Federal Protection of Instream Values

Lavern Holdeman

University of Nebraska College of Law, lavernholdeman@hotmail.com

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation

Lavern Holdeman, Federal Protection of Instream Values, 57 Neb. L. Rev. 368 (1978)
Available at: https://digitalcommons.unl.edu/nlr/vol57/iss2/7

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Federal Protection Of Instream Values

I. INTRODUCTION

Environmental and recreational values are of deep concern to a large segment of modern society. Within such concerns are encompassed the preservation of water quantity and quality, as well as of fish and wildlife resources. Nowhere have these concerns been more strongly expressed than at the federal level of our government.

Federal involvement in instream use, planning, and preservation is on the increase. This increasing federal involvement inherently recognizes that the protection of instream values is fast becoming a problem of national concern, even though the states have traditionally controlled the acquisition and retention of water use rights.

The notion of federal involvement in the protection of instream values can be attributed, in part, to the failure of the states in many instances to protect those values. It would be short-sighted, however, to limit the rationale for federal involvement to those instances where the states could act but fail to do so, or to put the entire blame for inadequate protection of instream values upon the states. Indeed, there exists an affirmative right and duty in the federal government to preserve instream use properties, not only because in many cases the states have failed to act, but also because there exist many situations in which the interest to be protected is federal in nature or lies beyond the capabilities or jurisdiction of any one particular state to protect. Still, at a time when the federal government is becoming more cognizant of the need to protect the environment, state inaction presents a serious obstacle to the protection and preservation of instream values.

II. THE PROBLEM OF STATE INACTION

Protection of instream values has traditionally met with little success in state regulation and adjudication of water rights. Although a number of states have enacted specific legislation protect-
ing instream values, serious obstacles have impeded adequate protection on a comprehensive scale.

In most prior appropriation states the two basic requirements for a valid appropriation are a physical diversion of the water together with its application within a reasonable time to a beneficial use. The diversion requirement, in particular, appears totally inconsistent with the concept of "instream use." Diversion is still a necessary requisite for appropriation in the majority of prior appropriation jurisdictions. Indeed, some fairly recent decisions continue to hold that actual physical diversion is essential. Nowhere was the effect of the diversion requirement more clearly brought into focus than in Colorado River Water Conservation District v. Rocky Mountain Power Co.

Rocky Mountain Power arose under a statute which gave Colorado water conservation districts the power

[t]o file upon and hold for the use of the public sufficient water of any natural stream to maintain a constant stream flow in the

1. The state of Washington has adopted the following statute as a means of protecting instream values:

   The department of water resources may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.

   WASH. REV. CODE § 90.22.010 (Supp. 1976). See also COLO. REV. STAT. § 37-92-102(3) (1973) (vests the Colorado Water Conservation Board with power "to appropriate . . . or acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree").

2. The doctrine of prior appropriation is dominant in the eighteen Western continental states, including Alaska, and in Mississippi. See F. TRELEASE, WATER LAW 10-13 (2d ed. 1974). "Developed in the arid west, appropriation law is usually thought of as a system for water-short areas, where there is not enough for everyone, not even for all riparian owners." F. TRELEASE, WATER LAW 2 (1967).

3. This view of the elements required for a valid appropriation represents both the traditional view and the probable weight of modern authority. Compare 2 C. KINNEY, IRRIGATION AND WATER RIGHTS 1243-44 (2d ed. 1912) with 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 366 (1971).

4. In State ex rel. Reynolds v. Miranda, 83 N.M. 443, 493 P.2d 409 (1972), the court stated that "man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes." Id. at 445, 493 P.2d at 411.


amount necessary to preserve fish, and to use such water in connection with retaining ponds for the propagation of fish or for the benefit of the public.  

The conservation district sought to file for the appropriation of all the waters of a particular river, two creeks, and all their tributaries, on the basis that they had been "a habitat for fish and the propagation and preservation thereof for over 40 years, and [had] been used by the public to fish and for the recreational activities connected therewith during all of said period of time."  

Stating that "the rule is elementary that the first essential of appropriation is the actual diversion of water with intent to apply a beneficial use," the court rejected the argument of the conservation district:

There is no support in the law of this state for the proposition that a minimum flow of water may be "appropriated" in a natural stream for piscatorial purposes without diversion of any portion of the water "appropriated" from the natural course of the stream. By the enactment of C.R.S. 1963, 150-7-5(10) the legislature did not intend to bring about such an extreme departure from well established doctrine, and we hold that no such departure was brought about by said statute.

Rocky Mountain Power is an example of the approach to in-stream use taken in most prior appropriation jurisdictions which continue to espouse the physical diversion requirement. Interestingly, the Colorado legislature chose to overrule Rocky Mountain Power by statutory enactment. In 1973 the legislature amended Colorado's appropriation statute by deleting the diversion requirement. Thus, Colorado now defines "appropriation" solely in terms of "the application of a certain portion of the waters of the state to a beneficial use."  

Removal of the diversion requirement from the Colorado appropriation statute enhances the theory that physical diversion is not required for a valid appropriation in modern appropriation systems. One of the primary purposes for requiring a physical diversion of the water is that it provides objective physical evidence of an intent to make an appropriation. In modern times, however, other legal

7. 158 Colo. at 333, 406 P.2d at 799.
9. Id. at 335, 406 P.2d at 800.
10. Id.
12. Id.
methods for giving evidence of an intent to appropriate are available, with the permit system being the method most predominantly used.\textsuperscript{14} Illustrative of the permit method are the Nebraska appropriation statutes,\textsuperscript{15} which require the "United States of America and every person hereafter intending to appropriate any of the public waters of the State of Nebraska"\textsuperscript{16} to file an application for a permit to make such appropriation with the Nebraska Department of Water Resources. This application is then recorded in the offices of the department, if properly filed, and open to the public for inspection.\textsuperscript{17}

Under the permit system, filing an application for a permit to appropriate water constitutes objective notice of intent to make an appropriation. As such, the diversion requirement seems quite unnecessary for a valid appropriation. It is a vestige of the past which is no more required for notice under the permit system than the physical transfer of a clod or twig to the transferee of real property is required under the modern system of real property recording instruments. Yet, the physical diversion requirement is still a prerequisite in most prior appropriation jurisdictions.

Many, if not most, prior appropriation states now recognize recreation and scenic beauty as "beneficial uses" either by statute\textsuperscript{18} or judicial fiat.\textsuperscript{19} However, a definition of "beneficial use" which includes recreational and aesthetic values may still present problems, particularly during times of water scarcity. Indeed, many states have adopted constitutional provisions for periods of shortage which prefer domestic, agricultural, and manufacturing uses, in that order, but which totally exclude recreation and aesthetics from the priority scheme.\textsuperscript{20}

Past cases dealing with the "beneficial use" requirement have tended to take a pragmatic approach to what constitutes a beneficial use. In Empire Water and Power Co. \textit{v.} Cascade Town Co.,\textsuperscript{21} the United States District Court for the District of Colorado was faced

\textsuperscript{14} See F. Trelease, \textit{Water Law} 38 n.5 (2d ed. 1974).
\textsuperscript{16} Id. § 46-233.
\textsuperscript{17} Id.
\textsuperscript{18} E.g., Colo. Rev. Stat. § 37-92-103 (4) (1973) (defining "beneficial use" as "also includ[ing] the appropriation by the state . . . of such minimum flows . . . as are required to preserve the natural environment to a reasonable degree").
\textsuperscript{19} E.g., State \textit{ex rel.} State Game Comm'n \textit{v.} Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1947).
\textsuperscript{20} E.g., Neb. Const. art. XV, § 6; Idaho Const. art. 15, § 3.
\textsuperscript{21} 205 F. 123 (8th Cir. 1913).
with the question of whether a resort owner's claim to the natural beauty of a waterfall and foliage, which depended upon the natural flow of a stream, constituted a beneficial use. While concluding that there might be instances in which a purely aesthetic or recreational use could be "beneficial," the court held:

The laws of Colorado are designed to prevent waste of a most valuable but limited natural resource, and to confine the use to needs. By rejecting the common-law rule [of riparianism] they deny the right of the landowner to have the stream run in its natural way without diminution . . . . It may be that if the attention of the lawmakers had been directed to such natural objects of great beauty they would have sought to preserve them, but we think the dominant idea was utility, liberally and not narrowly regarded, and we are constrained to follow it.22

Another problem for a number of courts with classifying general recreational and aesthetic values as beneficial uses was the existence of a public, as opposed to personal, benefit. To them, a beneficial use was something private and personal which could only be effected by an individual user. In Lake Shore Duck Club v. Lake View Duck Club,23 for example, the Utah Supreme Court set forth the following dicta:

To our minds, it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it . . . . If the beneficial use for which the appropriation is made cannot, in the nature of things, belong to the appropriator, of what validity is the appropriation? The very purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership.24

Although the cases which define "beneficial use" to exclude public recreational and aesthetic interests are largely historical in nature and have to a certain extent been negated by statute and inconsistent case law,25 general aesthetic and recreational values still may not be recognized as beneficial uses in specific situations. This is particularly notable in the case of constitutional provisions,26 which exclude aesthetic and recreational uses from the state water use priority scheme.

A further problem facing instream use protection at the state level is the inclusion of a "right to appropriation" provision in the

22. Id. at 129.
23. 50 Utah 76, 166 P. 309 (1917).
24. Id. at 80-81, 166 P. at 310-11.
25. See notes 18 and 19 supra.
26. See note 20 supra.
constitutions of some prior appropriation states.\textsuperscript{27} Such provisions generally state that the right to divert any unappropriated waters of a natural stream for beneficial use shall never be denied to the citizens of the state.\textsuperscript{28}

The "right to appropriation" provisions have been construed by some courts to mean that the state is constitutionally prohibited from ever preventing its citizens from exercising their right to physically divert and use all unappropriated waters. In \textit{Loup River Public Power District v. North Loup River Public Power & Irrigation District},\textsuperscript{29} the Nebraska Supreme Court held that the "right to appropriation" clause in the Nebraska Constitution had the following effect:

A right of appropriation, under our Constitution, ... is a property right which is entitled to the same protection as any other property right. The right of property therein cannot be violated with impunity any more than that in any other type of property. This is so fundamental that citations of authority are unnecessary.\textsuperscript{30}

In \textit{State Water Conservation Board v. Enking},\textsuperscript{31} the Idaho Supreme Court struck down a statute authorizing the board to appropriate unappropriated waters for water conservation projects on the basis of the "right to appropriation" clause in the constitution.\textsuperscript{32} In so doing the court stated:

\begin{quote}
[I]t is clear that [the conservation statute] attempts to authorize the board to appropriate any or all the unappropriated public waters of the state, and thereby to withdraw them from private appropriation by any person who may desire to comply with the Constitution and statute in the diversion and appropriation of public waters. ... If the board is merely an arm of the state performing "governmental functions," it cannot, in the face of these constitutional provisions, be authorized to withdraw from private appropriation the unappropriated waters of the state.\textsuperscript{33}
\end{quote}

It is notable, however, that in 1974 when the Idaho Supreme Court once again considered the issue in \textit{Idaho Department of Parks v. Idaho Department of Water Administration},\textsuperscript{34} it distinguished, if not overruled, \textit{Enking}.

\begin{thebibliography}{99}
27. \textit{E.g.,} \textit{Neb. Const.} art. XV, § 6; \textit{Idaho Const.} art. 15, § 3; \textit{N.M. Const.} art. 16, § 2.
28. \textit{Id.}
29. 142 Neb. 141, 5 N.W.2d 240 (1942).
32. \textit{Idaho Const.} art. 15, § 3.
33. 56 Idaho at 732, 58 P.2d at 783.
34. 96 Idaho 440, 530 P.2d 924 (1974).
\end{thebibliography}
In Idaho Department of Parks, the court was asked to determine the constitutionality of a statute authorizing the department “to appropriate in trust for the people of Idaho certain unappropriated natural waters of the Malad Canyon in Gooding County, Idaho.”

The stated purpose for enacting the statute was to protect the waters of the Malad Canyon for recreational purposes. The case was appealed to the Idaho Supreme Court from a decision by the Idaho Department of Water Administration which held that “in Idaho there [could] be no valid appropriation of water without at least a proposed physical diversion or reduction of water to possession.”

In response to the argument that the statute was unconstitutional under the authority of Enking, the court held:

[The statute] does not constitute a disobedience of the constitutional mandate that the “right to divert and appropriate the unappropriated waters * * * to beneficial uses, shall never be denied.” The only authority contrary to that holding is the language we determine to be arguably dictum in Enking, and to the extent that this opinion is inconsistent with that language we overrule the latter.

The concept of an appropriation of water by the state in trust for the people, such as that enunciated in the Idaho statute, is not new. The “public trust doctrine” is a long standing and viable alternative for overcoming the many obstacles which some states have placed in the path of effective instream regulation, including the “right to appropriation” provisions in their constitutions.

The public trust doctrine is based upon the proposition that the state holds title to unappropriated and navigable waters “in trust for the people of the state that they may enjoy . . . the waters . . . freed from the obstruction or interference of private parties.” Under this doctrine the state, as trustee for its citizens, can withdraw such waters from appropriation for their benefit. A number of states have embodied the public trust doctrine in specific constitutional provisions which provide that all of the unappropriated waters of that state are held in trust for the people.

36. Id. at 441, 530 P.2d at 925.
37. Id.
38. Id. at 442, 530 P.2d at 926.
39. Id. at 443, 530 P.2d at 927.
41. “All waters within the State are declared to be ‘the property of the public’ . . . in Arizona, California, Colorado, Montana, Nevada, New Mexico, Oklahoma, Oregon, North Dakota, South Dakota, Texas, Utah and Wyoming . . . .” 1 S. Wiel, WATER RIGHTS IN THE WESTERN STATES § 6, at 12 (3d ed. 1911).
thermore, other states specifically include in their "right to appropriation" provisions a clause allowing state prohibition of private appropriation when it is in the public interest. In spite of the flexibility which the public trust doctrine provides appropriation states in dealing with instream use protection in the public interest, a number of state courts refuse to litigate the public trust issue.

The problem of preserving instream use is not inherently limited to prior appropriation jurisdictions. Even in riparian states there exists no common law authority which recognizes the right of the public at large to use the waters of the state for recreational and environmental purposes. Although the riparian doctrine does recognize the right to have the natural flow of the stream maintained against unreasonable diminution, and this principle extends to the right to an established flow even for recreational and aesthetic purposes, this right is purely personal to the riparian land owner. As such, he may enjoin the public from using waters upon which his land abuts.

III. THE FEDERAL PREROGATIVE IN PROTECTING INSTREAM VALUES

A. Some Underlying Principles

A number of principles exist under which the federal government can and does exercise its authority to protect instream values. The most obvious vehicles for instituting federal regulation of

42. See, e.g., Neb. Const. art. XV, § 6 (permitting denial of the right to divert "when such denial is demanded by the public interest").

43. "While the legislatures and courts of many states have recognized their obligation to safeguard the public trust, there are a number of courts which persistently adhere to the belief that courts are not an appropriate forum in which to examine administrative actions dealing with public trust lands." Sax, The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 551 (1970).

44. States recognizing the doctrine of riparianism as the basis for acquiring water rights include Hawaii and states east of and including Minnesota, Iowa, Missouri, Arkansas and Louisiana, with the exception of Mississippi. See F. Trelease, supra note 14, at 10-13.


47. In Hoover v. Crane, 362 Mich. 36, 106 N.W.2d 563 (1960), the Michigan Supreme Court upheld the rights of cottage owners on a small lake to an established minimum level of water as against a subsequent riparian owner who sought to use the water for irrigation purposes.

48. E.g., Boerner v. McCallister, 197 Va. 169, 175, 89 S.E.2d 23, 26 (1955)
water resources have been the property clause and the commerce clause, together with their resulting doctrines of federal reserved rights and navigational servitude. These doctrines provide the federal government a far-reaching supremacy which authorizes it to exercise its powers for the protection of federal interests.

Under the federal reserved rights doctrine the federal government is deemed to have withheld from state and private ownership that quantum of water sufficient to maintain federal lands for the purposes for which such lands were reserved. This right is grounded in the underlying proposition that the United States, as sovereign, originally owned the Western lands, and thus the waters and water rights on such lands as well. When the federal government reserved certain Western lands for its own use, it also impliedly reserved the rights to all waters thereon in an amount necessary to enhance and preserve those lands.

The implied reservation doctrine enables the federal government, as the owner of the reserved water and water rights, to protect the continued flow of its waters on Indian reservations and federal enclaves such as national recreation areas, forests, and wildlife refuges against encroachment by private and nonfederal public interests. An important feature of the federal reserved rights doctrine is that it is applicable whether the stream feeding the particular federal enclave is navigable or non-navigable.

The doctrine of navigational servitude empowers the federal government to regulate waters which are used or are capable of being used in interstate commerce. This doctrine not only authorizes Congress to exclude discriminatory or unduly cumbersome state regulation of interstate commerce on navigable waters, but

( enjoining members of the public from fishing in waters adjacent to the riparian plaintiff's property on the basis that "the [river flowing] through the lands of the complainant, is a non-navigable stream and consequently private, the bed of which is vested in the complainant, and is not public or vested in the public").

49. U.S. CONST. art. IV, § 3, cl. 2.
50. U.S. CONST. art. I, § 8, cl. 3.
52. Id. at 703.
53. Id.
56. See U.S. CONST. art. I, § 8, cl. 3.
59. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).
also empowers it to enact substantive legislation and regulations for the protection and enhancement of such commerce.\textsuperscript{60}

Although this doctrine, as originally enunciated, was limited to clearing, improving, and maintaining channels and harbors for the purposes of utilizing their navigational properties, that authority has been extended to embrace purposes other than navigation.\textsuperscript{61} In fact, such activities as flood control\textsuperscript{62} and the generation of hydroelectric power\textsuperscript{63} are now considered to be within the scope of the federal navigational servitude.

The concept of permissible federal navigational powers has been so expanded that today they are construed to extend not only to the pertinent portions of navigable streams but also to non-navigable portions thereof, streams which are capable of navigation with reasonable improvements, and non-navigable tributaries of navigable streams.\textsuperscript{64} Under the aegis of this broad interpretation of the federal navigational powers, the doctrine of navigational servitude provides an effective means for affirmative regulation in favor of instream values. Indeed, some courts are now beginning to take cognizance of the fact that the destruction of aesthetic and recreational properties of navigable waters has "a substantial, and in some areas a devastating effect on commerce."\textsuperscript{65}

The taxing and spending powers of Congress authorize it to "provide for the . . . general Welfare of the United States."\textsuperscript{66} The issue of whether a congressional appropriation provides for the general welfare is determined in the first instance by Congress,\textsuperscript{67} and that determination is decisive unless it was arbitrarily made and clearly wrong.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{60} But see United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).
\item \textsuperscript{61} See United States v. Appalachian Power Co., 311 U.S. 377 (1940); Arizona v. California, 283 U.S. 423 (1931).
\item \textsuperscript{62} Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).
\item \textsuperscript{63} First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946).
\item \textsuperscript{64} See Comment, Minimum Streamflows—Federal Power to Secure, 15 Nat. Resources J. 799, 805 (1975), and cases cited therein.
\item \textsuperscript{65} Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).
\item \textsuperscript{66} U.S. Const. art. I, § 8, cl. 1.
\item \textsuperscript{67} United States v. Butler, 297 U.S. 1, 65 (1936).
\item \textsuperscript{68} Congress may spend money in aid of the "general welfare" . . . . The line must still be drawn between one welfare and another, between particular and general. Where this line shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confined to the courts. The discretion belongs to Con-
With the discretion concerning what constitutes the "general welfare" vested in Congress, that term has a constantly changing definition depending upon the needs of the times. In *Helvering v. Davis*\(^6\) the Supreme Court stated that "the concept of the general welfare [is not] static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times."\(^7\)

Conservation of this nation's dwindling natural resources is a compelling national need in modern times. It is logical, therefore, that the problems of conversation, such as the protection of in-stream values, constitute problems which affect the "general welfare." As such, Congress can rightfully utilize its taxing and spending powers to protect those values. Indeed, as long as forty years ago, the courts to some extent recognized that the power to tax and spend for the general welfare includes expenditures for the purposes of conservation. *In re United States*\(^7\) upheld the right of the United States Department of Agriculture, under the National Industrial Recovery Act, to condemn and set aside land for the purposes of flood control, reforestation, and the establishment of a wildlife refuge\(^2\) on the basis that such expenditures constituted a valid exercise of the taxing and spending powers for the general welfare.\(^3\)

---

\(^6\) Helvering v. Davis, 301 U.S. 619, 640 (1937).

\(^7\) Id. at 641.

\(^71\) 28 F. Supp. 758 (W.D.N.Y. 1939).

\(^72\) It is clear that forestation, prevention of soil erosion and flood control have come to be recognized in the mind of Congress as public necessities if we are to conserve our natural resources. Little question could be raised regarding the authority of the state to fulfill any of these programs. Likewise there can be no doubt that forestation, and flood control on even minor streams, and control of soil erosion over a comparatively small area affect an interest which is "national and general as contradistinguished from local or special." The nature of the program for wildlife-reforestation projects indicates an activity involving a scope much more extensive than a single state. Id. at 763.

\(^73\) There can be no doubt that projects looking to flood control, re-forestation and prevention of soil erosion may in and of themselves affect that "general welfare." As to the establishment of game refuges there can be little doubt under any circumstance. . . . These activities may well be and are in aid of the "general welfare" and hence in the "public interest," irrespective of the demands of the economic interests of the country. Id. at 764.
Just as important as the power to spend moneys raised by taxation for the protection of the "general welfare" is the right of Congress to withhold such funds if certain imposed conditions are not met. The United States Supreme Court in *United States v. MacCollom*[^74] stated that "[w]here Congress has addressed the subject . . . and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized."[^75]

Congress can, as stated in *MacCollom*, place conditions upon grants of federal funds. Furthermore, it can utilize its powers to withhold or terminate state funds unless the pertinent conditions are met. In *Georgia v. Mitchell*[^76] the Department of Health, Education and Welfare, under the authority of the Civil Rights Act,[^77] terminated federal assistance to the State of Georgia for failing to take affirmative steps to cure the impact of its past segregationist policies within the public schools.[^78] The court rejected the claims of Georgia, stating that "the Department of Health, Education and Welfare was justified in utilizing the provisions of 42 U.S.C. § 20002-1"[^79] to terminate federal funds for public education. Armed with this power, Congress has the ability to require state compliance with activities consistent with its provisions for the "general welfare." Since the protection of instream values is of extreme importance to the general welfare in today's society, state compliance with federal provisions for those values can effectively be enforced through the withholding of federal funds for water-related projects.

The power of eminent domain provides the federal government with yet another means for protecting instream values. Although this power is not directly granted in the Constitution,

"[i]t has not been seriously contended . . . that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the

[^75]: Id. at 321.
[^76]: 450 F.2d 1317 (D.C. Cir. 1971).
[^78]: The pertinent portion of section 2000d-1 reads as follows:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination or refusal to grant or to continue assistance under [a] program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . .

*Id.*

[^79]: 450 F.2d at 1320.
obstinancy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed.”

Furthermore, as reasoned by the Court, in Kohl v. United States, the Constitution by implication recognizes such a right:

The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. . . . The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?

It is well established that the government may appropriate navigable waters without it constituting a “taking” for which compensation will be required. The rationale for the no-compensation rule, as stated in United States v. Virginia Electric & Power Co., is that the navigational servitude “is the privilege to appropriate without compensation which attaches to the exercise of the power of the government to control and regulate navigable waters in the interest of commerce.” In spite of the broad reach of the navigational servitude, however, there are a number of non-navigable streams and watercourses which are beyond federal jurisdiction.

The power of eminent domain, on the other hand, enables the federal government to reach those non-navigable streams. A private right in water is “property” within the fifth amendment, subject to taking, for compensation, by the federal government. Thus there are few, if any, waters or water rights within the United States which are exempt from the power. Furthermore, the protection of instream values for the purposes of public recreation and enjoyment constitutes a “public use,” thus satisfying the traditional requirement that the taking of property, under an exercise of the power of eminent domain, must be for a public purpose.

81. 91 U.S. 367 (1875).
82. Id. at 372-73.
85. Id. at 627-28.
86. Id. at 627.
87. Article 5 of amendments to the constitution of the United States prohibits the taking of private property for public use
B. Increasing Awareness of Environmental Values

The attitude of the federal government today is one of an increased awareness of the importance of instream and other environmental values, as well as a cognizance of the need to preserve those values. This attitude is reflected in a number of statutes enacted by Congress which are designed to insure that the federal government will not knowingly encroach upon the natural environment.

The National Environmental Policy Act of 196988 (NEPA) requires federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the human environment"89 an environmental impact statement concerning the effect such federal actions will have on the quality of the human environment.90 Although compliance with NEPA is viewed basically as a procedural matter,91 the statement must contain adequate information "to allow a reasoned choice"92 by the particular agency whose duty it is to decide whether the proposed federal action should be carried out. One of the most important features of NEPA, however, is that it supplements the traditional cost-benefit analysis of proposed federal projects with additional environmental considerations which are often difficult, if not impossible, to measure in terms of dollars and cents.

without just compensation. If the use for which it is proposed to take such property is not a public use . . . then no proceedings for condemnation can or should be allowed.

In re Manderson, 51 F. 501, 503 (3d Cir. 1892).

89. Id. § 4332(c).
90. The environmental impact statement requires "detailed" information concerning
   (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources should it be implemented.

Id.

In *Sierra Club v. Morton* the Court of Appeals for the Fifth Circuit answered the question concerning how specifically environmental benefits and detriments must be quantified:

"NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula." Nevertheless, "an agency [must] search out, develop and follow procedures reasonably calculated to bring environmental factors to peer status with dollars and technology in their decision-making." . . . However, every attempt to assign a dollar value to future effects of present actions necessarily involves prediction. . . . The decisionmaker's task nevertheless remains the same. It is not to total up dollars and cents in a sort of profit-loss ledger, but rather to consider the previously unconsidered by giving weight and consideration to future generations in deciding whether present economic benefits indicate that the depletion of irreplaceable natural resources should proceed in the manner suggested, or at all.

NEPA clearly shows a Congressional intent to give environmental factors serious consideration in all federal agency actions.

The Intergovernmental Cooperation Act of 1968 also focuses upon the effect which federally sponsored or financed programs and projects may have upon the environment. Whereas NEPA is largely procedural in nature, the Intergovernmental Cooperation Act grants the President substantive power to establish rules and regulations "governing the formulation, evaluation and review of Federal programs and projects." The Act seeks to foster "[w]ise development and conservation of natural resources, including land, water, minerals, wildlife and others; . . . [a]dequate outdoor recreation and open space; and . . . [p]rotection of areas of unique natural beauty, historical and scientific interest." Through the enactment of the Intergovernmental Cooperation Act, Congress has exhibited an interest in protecting the environmental values of water and other natural resources from federal encroachment. This interest goes beyond a mere procedural consideration of the effect which proposed federal actions might have upon those resources.

C. Exercising the Federal Prerogative

The federal government has utilized and, in fact, expanded its authority to protect instream values. This has been done through

---

93. 510 F.2d 813 (5th Cir. 1975).
94. Id. at 827.
97. Id.
various congressional enactments and judicial pronouncements favoring federal regulation of water quantity and quality.

The Fish and Wildlife Coordination Act\(^9\) is a prime example of how the federal government has been empowered to protect instream values. The Act is prefaced by a recognition of "the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors."\(^99\) The stated policy of the Act is "to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs."\(^100\) To effectuate this policy, Congress gave the Secretary of the Interior broad authorization

\[
\text{to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof and their habitat in controlling losses of the same from disease and other causes, . . . in providing public shooting and fishing areas, . . . and in carrying out other measures necessary to effectuate the purposes of said sections . . . .}\(^101\)
\]

The scope of the Act is intentionally broad. It requires that before any impoundment, diversion, or other alteration of any body of water proposed or authorized by any federal department or agency, or any other public or private agency under federal permit or license will be allowed, the department or agency concerned must consult the applicable conservation agency of both the United States and the state wherein the project is being proposed, for the purpose of protecting affected fish and wildlife resources and their habitats.\(^102\)

The provisions of the Fish and Wildlife Coordination Act have been made the basis for decisions upholding federal orders requiring the maintenance of a minimum flow. In California v. Federal

\(^{99}\) Id. § 661.
\(^{100}\) Id.
\(^{101}\) Id.
\(^{102}\) The pertinent portion of § 662(a) provides:

\[
\begin{align*}
\text{Whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein impoundment, diversion, or other}
\end{align*}
\]
Power Commission," the petitioners sought to have a condition removed from a license to construct an irrigation project. The condition in the license required the petitioners to maintain a sufficient water level below a dam in the project to support established fish runs.

Finding jurisdiction in the Federal Power Commission by the fact that "[l]ands of the United States in the public domain would be used in the construction and operation of the project," the court upheld the condition in the license. Its analysis was not, however, based upon either the doctrine of reserved rights, although the land was in the public domain, nor upon the doctrine of navigational servitude, since "the river [was] not navigable." The court rather based its holding on the contention that the condition was proper, in view of the Fish and Wildlife Coordination Act "manifesting legislative concern with the preservation of fish and wildlife resources," coupled with the "prospect . . . that the entire Tuolumne fish run [would] be destroyed in the near future."

The Fish and Wildlife Coordination Act has also been instrumental in taking the federal government beyond its traditionally recognized jurisdiction over navigation. In Zabel v. Tabb, the United States Court of Appeals for the Fifth Circuit reversed a Florida District Court order requiring the Secretary of the Army to issue a permit to dredge and fill in navigable waters for the purpose of constructing a trailer park. The lower court order was issued on the basis "that the Secretary of the Army and his functionary, the Chief of Engineers, had no power to consider anything except interference with navigation." The court of appeals eloquently rejected this argument, holding that under the dictates of the Fish

control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources . . .

Id. 345 F.2d 917 (9th Cir.), cert. denied, 382 U.S. 941 (1965).
104. Id. at 919.
105. Id. at 921.
106. Id.
107. Id. at 928.
108. Id.
111. 430 F.2d at 201.
112. We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, in-
and Wildlife Coordination Act and NEPA, the Secretary of the Army could refuse to authorize projects in navigable waters on ecological grounds even though the proposed project would not interfere with navigation, flood control, or the production of power.\textsuperscript{113}

The permit in controversy in \textit{Zabel} was required under section 10 of the Rivers and Harbors Appropriation Act,\textsuperscript{114} which, among other things, makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of the United States"\textsuperscript{115} without the recommendation of the Chief of Engineers and the authorization of the Secretary of the Army. In reading the Fish and Wildlife Coordination Act into that statute, the court vested the Corps of Engineers with the right and power to protect instream values when considering the approval of such permits. Indeed, even Congress has stressed that in all federal investigations and improvements under the jurisdiction of the Corps, "said investigations and improvements shall include a due regard for wildlife conservation."\textsuperscript{116} This regard for instream values and wildlife habitat is, however, in conflict with a number of other obligations imposed upon the Corps by Congress.

The power of the Corps to engage in the improvement of rivers and harbors also includes such responsibilities as maintaining authorized river and harbor projects in excess of authorized depths "where such excess depths have been provided by the United States for defense purposes and whenever the Chief of Engineers determines that such waterways also serve essential needs of general commerce."\textsuperscript{117} Likewise, the Corps is authorized to provide for a comprehensive program of eradication and control of aquatic plant growths in the interests of such things as navigation, flood control, and agriculture.\textsuperscript{118} It is clear, therefore, that the protection of instream values is often in direct conflict with other duties which the Corps is obligated to perform. Indeed, the protection and en-

\begin{itemize}
  \item \textit{Id.}
  \item This view was based upon the court's reading NEPA and the Fish and Wildlife Coordination Act together. The court stated that, in view of these acts, "there is no doubt that the Secretary can refuse on conservation grounds to grant a permit." \textit{Id.} at 214.
  \item \textit{Id.} § 540.
  \item \textit{Id.} § 562a.
  \item \textit{Id.} § 610.
\end{itemize}
hancement of commerce and the national defense is incompatible with environmental needs more often than not. Since the traditional role of the Corps of Engineers has been to promote commerce and the national defense, it is likely that environmental values will be given little consideration by the Corps whenever a conflict arises between defense and commerce, on the one hand, and protection of instream values, on the other. Nevertheless, the Zabel sanction of the right to deny a permit on purely ecological grounds unrelated to commerce or defense is an indication of the impact which the Fish and Wildlife Coordination Act has had upon federal water regulation.

Another example of the impact of the Fish and Wildlife Coordination Act was exemplified in United States v. Stoeco Homes, Inc. Stoeco viewed the Act, together with NEPA, as expanding the federal navigational powers to include the power to regulate any use of navigable waters:

The expansive definition of the federal government's navigational servitude may be traced to the enactment in 1958 of The Fish and Wildlife Coordination Act ... and of The National Environmental Policy Act of 1969 .... Prior to these enactments the chief concerns of the Army Corps of Engineers were ... the prevention of encroachments on the navigational servitude which the government intended to use for some other purpose, such as flood control ....

Using this expansive definition of the federal navigational powers, the court held that although neither the Fish and Wildlife Coordination Act nor NEPA by their express terms applied to state or private activities, "Congressional legislative power under the commerce clause would be broad enough to encompass federal regulation of any activities affecting the marine ecology" in any navigable stream.

The federal reserved rights doctrine has also been utilized and expanded to provide far-reaching protection of instream values. An important case applying that doctrine arose under a reservation made pursuant to the American Antiquities Preservation Act. This Act gives the President discretionary power to proclaim landmarks and other objects of historic, prehistoric, or scientific interest on lands controlled by the federal government to be national monuments. It also authorizes the Secretary of the Interior to

120. Id. at 606.
121. Id. at 607 (emphasis added).
123. The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks,
accept a relinquishment of such items by the private and state sectors to the federal government.\textsuperscript{124}

*Cappaert v. United States*\textsuperscript{125} arose out of a presidential proclamation issued under the authority of the American Antiquities Preservation Act by President Truman in 1952.\textsuperscript{126} That proclamation withdrew from the public domain a forty-acre tract of land in Nevada containing a body of water known as Devil's Hole, a remnant of the prehistoric Death Valley Lake system.\textsuperscript{127} The primary purpose for issuing this proclamation was the preservation of an unusual race of desert fish of scientific interest, called pupfish, which was to be found nowhere else in the world.\textsuperscript{128}

In 1968, the petitioners began pumping groundwater for private use from the same aquifer which fed Devil's Hole, thereby reducing the water level and endangering the fish.\textsuperscript{129} Subsequently, they applied to the Nevada State Engineer for a permit to change the amount of water drawn from several of their wells.\textsuperscript{130} The United States filed a protest requesting either denial of the application or, in the alternative, postponement of the request until the government could determine which, if any, of petitioners' wells were contributing to the declining water level in Devil's Hole.\textsuperscript{131} Both of these requests were denied by the state engineer, who granted the application.\textsuperscript{132}

The United States then brought an original action in the United States District Court for the District of Nevada for a declaratory order establishing its rights to use so much of the water appurtenant to Devil's Hole as was necessary to maintain the pupfish, and for an injunction to keep the petitioners from pumping water,
except for domestic purposes. The court granted the injunction on the basis that the pupfish was a species which the public had an interest in preserving. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court and remanded the case to that court for the purpose of “retain[ing] continuing jurisdiction so that it may promptly act if a change in water level is required to preserve and protect the pupfish in the Devil's Hole pool.”

On appeal, the United States Supreme Court affirmed the decision of the ninth circuit. In so doing, it rejected the argument of the petitioners that the American Antiquities Preservation Act did not give the President authority to preserve the water level of a pool, but only to reserve lands for the purpose of protecting archaeological sites, by stating that

the language of the Act which authorizes the President to proclaim as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government” is not so limited. The pool in Devil's Hole and its rare inhabitants are “objects of historic or scientific interest.”

The Court likewise rejected the petitioners’ claim that the doctrine of implied reservation of water rights was inapplicable to groundwater. While stating that even if such was the rule, the implied reservation doctrine would apply in this situation because “the water in the pool [was] surface water,” the Court made it quite clear that the implied reservation doctrine did not turn upon any technical distinction between surface and groundwater:

The federal water rights were being depleted because, as the evidence showed, the “[g]round water and surface water are physically interrelated as integral parts of the hydrologic cycle.” . . . Thus, since the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.

133. This case had a long history in the federal courts. However, the proceeding from which the Supreme Court appeal was ultimately taken was United States v. Cappaert, 375 F. Supp. 456 (D. Nev. 1974).
134. Id. at 461.
136. United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974).
137. Id. at 322.
139. Id. at 142.
140. Id.
141. Id. at 142-43 (footnote omitted).
This finding by the Court that the implied reservation doctrine is applicable to both surface and groundwater is of tremendous significance, since that doctrine had never been applied to groundwater prior to *Cappaert.* As noted by the Court, "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to ground water." *Id.* at 142.

The Endangered Species Act is another statute which authorizes the federal government to act to protect instream values, albeit in a fairly limited setting. In this Act, Congress recognized that certain species of fish, wildlife, and plants in danger of extinction were "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." One of Congress' stated purposes for enacting the Act was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." In furtherance of that policy Congress directed "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities" in furtherance of that goal. The Endangered Species Act also gives the Secretaries of the Interior, Commerce, and Agriculture standards for determining whether a particular species is endangered, and the authority to

---

142. As noted by the Court, "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to ground water." *Id.* at 142.

143. *Id.* at 145.


145. *Id.* § 1531 (a) (3).

146. *Id.* § 1531 (b).

147. *Id.* § 1531 (c) (emphasis added).

148. "The term 'Secretary' means . . . the Secretary of the Interior or the Secretary of Commerce . . . except that with respect to the enforcement of the provisions . . . which pertain to the importation or exportation of terrestrial plants, the term means the Secretary of Agriculture." *Id.* § 1532 (10).

149. The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, sporting, scientific, or
protect that species by regulation if such is found to be the case.\textsuperscript{150}

Although the main thrust of the Endangered Species Act is directed toward insuring that acts of federal agencies will not “jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species,”\textsuperscript{151} it provides also for application of the Act to nonfederal actions as well “by consultation with the States concerned.”\textsuperscript{152} Even in those cases in which state cooperation is not forthcoming the federal government is not powerless to protect a species, as the Act authorizes the federal government to exercise its powers of condemnation for the purpose of acquiring whatever land or water is reasonably necessary to protect the endangered species and its habitat.\textsuperscript{153}

The Endangered Species Act has set the stage for possible far-reaching and effective federal protection of instream values. In \textit{Hill v. Tennessee Valley Authority},\textsuperscript{154} environmental groups brought an action under the Act to enjoin the Tennessee Valley Authority from completing a dam which threatened to impound a section of the Little Tennessee River. The basis for the suit was that such an impoundment endangered the habitat of the snail darter, “a unique and theretofore unknown species of fish.”\textsuperscript{155} In the original action\textsuperscript{156} the district court judge refused to grant the

\begin{itemize}
\item educational purposes;
\item disease or predation;
\item the inadequacy of regulatory mechanisms;
\item or
\item other natural or manmade factors affecting its continued existence.
\end{itemize}

\textit{Id.} \S 1533 (a) (1).

\textbf{150.} Under subsection (c) of section 1533, the Secretary of the Interior is required to publish a list of all species found to be threatened or endangered. The Secretaries of the Interior, Commerce, and Agriculture are then required to “issue such regulations as [they deem] necessary and advisable to provide for the conservation of such species.” \textit{Id.} \S 1533 (d).

\textbf{151.} \textit{Id.} \S 1536. The scope of the Act is extremely broad, considering that section 1536 defines “federal interest” as including any “actions authorized, funded, or carried out” by an agency of the federal government.

\textbf{152.} \textit{Id.} \S 1535 (a).

\textbf{153.} \textit{Id.} \S 1534. This section authorizes the Secretary of the Interior to “utilize the land acquisition and other authority” of various other acts to protect species that are endangered by nonfederal actions.


\textbf{155.} \textit{Id.} at 1067.

injunction even though it had been proved that the proposed dam would adversely affect, or even destroy, the habitat of the snail darter. The judge held that because the project predated the Act and could not reasonably be modified, the Act did not require that it be halted.\(^\text{157}\)

On appeal, the United States Court of Appeals for the Sixth Circuit disagreed:

TVA argues that closure of the Tellico Dam, as the last stage of a ten year project, falls outside the legitimate purview of the Act if it is rationally construed. TVA cautions that it would lead to absurd results if we were to include the terminal phases of ongoing projects among the "actions" of departments and agencies to be scrutinized for compliance. We find this familiar line of reasoning unpersuasive and believe that the District Court erred in adopting it.\(^\text{158}\)

Holding that ongoing projects were not excluded from the Endangered Species Act, the court reversed the district court and remanded the case "with instructions that a permanent injunction issue halting all activities incident to the . . . [p]roject which may destroy or modify the critical habitat of the snail darter,"\(^\text{159}\) until such time that "Congress, by appropriate legislation, exempts [the project] from compliance with the Act or the snail darter has been deleted from the list of endangered species . . . ."\(^\text{160}\)

The injunction issued by the court of appeals in Hill completely halted a project which had been under construction for ten years and which was nearing its final stages of completion. Although the Supreme Court has granted certiorari to hear this case,\(^\text{161}\) if not overturned by that Court, Hill will give proponents of instream values substantial power to enjoin projects which threaten endangered species with a loss of habitat.

The Endangered Species Act has also been construed to protect the habitat of an endangered species from private encroachment where the federal action by itself posed no threat to such habitat.

---

\(^\text{157}\). According to the district court judge,

This case must be viewed in the context of its particular facts and circumstances. We go no further than to hold that the Act does not operate in such a manner as to halt the completion of this particular project. A far different situation would be presented if the project were capable of reasonable modifications that would insure compliance with the Act or if the project had not been underway for nearly a decade.

\(^\text{158}\). Id. at 763.

\(^\text{159}\). 549 F.2d at 1070.

\(^\text{159}\). Id. at 1075.

\(^\text{160}\). Id.

In *National Wildlife Federation v. Coleman*, the United States Court of Appeals for the Fifth Circuit reversed a district court decision and granted an injunction to prevent construction of a highway across a portion of land upon which an endangered species of bird, known as the Mississippi Sandhill Crane nested. The court issued the injunction on the basis that even though danger "[would] not come from the physical existence of the facility [it would come] from the inherent development which accompanies a new highway." It rejected the contention that the Secretary of Transportation had adequately considered the effects of the highway on the crane because, according to the court, he had failed to take into account the loss of habitat which would result from private development through "excavation of and drainage caused by borrow pits," and the resulting loss of the crane's primary water source.

As demonstrated, the Endangered Species Act has provided interested environmentalists with a powerful weapon to be used in combating the destruction of instream values where an endangered or threatened species is concerned. If the *Hill* case is upheld, indications are that the power to protect these values will be greatly enhanced. There are, however, a number of features about the Endangered Species Act which keep it from being effective as a comprehensive federal act for the protection of instream values.

The reach of the Endangered Species Act is inherently narrow, touching only those federal actions which adversely affect certain species of wildlife threatened with extinction. Furthermore, the Act runs at cross purposes with a number of separate statutory provisions which seek to improve the quality of the human environment in other ways. Indeed, the Federal Power Commission in *Hill* was merely operating pursuant to the Federal Power Act, which directed it to utilize water resources for "public purposes." When the relative importance of human comfort and advancement is weighed against instream and other environmental objectives, it is highly doubtful that the balance will often weigh more heavily in favor of the protection of the habitats of threatened species of wildlife, particularly at the high cost represented in *Hill*.

The *Wild and Scenic Rivers Act* represents a specific instance in which Congress has provided directly for the preservation of

162. 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976).
164. 529 F.2d at 366.
165. Id. at 373.
166. 16 U.S.C. §§ 791(a) to 823 (1976).
167. See id. § 797(a).
natural instream values. This Act established a national wild and scenic rivers system comprised of rivers "(i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow." 169

Under this Act either the Secretary of the Interior or the Secretary of Agriculture is authorized to recommend rivers for inclusion in the wild and scenic rivers system.170

The basic requirements for eligible rivers, under the Wild and Scenic Rivers Act, are that they be rivers "which, with immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values,"171 and that they be "in [their] free-flowing condition, or . . . [restored] to this condition."172 A major goal of the Act is to make certain that such rivers "shall be preserved in [their] free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations."173 To that end the Act requires:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.174

While the Wild and Scenic Rivers Act seeks to preserve the free-flowing values of certain rivers by prohibiting further appropriation and use of their waters, a problem is immediately presented with respect to persons having already acquired rights to those waters. Absent a navigational servitude or federal reservation, these rights are rights of property, protected under the fifth amendment. As such, a further important feature of this Act is that it authorizes the federal government to exercise its power of eminent domain "to acquire lands and interests in land within the authorized boundaries of any component of the national wild and scenic rivers system."175 Furthermore, the Act seeks to not

169. Id. § 1273 (a).
170. Id. § 1275 (a).
171. Id. § 1271.
172. Id. § 1273 (b).
173. Id. § 1271.
174. Id. § 1281 (a).
175. Id. § 1277 (a).
only force the state and private sectors to relinquish lands and waters for the purposes of the Act but also seeks to work in cooperation with states, at their request, should they desire to participate in the inclusion, preservation and administration of rivers in the national wild and scenic rivers system.¹⁷⁶

The irony of the Wild and Scenic Rivers Act lies in the fact that by seeking to preserve streams in their natural free-flowing condition, it precludes those types of activities which might best enhance instream values. Indeed, not every free-flowing stream tends naturally to be in the best condition possible for the enhancement of such values. Dredging and stream augmentation often play an important role in aiding streams to realize their maximum instream use potential. The Wild and Scenic Rivers Act precludes this type of activity. Furthermore, the reach of the Act is restrictively narrow, thus preventing it from being a viable means for comprehensive instream use protection.

Recent Congressional enactments in the area of pollution control also provide hope for proponents of instream use protection. The 1972 Amendments to the Federal Water Pollution Control Act vest the administrator of the Act with the authority to “develop comprehensive programs for preventing, reducing, or eliminating” pollution of navigable and groundwaters. They also require that “due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes.”¹⁷⁸

Section 102 of the Federal Water Pollution Control Act¹⁷⁹ specifically provides, in subsection (b), that the Army Corps of Engineers, the Bureau of Reclamation, or other federal agencies, shall give consideration to the need for storage as a means of augmenting stream flows not only for water quality features¹⁸⁰ but also for “other than . . . water quality” features such as “recreation, esthetics, and fish and wildlife.”¹⁸¹ As stated in Save Our Invaluable Land (SOIL), Inc. v. Needham,¹⁸² “[u]nder this particular approach water [is] stored to be released when the natural flow in a stream [is] low, thereby augmenting the stream flow and diluting the pollution entering the stream below the storage facil-

¹⁷⁶. See id. § 1276(c).
¹⁷⁸. Id.
¹⁷⁹. Id. § 1252.
¹⁸⁰. Id. § 1252(b) (1).
¹⁸¹. Id. § 1252(b) (2).
¹⁸². 542 F.2d 539 (10th Cir. 1976), cert. denied, 430 U.S. 945 (1977).
ity.’ Section 102 therefore represents an affirmative effort on the part of Congress to maintain a minimum flow in navigable streams through augmentation, if necessary, in order to dilute the effects of water pollution. Furthermore, in expanding the Act to make factors other than pollution, such as recreation, aesthetics, and fish and wildlife, relevant for the purpose of the Act, Congress has given the federal government a valuable tool to be used in the overall protection of instream values.

Section 208 of the amendments to the Federal Water Pollution Control Act also provides for a comprehensive planning process for all of the nation’s water resources, in an effort to identify and treat areas having substantial water quality control problems. One of the explicit goals of section 208 planning, as set forth in Natural Resources Defense Council, Inc. v. Train, ‘is the restoration and maintenance of waters so that by 1983 they will be fit for human recreation and wildlife propagation.

Section 208 planning seeks the cooperation of the states in planning for and reaching water quality goals. It requires the various state governors to identify each area within their own states which has substantial water quality control problems, and to appoint a representative or organization capable of developing effective waste treatment plans for the entire area so designated. These representatives or organizations are then required to establish continuing regulatory programs for identifying pollutants and treating the waste problems arising therefrom.

Through financial incentives, Congress has made such a program attractive to the states. In this manner the federal government may reach water resources beyond federal jurisdiction for the purposes of both controlling pollution and enhancing instream values. In addition, under the terms of section 303 of the amendments to the Federal Water Pollution Control Act, a state is required to adopt water quality standards applicable to intrastate waters. However, if the administrator of the Act determines that

183. Id. at 541.
185. Id. § 1288.
187. Id. at 1387.
189. Id.
190. Id. § 1288(b).
191. Id. § 1288(f).
192. Id. § 1313.
193. Id. § 1313(a) (3).
such standards are not consistent with the applicable requirements of the Act, he is authorized to, first, notify the state of changes needed to bring its standards into compliance and, second, to promulgate standards for that state if compliance is not forthcoming.\footnote{Id. § 1313 (a) (3) (C).} Certainly, sections 208 and 303 planning bode well for advocates of the protection of instream values, particularly those who have heretofore been frustrated by the state inactivity in this area.

D. The Future of Federal Involvement

In spite of existing federal statutory and judicial authorities capable of providing protection for instream values, federal activity in this area remains largely a matter of piecemeal legislation together with occasional favorable judicial pronouncements. As noted by the Water Resources Council in a recent Federal Register notice,\footnote{Water Resources Council, Water Resource Policy Study, Issue and Option Papers, 42 Fed. Reg. 36,787 (1977).} this has led to a number of problems hampering effective water management:

Federal water policies are frequently not coordinated with overall Federal policy. Undesirable results have occurred, such as navigation projects not consistent with overall transportation policy and irrigation projects not consistent with agricultural policies.

Federal water resource planning is oriented to construction projects rather than to comprehensive management of the nation's resources by all alternative means.

There is a lack of coordination between water quality and water quantity planning efforts, leading to instances of more costly or less effective solutions to watershed problems than would be the case if the planning were less compartmentalized.\footnote{Id. at 36,789-90.}

In addition to the lack of an organized, comprehensive approach to water planning by the federal government, federal regulation has been, in the past, largely limited to those actions taken by, or under permit from, the federal government. Although the reach of the federal government within this area is admittedly broad, it still has failed to reach the great multitude of water resources not subject to federal navigation or reservation powers. Indeed, the federal government has been reluctant to encroach upon the traditional jurisdiction of the states over nonfederal water use rights. There are indications, however, that the federal role in water plan-
In the Water Resources Planning Act,\textsuperscript{197} Congress manifested an explicit policy in favor of "the conservation, development, and utilization of water and related land resources of the United States on a comprehensive and coordinated basis by the Federal Government, States, localities, and private enterprise with the cooperation of all . . . concerned."\textsuperscript{198} The objectives of the Act include: (1) enhancing regional economic development, (2) improving and protecting the quality of the total environment, (3) fostering the well-being of the people of the United States, and (4) fostering economic development.\textsuperscript{199} Perhaps the major significance of the Water Resources Planning Act is, however, that it represents an attempt by Congress to explore possible means for formulating a single national water policy and plan for dealing with the overall problems facing this nation's water resources.

The Water Resources Planning Act created the Water Resources Council\textsuperscript{200} and vested it with the responsibility to maintain a continuing study of the nation's water resources and related programs and policies. It is responsible for reporting its findings and recommendations directly to the President,\textsuperscript{201} and for establishing prin-

\textsuperscript{199} Id. § 1962-2.
\textsuperscript{201} The Council shall—
\begin{enumerate}
  \item maintain a continuing study and prepare an assessment biennially, or at such less frequent intervals as the Council may determine, of the adequacy of supplies of water necessary to meet the water requirements in each water resource region in the United States and the national interest therein; and
  \item maintain a continuing study of the relation of regional or river basin plans and programs to the requirements of larger regions of the Nation and of the adequacy of administrative and statutory means for the coordination of the water and related land resources policies and programs of the several Federal agencies; it shall appraise the adequacy of existing and proposed policies and programs to meet such requirements; and it shall make recommendations to the President with respect to Federal policies and programs.
\end{enumerate}
ciples, standards and procedures for the preparation of regional or river basin plans and federal water projects.  

In 1973 the Water Resources Council, pursuant to the directives of the Water Resources Planning Act, issued a document setting forth the principles and standards which it formulated in reference to a national water resources policy. That document not only outlined basic national objectives and planning procedures for federally assisted water resources projects, but also focused upon state, local and private water management activities. This study has been made the basis for further action to be taken by the Water Resources Council.

On July 15, 1977, the Water Resources Council issued a notice announcing the beginning of a Water Resource Policy Study. This study is being undertaken at the request of President Carter who, in his May 23, 1977, Environmental Message to Congress, called for a comprehensive review of federal water policy. The purpose of the notice issued by the Water Resources Council was "to present a summary of the major problems associated with Federal water resource planning and to suggest a number of options for solving or reducing these problems."

As a starting point for the study the Water Resources Council has adopted the basic objectives set forth in its Principles and Standards, including, "maintaining or enhancing the natural environment (Environmental Quality)." In pursuing these objectives, the Council recognized that broadened federal regulation in favor of environmental values was a viable option for consideration. The Council stated the problem as follows:

The Council shall establish, after such consultation with other interested entities, both Federal and non-Federal, as the Council may find appropriate, and with the approval of the President, principles, standards, and procedures for Federal participants in the preparation of comprehensive regional or river basin plans and for the formulation and evaluation of Federal water and related land resources projects. Such procedures may include provision for Council revision of plans for Federal projects intended to be proposed in any plan or revision thereof being prepared by a river basin planning commission.

Id. § 1962a-2.

WATER RESOURCES COUNCIL, PRINCIPLES AND STANDARDS FOR PLANNING WATER AND RELATED LAND RESOURCES (1973) [hereinafter referred to as Principles and Standards].


Id. at 36,788.

Principles and Standards, supra note 203.

The Federal role in water resource development has been criticized as unclear, outdated or inconsistent for a number of functional areas such as . . . outdoor recreation . . . [and] fish and wildlife enhancement . . . . This problem may have developed because policies have not been updated to meet changing needs, clarified where needed, or developed comprehensively. 209

The study will be broken into four main issue areas for consideration. However, of particular interest to proponents of instream use is issue area number three. 210 Issue area number three, "in recognition that environmental quality must be maintained and enhanced," 211 will focus upon "an examination of alternative water resources related institutions." 212 This will necessarily encompass the effect which state institutional arrangements should have on alternate institutions. 213

While recognizing the fact that water use rights have traditionally been governed by state law, the Water Resources Council very bluntly emphasized the fact that it may be time for federal intervention if water quality and quantity are to be preserved for the nation:

The review . . . will respect the fact that the acquisition, use and disposition of rights to use water have historically been a matter of individual State law. But this respect is tempered by the recognition that as demands on the Nation's limited water resources increase, it may be necessary to develop a national perspective both as to water quantity and quality and to ensure that Federal policies promote the recognition of realistic goals through changes in existing institutions at all levels of government. 214

As such, many of the problems focused upon in issue area number three of the study are a direct attempt to define the future role which the federal government should play in protecting instream values. A number of the options which the study will consider

209. Id. at 36,789.

210. "Policy Considerations and Alternatives Relative to Institutions and Institutional Arrangements." Id. at 36,792.

211. Id.

212. Id.

213. [A]n examination of alternative water resources related institutions is appropriate in a national water resources policy review. The legal and economic institutions influencing water resources are many and complex. Any review must, therefore, be very broad. For the review to be comprehensive, it should not be limited to what has been traditionally viewed as strictly Federal areas concerning water resources. This is because Federal water resources policy and programs are influenced by other governmental institutions, primarily those of the States.

214. Id.
posit the distinct possibility that the federal government intends to play a stronger role in the protection of instream values under a more organized, comprehensive national water policy.

One of the problems which the Water Resources Council will address in its study is the fact that federal water subsidies have encouraged consumptive use of water resources while failing to provide the incentives necessary to promote efficiency, water conservation, and environmental quality.\(^{215}\) As expressed by the Council: "Disparities in subsidies, including the failure to recognize the value of alternative uses of water, have resulted in water quality degradation attributable to overuse."\(^{216}\) As a means for dealing with this problem the Council has suggested several options, including the establishment of water use charges to provide incentives for the most economic use of water, and the institution of a market system with a concomitant subsidization of the social and environmental uses of water resources to enable them to compete in the market.\(^{217}\)

The Water Resources Council also intends to deal directly with the problem of laws which impair the recognition of environmental concerns in the use of water. Practices which the Council claims may impair recognition of these values include state laws which fail to provide for the protection of instream values, as well as inadequate federal coordination and compliance in the area of instream use protection.\(^{218}\) The options proposed for dealing with the federal problem include a long-overdue consideration of the feasibility of vesting a single environmentally oriented agency with authority to review all federal agencies for compliance and coordination relative to environmental concerns.\(^{219}\) However, the most radical options to be considered relate to forcing compliance with environmental objectives upon state and private agencies and individuals. The options for consideration in this area include the possible establishment of federal institutions (as opposed to traditional state institutions) to protect instream values or alternatively, the possibility of requiring state and local governments to provide for the protection of instream values.\(^{220}\) In order to protect instream values against undue encroachment by state and private interests, the study proposes giving authority to the federal

\(^{215}\) Id. See id. at 36,791 (Problem 1).
\(^{216}\) Id. at 36,792.
\(^{217}\) Id. at 36,792-93.
\(^{218}\) Id. at 36,793. See id. at 36,791 (Problem 2).
\(^{219}\) Id. at 36,793.
\(^{220}\) Id.
government to exercise its powers of eminent domain in order to compensate “holders of valid rights whose uses are discontinued, either temporarily or permanently, when the water is needed for these instream uses.” The study furthermore proposes possible federal sanctions for forcing state compliance with instream use objectives: “State and local governments could be required to adopt strategies providing for instream flow needs through State law. Federal sanctions, through contracting, licensing and permit approval could be used to implement this alternative.”

In a somewhat related problem, the Water Resources Council noted the failure of many state water rights systems to recognize the relationship between ground and surface waters, and the resulting injury to water quantity and quality. The options to be considered in relation to this problem include the possibility of exercising federal powers to force the states to recognize the physical relationships between surface and groundwater, possible federal and state cooperation in developing a model water code which would recognize these relationships, and the conditioning of grants for water related activities upon the states’ implementation of a legal system recognizing those relationships.

IV CONCLUSION

The power of the federal government to affirmatively regulate in favor of instream values cannot seriously be questioned. However, the issue of the scope of that regulation has been problematic to the effective protection of those values in the past. Although the federal government has, through regulation and court adjudication, attempted to protect instream values to a limited extent, it is becoming increasingly clear that a comprehensive federal water policy which coordinates federal regulation of all of our nation’s water resources may be required if instream values are to be adequately protected.

The federal government is now apparently ready to seriously consider comprehensive regulation of water resources through federal institutions. The fact that it has chosen to give in-depth consideration to the need to protect instream values is encouraging. It suggests to federal agencies, as well as to state and local govern-

221. Id.
222. Id.
223. Id. See id. at 36,791 (Problem 3).
224. Id. at 36,793.
ments, that Congress intends to treat instream use as a national priority. It also acknowledges the possibility that the federal government has the right, if not the duty, to provide impetus and direction for adequate and effective regulations protecting instream values, and may indeed exercise those rights in the future.

Lavern Holdeman '78