compare* TEX. WATER CODE ANN. § 16.1331(d) (Vernon Supp. 1986) (Texas Water Commission is authorized to appropriate 5% of water in selected reservoirs built with state funds) *with* Fullerton v. State Water Resources Control Bd., 153 Cal. Rptr. 518, 524 (Cal. Ct. App. 1979) (some possession or control of water essential without express statutory authority to appropriate without diversion).

184. *See* TEX. WATER CODE ANN. § 11.033 (Vernon Supp. 1986) (municipalities' rights to take water which they deem essential is primary and fundamental).

185. *Compare id.* § 11.147(c) (commission's assessment of effects on bays and estuaries requires commission to consider six fundamental factors) *with id.* § 11.147(d) (Texas Water Commission will only consider effects on existing instream uses when evaluating application without explicit factors to weigh).

186. *See* TEX. PARKS & WILDLIFE CODE ANN. §§ 81.401 to -.405 (Vernon Supp. 1986) (Parks and Wildlife Department may acquire and develop wildlife areas along solid biological lines). Many western states allow state agencies whose interest lies in wildlife conservation to make appropriations for instream uses. *See, e.g.*, Colorado River Water Conservation Dist. v. Colorado River Water Conservation Bd., 594 P.2d 570, 573 (Colo. 1979) (Board able to make substantial appropriations to protect instream uses); McClellan v. Jantzen, 547 P.2d 494, 496 (Ariz. Ct. App. 1976) (Arizona Water Rights Agency authorized to appropriate waters stored in reservoirs to Fish and Game Departmentt for benefit of wildlife and recreation); State Dep't of Parks v. Idaho Dept. of Water Admin., 530 P.2d 924, 928 (Idaho 1974) (state law authorizes appropriation to Department of Parks for instream uses without diversion).

187. *See* TEX. WATER CODE ANN. § 11.002(6) (Vernon Supp. 1986) (Texas does not expressly allow Texas Department of Parks and Wildlife authority to apply for water permits in order to obtain adequate flow for instream uses such as wildlife protection). *But see* IDAHO CODE ANN. §§ 42-1501 to -1505 (Supp. 1985) (Water Resources Board has been granted express authority to make appropriations and grant permits for minimum instream flows).

188. *See* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986).

do indeed damage wildlife habitats.[189] Section 11.149 requires the commission to "assess effects of appropriations of more than 5000 acre-feet per year, on fish and wildlife habitats and may require the applicant to take reasonable actions to mitigate adverse impacts on such habitats."[190] Clearly this is a legislative mandate for some consideration, but the criteria for mitigation is not specified and offers no guidance for the courts.[191] The language of "may require . . . actions" has permissive undertones and may defeat any actual requirement for mitigation.[192]

V. RECOMMENDATIONS FOR EXPANDING THE EXISTING WATER CODE TO ENSURE MINIMUM FLOW PROTECTIONS AND PRESERVE TEXAS' IMPORTANT NATURAL ENVIRONMENTS

If Texas truly desires to protect instream flows and the important environmental interests dependent upon minimum flows in streams and rivers, the state must take more direct and affirmative action to secure those needs.[193] The 1985 legislation and the existing body of law justifying instream uses must be augmented to remove the doubts and uncertainties that remain.[194] The following suggestions would clarify the power of the Texas Water Commission with respect to public interest requirements and protection of instream uses for these interests.

---

189. *See id.* § 11.149 (mitigation may be required by applications which consider appropriations of more than 5000 acre feet).

190. *See id.* § 11.149.

191. *See* Analysis of Sierra Club Proposed Alternative to the "Bays and Estuaries/Instream Uses" provisions in the Water Package (HB2, SB138) Sierra Club, Lone Star Chapter, at 1 (Jan. 17, 1985) (alternative proposals from Sierra Club would require Water Commission to mitigate adverse effects on existing instream uses rather than present language which might provide alternative to mitigation).

192. *See id.* at 1 (Sierra Club wants permissive language of "may require" changed to "shall require" in order to guarantee mitigation).

193. *See* Sierra Club, Lone Star Chapter, *State Capitol Report,* at 1 (May 10, 1985) (serious questions remain whether water package will be sufficient to protect "bays and estuaries and fish and wildlife" habitats).

194. *See* Press Release, Sierra Club, Lone Star Chapter, at 4 (Sept. 9, 1985) (analyzes water package as glass "half filled," requiring legislature to take additional steps for instream protection).

A. *Administrative Denials or Reservations of Water for Instream Uses*

The new Water Code provisions should be redrafted in order to eradicate all permissive language relating to denial and conditioning of permits affecting instream uses and protection of fish and wildlife habitats.[195] It should be the affirmative duty of the Texas Water Commission to assess effects of permits on all important instream needs[196] and require that these needs be protected or damage be mitigated.[197]

The legislature should define wildlife preservation, bays and estuaries maintenance, and aesthetic beauty as beneficial uses having a higher priority among other uses,[198] thereby giving the commission more effective means of environmental protection.[199] At the very least, the commission should be required to condition permits to pro-

---

195. *See, e.g.*, TEX. WATER CODE ANN. §§ 11.147(d), (e) (Vernon Supp. 1986) (Texas Water Commission shall "consider the effects, if any" of appropriations on instream uses and fish and wildlife habitats without express factors to consider); *id.* § 11.147(f) (Parks and Wildlife Department may be party to hearing, when issuance of permit will effect instream uses, "at their option"); *id* § 11.149 (Texas Water Commission "may require" appropriation applicant to mitigate adverse effects of permit issuance on"fish and wildlife habitats"). *But see* KAN. STAT. ANN. § 82a-703b (1984) (all new appropriation permits subject to minimum stream flow required by state).

196. *Compare* TEX. WATER CODE ANN. § 11.147(b) (Vernon Supp. 1986) (commission must assess effects on permit issuance on bay and estuary inflows) *with id.* §§ 11.147(d), (e) (commission need only consider effects, if any, when issuance of permit impacts existing instream uses or fish and wildlife habitats).

197. *See id.* § 11.149 (Texas Water Commission "may require" applicant for appropriation permit to take reasonable steps to mitigate any adverse impacts on environment).

198. *Cf.* CAL. WATER CODE §§ 1253-57 (Deering 1977) (Water Board responsibility when determining best use between applications, California has more flexible guideline for determining which use will best benefit public interest); *see also* Temescal Water Co. v. Dep't of Public Works, 280 P.2d 1, 7 (Cal. 1955) (Department of Public Works has broad discretion in determining whether issuance of permit will best serve public interest). In Texas, the Texas Water Commission must give preference to applications according to statutory order of beneficial uses. *See* White, *Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 8 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983). Arizona has same preference list of beneficial uses which has been held a legislative mandate for considering higher ranked uses first. *See* Jarvis v. State Land Dep't, 479 P.2d 169, 174 (Ariz. 1970). Arizona's statute requiring preferences has been heavily criticized and should give way to more general and flexible guidelines. *See* Note, *Arizona Water Law: The Problem of Instream Appropriation for Environmental Use By Private Appropriators,* 21 ARIZ. L. REV. 1095, 1108 (1979).

199. *See* White, *Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 8 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983) (preferred uses may restrict benefits of protecting instream flows).

tect stream flows when applications contain alternative sources of water supply that could be reasonably employed.[200] These safeguards would ensure environmental protections by forcing the commission to make findings of the potential detrimental effects on existing water courses and take affirmative steps to guard against damage.[201] By allowing water appropriations specifically for instream uses, additional legislation augmenting the existing Code would increase the chance of environmental preservations.[202]

B. *Appropriative Right Permits for Instream Uses*

Texas should expressly authorize the Texas Water Commission to grant appropriation permits to protect instream flows without the need for diversion requirement to perfect these rights.[203] In granting appropriations for instream uses when unappropriated water is available, perfected and recognized water rights may well preserve minimum flow required for wildlife preservation.[204]

The commission should possess more express authority to grant permits for instream uses.[205] This could be implemented easily if in-

---

200. *See* Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 123-25 (1911) (water used for beneficial purposes should give way to other uses, when competing demands and more efficient means available for meeting those demands).

201. *See* White, *Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 8-13 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983) (permit conditions will be important and complicated part of minimum instream flow protection in Texas); *cf.* WASH. REV. CODE ANN. § 90.03.247 (Supp. 1986) (once minimum flow levels have been recognized "permits shall be conditioned to protect [minimum flows]").

202. See *White, Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 13 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983) (added legislation to Texas Water Code can help promote instream uses by allowing appropriations to conservation minded appropriators).

203. *See* COLO. REV. STAT. § 37-92-102(3) (Supp. 1985) (Colorado Water Conservation Board granted authority to make instream water appropriations). Most western states give express authority to water rights agencies to make appropriations for instream uses. *See, e.g.,* IDAHO CODE §§ 42-1501 to -1505 (Supp. 1985) (minimum stream flows are beneficial uses and appropriations may be made to protect them); NEB. REV. STAT. §§ 46-2, 108-10, 114-17 (Supp. 1985) (instream appropriations allowed when in public interest to do so); WASH. REV. CODE ANN. § 90.03.345 (Supp. 1986) (legislature established appropriation and reservation mandates to protect minimum flows and levels).

204. *See White, Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 8-13 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983) (permits for instream use helpful for protecting environment and granted permits give notice to future appropriators that water used and unavailable).

205. *See* TEX. WATER CODE ANN. § 16.1331 (Vernon Supp. 1986) (Texas Water Commission may issue permits for 5% of water which reserved for instream uses from reservoirs

stream or minimum flows maintenance takes a higher position in the priorities of uses found in the Water Code.[206] It will be important to establish the instream use right without the historic diversion requirement since the water must remain within the banks of the stream.[207]

Texas Parks and Wildlife Department as appropriative right holder: The legislature should pass provisions which expressly grant the Texas Parks and Wildlife Department the ability to appropriate water for instream maintenance in order to effectuate the department's duties as custodian of Texas' wildlife 'sanctuaries' and 'endangered species.'[208]

The Texas Parks and Wildlife Department has a genuine interest in environmental protection and is sensitive to the environmental concerns of Texas.[209] The department should be allowed to freely appropriate water if it deems it necessary to protect its concerns and interest.[210] The department needs the authority to acquire water

---

built with state money which are within 200 river miles of coastline). *But see* WASH. REV. CODE ANN. § 90.03.345 (Supp. 1986) (legislature has given authority to grant appropriations to protect minimum flows and does not limit appropriations to any set amount).

206. *See* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986) (appropriations may be made for "other beneficial uses" which would include instream use, but other uses such as irrigation and hydroelectric power are higher priority).

207. *See* State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 928 (Idaho 1974) (beneficial use of water for instream purposes should not require physical diversion of water). Diversion requirements, when water is used for minimum flow protections, have been rejected when legislature has abolished it expressly or impliedly. *See* Tarlock & Rice, *Minimum Stream Flow Maintenance,* PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS, § 9, at 8 (1985).

208. *See* White, *Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 25-26 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983) (Texas Department of Parks and Wildlife should seek appropriative rights in water for maintenance of wildlife sanctuaries). It has been urged that the legislation authorizing 5% reservation of water in coastal reservoirs be redrafted, allowing the Parks and Wildlife Department ability to appropriate water as it deems necessary. *See* Press Statement of Sierra Club, Lone Star Chapter, at 3-4 (Sept. 9, 1985). *See generally* TEX. PARKS & WILDLIFE CODE ANN. §§ 68.001, 81.201 (Vernon 1976) (establishing authority for wildlife sanctuaries and preservation of endangered species).

209. *See* TEX. PARKS & WILDLIFE CODE ANN. §§ 1.011, 13.002 (Vernon Supp. 1986) (all wild animals, aquatic animals, beds of public waters are property of people of Texas and Parks and Wildlife Department may maintain and manage, as well as develop, recreational resources of state).

210. *See* MONT. REV. CODE ANN. § 85-2-316 (Supp. 1985) (Montana authorizes Board of Natural Resources and Conservation to appropriate water to maintain minimum flow and reserve large amounts of water for environmental protection). This procedure maintains substantial quantities of water in Yellowstone Basin. *See* Tarlock, *The Recognition of Instream Flow Rights: 'New' Public Western Water Rights,* 25 ROCKY MTN. L. INST. 24-1, 24-36-39

rights in the same capacity as it has to obtain wildlife sanctuaries or to protect endangered species. The stronger the preference for instream uses in the Texas Water Code, the better chance the department has in effectuating "habitat acquisition and improvement."[211] If legislative authorization fails to establish adequate protections, the Texas Parks and Wildlife Department, as custodian of Texas' wildlife environments or other affected parties, may pursue minimum instream flow through an expanded public trust doctrine.[212]

C. *The Public Trust Doctrine*

The public trust doctrine has been a useful tool in advancing public interests in many instances where the state has acted selfishly without regard to public interests.[213] The Texas courts should recognize and expand the public trust application beyond navigation, commerce, and fisheries to include all environmental values as well.[214]

If the Water Commission remains strapped to the preferential treat-

---

(1979); *see also* NEB. REV. STAT. §§ 46-2, 108 (Supp. 1985) (instream appropriations may only be granted to Nebraska's "Game and Parks Commission or Natural Resources District").

211. *See* TEX. PARKS & WILDLIFE CODE ANN. § 68.001(2)(B) (Vernon 1976) (general powers of Parks and Wildlife Department includes wildlife habitat acquisition and mangement). *But see* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986) (preferences in beneficial uses may be implemented when competing uses arise in application process); *see also* White, *Opportunities for Protecting Instream Flows in Texas, Oklahoma, and Arkansas,* at 8-9 (Fish and Wildlife Service, U. S. Department of the Interior, Sept. 1983) (Water Commission of Texas must give preference to uses ranked by priority in Water Code).

212. *See* Diversion Lake Club v. Health, 126 Tex. 129, 139, 86 S.W.2d 441, 446 (1935) (permit to irrigate water does not allow interference of public rights in public waters). The rationale of *Diversion Lake Club* supports the argument that an appropriative system of water law does not subsume the public trust doctrine, but that the doctrine is separate and exists with authority to require the Texas Water Commission to protect public rights in natural resources. *See* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 406-407 (1985); *see also* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 732, 189 Cal. Rptr. 346, 369 (1983) (public trust doctrine and appropriative rights system are integrated, but each has distinct function).

213. *See* Morrison & Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries,* 37 BAYLOR L. REV. 365, 374 (1985) (courts have used doctrine to invalidate grants of public trust property and as mechanism for enforcing trust obligations of title holder of trust property).

214. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 725-26, 189 Cal. Rptr. 346, 362-63 (1983) (public trust applications have been expanded beyond navigation, commerce and fisheries to include protection of riparian fish and wildlife habitats). California has not felt limited to antiquated notions of trust applications and will apply the trust principles for "preservation of lands in their natural condition" so they may serve as ecological units for scientific study, for open space, and as environments which provide food and habitat for birds and marine life. *See* Marks v. Whitney, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

ment of all beneficial uses over those of recreation and environment,[215] the judiciary, with its growing involvement in water rights policy-making, may be the only alternative for adequate instream protections.[216] The courts may well be the best arena for effectuating the balance between private and public rights to water resources.[217] Public interest groups and citizens, armed with a constitutional mandate for protection of public rights to natural resources,[218] may turn to the courts for resolve if the prior appropriation system proves deficient in protecting the expanded public trusts interest.[219] Whatever theory is utilized, affected groups may pursue to guarantee protection of instream uses, it is apparent that more legislative expressions must be effectuated in order for the courts to resolve any disputes arising between appropriative right holders and those persons wishing to preserve Texas natural habitats.[220] The above recommendations, if taken to heart, may preserve Texas natural resources for generations to come.

VI. CONCLUSION

Appropriative water rights law encompasses many legal justifications for the protection of instream uses such as recreation, fish, and wildlife habitats, and aesthetic beauty of our great outdoors. These protections include administrative water rights appropriation, administrative denial or conditioning of appropriative rights, and the public

---

215. *See* TEX. WATER CODE ANN. § 11.024 (Vernon Supp. 1986).

216. *See* Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1092 (Idaho 1983) (public trust forms outer boundaries at all times of permissible government action related to trust resources).

217. *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 727, 189 Cal. Rptr. 346, 364 (1983) (public interest questions which require balancing of interests and needs in water rights administration with those of public trust values, and courts must draw from judicial precedent, public trust, water rights system, and expert testimony).

218. *See* TEX. CONST. art. XVI, § 59 (1917) (duty of state legislature to preserve all Texas natural resources for benefit of pubic).

219. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 473, 477 (1970) (doctrine will allow judiciary to intervene with government administration which fails to protect public rights to water uses).

220. *See* Johnson, *Legal Assurances of Adequate Flows of Fresh Water into Texas Bays and Estuaries to Maintain Proper Salinity Levels,* 10 HOUS. L. REV. 598, 623 (1973) (public trust doctrine acting alone without expressed legislative guidance might not be enough to insure minimum flows); Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy,* 22 SANTA CLARA L. REV. 63, 65 (1982) (environmentalist should not seek remedy in public trust doctrine without statutory principles established for environmental protection).

trust doctrine. Unfortunately, Texas has not historically recognized instream needs. Furthermore, Texas' recent treatment of instream flows may not be sufficient to ensure instream protection.

Many western states have passed enabling legislation which has specifically addressed the issues of instream uses and have made advances toward protecting minimum stream flows necessary to protect natural environments. Texas has enacted legislation which has significantly advanced recognition of public interests in the maintenance of instream values. The statutes, however, only express the fact that a problem exists and that the Water Commission and Parks and Wildlife Department must consider effects of appropriations on the environment.

Administrative policy making will not be the answer to protecting Texas' instream needs, especially if the powers of the administrative agencies are statutorily limited. The Texas Legislature must authorize the commission to make instream appropriations in the public interest without the historical limitations. The Parks and Wildlife Department must be authorized by the state to hold appropriative rights to instream uses. The Water Commission must be required to condition future appropriations on minimum flows necessary for environmental maintenance.

If the legislature fails in its duty as trustee of public waters for the benefit of all citizens, then we must address the judiciary for intervention before the carnage of the appropriative rights system dries up Texas fish and wildlife habitats. If Texans are to preserve the natural beauty of Texas' wildlife habitats for generations to come, the legislature will have to address these issues which remain unanswered.