Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation

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MAINTAINING THE STATUS QUO: PROTECTING ESTABLISHED WATER USES IN THE PACIFIC NORTHWEST, DESPITE THE RULES OF PRIOR APPROPRIATION

BY
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Water law in the Northwest states has long been based on the well-established rules of the Prior Appropriation Doctrine. In recent years, however, the four Northwest states often have not applied these rules against existing water users. State legislatures, courts, and water resource agencies have routinely changed the rules, or refused to implement them, if doing so might curtail current uses. This Article examines the ways in which the Northwest states have maintained the water use status quo despite the traditional rules. The Article then evaluates the economic and environmental implications of state efforts to protect existing water uses, and assesses how these efforts may affect other water users.

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I. INTRODUCTION

For decades, water law in all four Pacific Northwest states (Washington, Oregon, Idaho, and Montana) has been based on the prior appropriation doctrine.[1] That doctrine has been a fixture in the western United States for over a century,[2] and the fundamental rules of water law based on prior appropriation are well established. These basic rules provide water users with a high degree of certainty and security, creating private property rights to use[3] a resource that is owned by the public,[4] but they also limit water use in some significant ways. For example, the traditional rules restrict where, when, how, and how much water may be used, and specify how water rights may be established and lost.[5]

The Northwest's water resources and those who rely on them have come under increasing stress in recent years. Causes of this stress include overappropriation, drought, population growth, the decline of salmon and other fish populations, aquifer depletion, water quality impairment, assertion of tribal water rights, increasing competition for water supplies, public demands for environmental protection, and other factors.[6] These

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[1] The prior appropriation doctrine was established in the Idaho Constitution, dating to 1889. Idaho Const. art. XV, § 3. In Montana, the doctrine is rooted in statutes of the 1860s and 1870s. Mettler v. Ames Realty Co., 201 P. 702, 706-07 (Mont. 1921). Oregon codified prior appropriation as the law of the state in 1909. OR. REV. STAT. §§ 537.110-537.330 (1997). Washington followed suit in 1917, becoming the last state in the West to adopt a comprehensive water code. Wick Dufford, *Washington Water Law: A Primer*, 11 ILLAHEE 29, 31 (1995); WASH. REV. CODE §§ 90.03.005-90.03.611 (1992 & Supp. 1998).

[2] JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 318-33 (1991).

[3] "[P]rivate ownership of stream water while in its natural environment does not exist; but private rights to abstract and use such waters—under State supervision and control in the exercise of its police powers—do exist, and they are property rights." 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 443 (1971).

[4] The laws of Idaho, Montana, Oregon, and Washington each recognize that the waters of the state are owned by the public. IDAHO CONST. art. XV, § 1; IDAHO CODE § 42-101 (1996 & Supp. 1998); MONT. CONST. art. IX, § 3(3); MONT. CODE ANN. § 85-2-101 (1997); OR. REV. STAT. § 537.110 (1997); WASH. REV. CODE § 90.03.005 (1992 & Supp. 1998).

[5] *See infra* notes 24-39 and accompanying text.

[6] *See generally* DEBORAH MOORE ET AL., RESTORING OREGON'S DESCHUTES RIVER: DEVELOPING PARTNERSHIPS AND ECONOMIC INCENTIVES TO IMPROVE WATER QUALITY AND INSTREAM FLOWS (1995) (documenting environmental trends and conditions in the Deschutes River Basin); IDAHO WATER RESOURCE BD., IDAHO STATE WATER PLAN (1997) [hereinafter IDAHO WATER PLAN] (commenting on Idaho water policies and objectives).

factors have helped create and exacerbate water conflicts, often forcing the states to face difficult issues they had long avoided.

In facing these issues, the states commonly have *not* applied the traditional rules of western water law. Instead, states often have effectively waived or abandoned these rules in order to preserve existing water-use practices. State deference to existing water uses takes many forms, from silent yet unmistakable failures to enforce long-standing rules,[7] to changes in state statutes for the express purpose of allowing established uses to continue.[8]

The accommodation of status quo water uses is now the overarching principle of Northwest water policy. Simply put, the Northwest states protect water users' *established practices* more faithfully than their *legal rights*. Where existing water uses are inconsistent with traditional rules of water law, the states have often bent, changed, or ignored those rules in order to preserve these established practices.[9] This unwritten policy favors those appropriators whose uses would be curtailed by a straightforward application of water law principles and disadvantages others, including other existing water users, prospective new users, and those interested in restoring instream flows, who would benefit if these principles were implemented.[10]

Many of the traditional rules of western water law are fading in practical importance as legislatures, courts, and agencies protect existing water uses from the application of these rules. The states' policy of protecting existing uses seems to be based on considerations of politics, economics, and equity. But this policy may damage other water users, impair instream flows, limit economic opportunities, and ultimately create greater uncertainty about water use and management.

This Article examines the unofficial status quo policy of the Northwest states. Part I provides a brief background on water use in the Northwest and on the traditional rules of western water law. Part II sets out the basic precepts that states follow to allow the continuation of existing uses, and identifies specific instances where states have protected the status quo by failing to enforce traditional water law rules, changing those rules, precluding state curtailment of ongoing uses, or insulating those uses from the effects of instream demands. Part III considers the implications of abandoning the traditional rules to preserve the status quo, discussing how this practice might change "winners" and "losers" among water interests and perpetuate economic concerns regarding water use. The Article concludes with an explanation of how the protection of status quo water uses may alter assumptions and arguments about future water policy for the Northwest.

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[7] *See infra* notes 55-94 and accompanying text.

[8] *See infra* notes 95-116 and accompanying text.

[9] *See infra* Part II.

[10] *See infra* notes 176-213 and accompanying text.

A. Water Use in the Northwest

People not familiar with the Pacific Northwest, and even some who are, often believe the region is far wetter than it really is. The region's legendary rainfall is not evenly distributed, and the area east of the Cascades is typically quite dry.[11] In Idaho, average annual precipitation in the mountains exceeds sixty inches, but most of the state receives less than twenty inches.[12] Even west of the Cascades, where winter precipitation is generally abundant, many streams run short of water in the summer and fall. In the Dungeness and Quilcene basins on Washington's Olympic Peninsula, for example, low streamflows are a chronic problem.[13] Given the demands for water to meet existing and new uses, both instream and out-of-stream, most of the Northwest does not have enough water.[14]

Irrigation is, by far, the dominant out-of-stream water use in the region. Irrigation accounts for over eighty-seven percent of total water withdrawals in the Northwest[15] and nearly ninety-seven percent of the region's water consumption.[16] The next largest water use, public supply, accounts for less than five percent of withdrawals, while industrial withdrawals are less than three percent.[17] The percentages vary somewhat by state. In Idaho, for example, irrigation accounts for ninety-five percent of water withdrawals and livestock use exceeds public supply and industrial with-

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[11] *See* Michael C. Blumm, *Seven Myths of Northwest Water Law and Associated Stories*, 26 ENVTL. L. 141, 142 (1996).

[12] IDAHO WATER PLAN, *supra* note 6, at 25.

[13] "[A] discrepancy exists between the quantity of water needed for optimal fish production and the needs of out-of-stream uses. The gap between the needs of the fish expressed by *recommended* instream flows, and the *present* instream flow after withdrawals for agriculture, municipal, business and future growth needs is substantial." *Dungeness-Quilcene Water Resources Management Plan* xiv (submitted to the Washington Department of Ecology under the Chelan Agreement, June 30, 1994).

[14] As stated recently by Oregon's water management agencies,

> The soggy winter and spring climate of Oregon's northwest quarter have given the state a reputation for water abundance that obscures an important fact: each year the state's water supply falls far short of the demands placed on it. Across Oregon, many streams are dry in the summer and fall months. Significant natural flow reserves for new or expanded uses do not exist. In many places, sufficient flows for *existing* uses do not exist—and haven't for decades. In more and more areas, we are facing uncertainties about groundwater reserves. All over the state, prospective users are competing for the last drops of available water. Put very simply, there is not enough water where it is needed, when it is needed, to satisfy existing and future out-of-stream and instream uses. This situation seriously limits the ability of Oregon's economy to grow and threatens the long-term sustainability of the natural systems our economy relies upon.

OREGON WATER RESOURCES COMM'N & DEP'T, 1995-1999 STRATEGIC WATER RESOURCE MANAGEMENT PLAN 2 (1995) (emphasis added).

[15] WAYNE B. SOLLEY ET AL., ESTIMATED USE OF WATER IN THE UNITED STATES IN 1990, at 12 (U.S. Geological Survey Circular 1081, 1993). This publication defines the Pacific Northwest to include all of Washington, virtually all of Oregon except for the Klamath Basin, all of Idaho except for the Bear Lake Basin, and those portions of Montana and Wyoming which are part of the Columbia Basin.

[16] *Id.* at 9, 35.

[17] *Id.* at 12.

drawals combined.[18] In Washington, the most urbanized of the Northwest states, public supply makes up eleven percent of water withdrawals and industrial use more than six percent, but irrigation still exceeds seventy-six percent of total withdrawals.[19]

Water withdrawals have sharply depleted streamflows in many Northwest rivers.[20] As in other parts of the West, state efforts to protect instream flows have been too little and too late to keep rivers from drying up.[21] Also, water diversions and low streamflows have seriously harmed fish and other aquatic and riparian organisms.[22] Inadequate instream flows related to water withdrawals are a continuing and significant problem for western rivers and aquatic ecosystems.[23]

These water use patterns of the Northwest are not a recent development. They have been firmly established for decades, within the framework of state water laws based on the bedrock principles of the venerable

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[18] *Id.* at 13.

[19] *Id.*

[20] Instream flow problems in the Northwest have not been intensively studied, so it is difficult to know their full severity and extent. A recent report on Northwest salmon declines notes that even though cropland agriculture affects vast areas of the Columbia River Basin

> [n]o comprehensive review of the effects of cropland agriculture on fish habitat in the Columbia basin exists, as far as we know. Farming can significantly alter hydrology and increases erosion and sedimentation processes many-fold over natural rates. . . . The principal effects of cropland agriculture on fish in the Columbia Basin no doubt stem from flow diversion and withdrawal for irrigation.

THE INDEPENDENT SCIENTIFIC GROUP, RETURN TO THE RIVER: RESTORATION OF SALMONID FISHES IN THE COLUMBIA RIVER ECOSYSTEM 145 (prepublication copy, Sept. 10, 1996) (citing NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT (1995)).

[21] *See* TIM PALMER, THE SNAKE RIVER: WINDOW TO THE WEST 96-99 (1991).

[22] *See* Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES. J. 319 (1996). Several panels of scientists recently reported on the factors affecting aquatic ecosystems in the West. *See also* AQUATIC ECOSYSTEMS SYMPOSIUM, REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION (W. L. Minckley ed., 1997) (also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161; phone (703) 487-4650). The scientists repeatedly identified water diversions and low flows as a major problem.

> Irrigated agriculture is traditionally the most insatiably thirsty activity in the West. Stream diversion for irrigation may reduce surface flows to a level insufficient to maintain riparian vegetation, while groundwater pumping lowers local and regional water tables and reduces stream flow, either of which can eliminate or weaken riparian vegetation.

Id. at 19. "Pumping, diverted flows, and channel entrenchment dried some habitats, an event fatal for a fish in a few minutes and extirpating whole communities when dams blocked reinvasion when and if flow resumed." *Id.* at 65.

[23] One report has noted the following:

> Historical degradation of surface-water habitats has left their biota even more vulnerable to present-day stresses. Ongoing practices which continue to degrade aquatic ecosystems include: flow regulation, diversion, and groundwater mining, which distort hydrologic regimes and eliminate, simplify, or fragment habitats; . . . [and] profligate agricultural irrigation, depleting and polluting surface waters . . . .

AQUATIC ECOSYSTEMS SYMPOSIUM, *supra* note 22, at 47. The report also identified three other practices that harm aquatic ecosystems: introduction of alien species, unregulated land use practices by extractive industries, and urbanization. *Id.* at 48-52.

prior appropriation doctrine. The following subsection briefly examines some of these principles.

B. The Traditional Basic Rules of Western Water Law

Western water law under the prior appropriation doctrine essentially is based on a handful of fundamental and long-standing rules. These few traditional rules are clearly established and simple to state, if not to apply. In general terms, these rules follow.

1. State Control of Waters

Perhaps the most basic rule of western water law is that the states control the use of water, which state laws declare to be a public resource.[24] States provide for private rights to use water, but those rights may be established only as authorized by the states.[25] Moreover, exercise of such rights is subject to state administration and enforcement.[26]

2. State Approval of Water Rights

The traditional steps needed to establish a water right are intent, diversion of water from its natural source, and application of water to a beneficial use.[27] Today, however, new appropriations may be made only on the basis of a permit issued by a state water resource agency.[28]

3. First in Time, First in Right

A water right's priority is based on the date of appropriation, and the oldest rights have the highest priority.[29] Where water is insufficient to satisfy all rights, junior appropriators' withdrawals are curtailed so that users with senior rights may continue to receive their full water supply.[30]

4. Beneficial Use Without Waste

Water may be appropriated only for a specified "beneficial use," and water rights authorize the use only of enough water to satisfy that benefi-

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[24] In all four Northwest states, water is legally owned by the public. *See supra* note 4.

[25] HUTCHINS, *supra* note 3, at 400-04.

[26] *Id.* at 304-06, 443.

[27] NATIONAL WATER COMM'N, A SUMMARY-DIGEST OF STATE WATER LAWS 29 (Richard L. Dewsnup & Dallin W. Jensen eds., 1973).

[28] *Id.* at 30. All four Northwest states now require a permit application to establish a new water right. IDAHO CODE § 42-202 (1996); MONT. CODE ANN. § 85-2-302 (1997); OR. REV. STAT. § 537.130 (1997); WASH. REV. CODE § 90.03.250 (1996). "If the application is approved, it is only an inchoate right, to be perfected by exercising reasonable diligence in constructing necessary works and facilities and applying the water to use." NATIONAL WATER COMM'N, *supra* note 27, at 31.

[29] *See* NATIONAL WATER COMM'N, *supra* note 27, at 29.

[30] *Id.* at 32.

cial use.[31] In addition, water uses must be reasonably efficient; no one has a legal right to "waste" water.[32]

5. Appurtenancy

Water rights usually specify a particular *place*, as well as type, of beneficial use.[33] In most states, water rights are appurtenant to a specific parcel of land,[34] and may not be used elsewhere without a transfer.[35]

6. Conditional Transferability

The holder of a water right may change its point of diversion, place, or purpose of use, but only with prior state approval.[36] Any such change, however, must not injure the rights of other appropriators,[37] whether junior or senior to the right being transferred.

7. Use It or Lose It

A water user may lose her water right by failing to exercise it, either by nonuse of water for a period of years (forfeiture)[38] or nonuse coupled with evidence of intent to abandon the right (abandonment).[39]

The foregoing list does not attempt to identify all the rules of western water law, or provide a detailed analysis of individual rules. It does, however, provide a brief summary of the most fundamental and familiar points of the prior appropriation doctrine. In theory, these traditional rules form the basis of water law in the Northwest states. As the following section explains, however, these rules are often sacrificed for the protection of existing water uses.

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[31] *Id.*

[32] As stated by the National Water Commission,

> [i]f water is used inefficiently, so that the use is wasteful, it is an illegal use, and is beyond the scope of the appropriation right. . . .
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> If the method of use is unreasonably inefficient, then the difference between the amount of water actually diverted and the amount reasonably required under an efficient use is the amount that is being wasted. Thus, the water right is valid, but the appropriator can be required to improve his efficiency and to avoid committing waste. And this applies to waste of water by excessive or unnecessary application (as an unneeded irrigation) as well as inefficient facilities (such as ditches that lose exhorbitant [sic] amounts to seepage).

Id. at 34.

[33] HUTCHINS, *supra* note 3, at 454-55.

[34] *Id.* As a matter of federal law, water from Bureau of Reclamation projects has been appurtenant to the land irrigated since the 1902 Reclamation Act. 43 U.S.C. § 372 (1994).

[35] Statutes of all four Northwest states require a transfer to approve a change in place of water use. IDAHO CODE § 42-222(1) (Supp. 1998); MONT. CODE ANN. § 85-2-402(1) (1997); OR. REV. STAT. § 540.510(1) (1997); WASH. REV. CODE § 90.03.380 (Supp. 1997).

[36] NATIONAL WATER COMM'N, *supra* note 27, at 37, 39.

[37] *Id.* at 37-39.

[38] *Id.* at 42. All four Northwest states have statutes providing that water rights may be forfeited if not used for a specified period of years without adequate justification. IDAHO CODE § 42-222(2) (Supp. 1998); MONT. CODE ANN. § 85-2-404(2) (1997); OR. REV. STAT. § 540.610 (1997); WASH. REV. CODE § 90.14.160 (1996).

[39] NATIONAL WATER COMM'N, *supra* note 27, at 41.

II. The Status Quo Policy in the Northwest

The Northwest states remain officially committed to the prior appropriation doctrine.[40] In reality, however, the states often effectively waive the traditional rules where they threaten to curtail established water uses. States have routinely bent, changed, or ignored the traditional rules, through action or inaction, in order to maintain such uses. As a practical matter, water management in the region today is based less on strict prior appropriation principles than on protection of the status quo, that is, preservation of the water use practices, legal or not, that have become established in an area.

"Where is the inconsistency?" the reader may ask. "Isn't prior appropriation itself based on protection of existing uses?" Certainly the traditional rules of western water law protect these uses in many ways, but the rules also establish limits to that protection. For example, users who violate the limits of their water rights by exceeding the specified rate, duty, or season of use, or applying water to unauthorized lands, are not protected by the traditional rules.[41] Nor are users protected who fail to use their water rights for an extended period,[42] who waste water,[43] or who do not observe legal requirements for establishing or maintaining a water right.[44] Junior appropriators are not protected from being shut off in favor of seniors during times of shortage, even if the juniors have not previously been subject to such regulation.[45] And the traditional rules do not prevent water from being used in new places or for new purposes, so long as such changes injure no other appropriators and are approved by the state.[46] Clearly then, the traditional rules of western water law do not provide absolute protection to existing water uses.

Two points must be noted at the outset of this discussion of the states' practice of protecting established water uses. First, there is no *inherent* conflict between preserving the status quo and applying traditional water laws. To the contrary, maintaining the status quo is fully consistent with prior appropriation rules so long as 1) all users' rights are clearly established, 2) water has been consistently well managed (based on good

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[40] Idaho, for example, recently adopted a state water plan that emerged "from a vision of Idaho in which water is used efficiently, and is allocated through laws that fully conform to the prior appropriation doctrine." Idaho Water Plan, *supra* note 6, at 4. Oregon's water resource agencies recently stated that while much has changed in Oregon since the adoption of the 1909 Water Code, "the fundamental principles of prior appropriation, beneficial use and the attachment of a water right to the land have remained intact." Oregon Water Resources Comm'n & Water Resources Dep't, Strategic Plan for Managing Oregon's Water Resources 1 (1997).

[41] *See generally* National Water Comm'n, *supra* note 27, at 35-36 (discussing waste, diversion, and use preferences regarding surface waters).

[42] *Id.* at 42.

[43] *Id.* at 34.

[44] *See generally id.* at 38-39 (discussing sales and transfer procedures pertaining to water rights).

[45] *See generally id.* at 32 (noting that water rights are prioritized in accordance with the date of their initiation, and that they may be enjoined if water standards are not maintained).

[46] *Id.* at 37-39.

data) and distributed among those users by priority, and 3) all appropriators are using water in accordance with the terms of their rights and with reasonable efficiency. However, to the extent that these conditions are not fully met, then current practices may deviate from the law. Where water rights are somehow in question, good data are lacking on basin hydrology or actual water use, or there is inadequate water use regulation, then existing uses may differ dramatically from users' legal rights. Depending upon the circumstances, some users will be better off with the status quo, while others will benefit if water is used and managed "by the book."

Second, while the Northwest states usually preserve the status quo at the expense of water law principles, there are exceptions. The results are not entirely consistent largely because state governments are not monolithic. State water-resource agencies, citizen commissions and boards, legislatures, governors, trial courts, and appellate courts all have jurisdiction over water matters. Often, one state government entity has sought to preserve an established water use by changing or not applying the law, while another entity of the same state government has tried to uphold the law. For example, the governors of both Oregon and Washington have vetoed recent legislative efforts to revise state law in favor of status quo water uses.[47] When the Idaho Department of Water Resources refused to curtail groundwater use to protect senior appropriators, the state supreme court held that the agency had a mandatory duty to regulate. In Washington, when the Department of Ecology took this same action, the state supreme court held that the agency had no authority to do so.[48] Given these common divisions within a state government, it is somewhat imprecise to speak of "state" efforts to protect established water uses, and defenders of the status quo do not always have the last word.[49]

Having stated these caveats, this Article examines the recent actions and practices of Northwest states with respect to established water uses. The record shows that the states commonly pursue an informal, unofficial

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[47] *See infra* notes 94, 96, 123 and accompanying text.

[48] When the Idaho Department of Water Resources refused to curtail established groundwater uses in order to protect senior appropriators, the state supreme court ordered the agency to regulate water use in accordance with legal priorities. Musser v. Higginson, 871 P.2d 809 (Idaho 1994) (court ordered state agency to curtail pumping by junior groundwater users as needed to protect senior surface water users). Conversely, after the Washington Department of Ecology acted to protect senior water users by limiting junior irrigators' groundwater withdrawals, the state court issued a divided opinion striking down the agency's action. Rettkowski v. Department of Ecology, 858 P.2d 232 (Wash. 1993) (holding that state agency could not curtail pumping by junior groundwater users unless there had been an adjudication).

[49] On the other hand, while efforts to protect the status quo do not always succeed in the courts or the legislatures, the threat of judicial or legislative action may have a chilling effect on state agency actions. An agency may be reluctant to curtail established water uses if it knows it is likely to be confronted by a local elected official, whether a judge or a state legislator. *See infra* notes 92-94 and accompanying text. If a state agency is concerned about such an outcome, or if it has insufficient staff or data to regulate water use adequately, it may simply defer action. *See infra* notes 84-86 and accompanying text. Thus, established water uses may continue unabated despite official state law and policy, albeit less securely than if they were protected by statute or court order.

policy of protecting the water use status quo even when it conflicts with traditional water law principles.[50] This status quo policy, like prior appropriation, has a few fundamental rules. Unlike the basic features of prior appropriation, however, these rules are difficult to locate in any treatise or casebook on western water law. Instead, they must be synthesized from state efforts to protect existing uses. With rare exceptions, states abide by the following basic precepts: 1) enforce the law only when necessary,[51] 2) change the law where needed to protect existing uses,[52] 3) avoid the position of having to curtail established water uses,[53] and 4) prevent instream demands from threatening existing out-of-stream uses.[54] This section discusses these basic tenets of the status quo policy and examines how states have implemented them.

A. Enforce the Law Only When Necessary

In deciding whether to curtail ongoing water uses, the water resource agencies in the Northwest states take a passive approach. If "enforcement" is defined as requiring water users to comply with applicable laws and water right conditions,[55] such as duty or place of use, all four states take enforcement action against water users almost exclusively in response to complaints from other users.[56] Montana's official policy is that a "complaint is always required unless the regional manager can document compelling reasons for recommending enforcement without one."[57] Even when disputes arise between groups of existing users, the agencies can be reluctant to step in.[58]

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50 *See infra* notes 77-83 and accompanying text.

51 *See infra* notes 55-94 and accompanying text.

52 *See infra* notes 95-130 and accompanying text.

53 *See infra* notes 131-52 and accompanying text.

54 *See infra* notes 153-75 and accompanying text.

55 For purposes of this Article, enforcement generally means something more aggressive than simply shutting off junior water users in times of shortage to meet a "call" by senior users from the same water source. States routinely regulate by priority in this manner. It is far less common for states to enforce water right limitations such as rate, duty or place of use, or to shut off junior groundwater pumpers whose use may be affecting senior users of surface water. *See infra* notes 56-64 and accompanying text.

56 Telephone Interviews with: Tom Paul, Deputy Administrator, Field and Technical Services Division, Oregon Water Resources Department (OWRD) (Mar. 24, 1997); Tim Luke, Manager, Water Distribution Section, Idaho Water Resources Department (IWRD) (Mar. 24, 1997); Jack Stults, Regional Offices Supervisor, Montana Department of Natural Resources and Conservation (DNRC) (Mar. 26, 1997); and Linda Pilkey-Jarvis, Enforcement Coordinator, Shorelands and Water Resources Program, Washington Department of Ecology (Mar. 31, 1997).

57 WATER RIGHTS BUREAU, MONTANA DEP'T OF NATURAL RESOURCES & CONSERVATION, CONFLICT RESOLUTION AND ENFORCEMENT ACTIONS UNDER THE WATER USE ACT 2 (1994) (on file with author).

58 After more than twenty years of complaints from senior water users and an extensive hydrologic study, in 1990 the Washington Department of Ecology (Ecology) finally issued a cease and desist order against junior irrigators in the Sinking Creek area. *See* Rettkowski v. Department of Ecology, 858 P.2d 232, 234-35 (Wash. 1993). The Washington Supreme Court, however, ruled that Ecology lacked statutory authority to take that action, because the basin had not yet been adjudicated. *Id.* at 236-40. In 1993, the Idaho Department of Water Re-

In Whatcom County, Washington, the state Department of Ecology (Ecology) has taken little action against widespread illegal water use, despite a 1993 survey[59] that found over five hundred users taking water without a valid right.[60] Most of these users were irrigators, and many had been using water illegally for decades, without a valid state permit, decreed right, or precode claim.[61] Despite this clear violation of state law, Ecology took no meaningful enforcement action against the Whatcom County users.[62] Washington Governor Gary Locke vetoed a bill approved by the 1997 Washington legislature that would have granted amnesty to the Whatcom County users.[63] Locke did, however, sign a bill that allowed these users to file water right claims that they had already relinquished under state law, effectively authorizing the uses to continue.[64]

It is impossible to ascertain the true extent of noncompliance with water laws and water rights in the Northwest, largely because the state water resource agencies do not actively seek out violators.[65] A perception exists that violations are common, and that enforcement is infrequent or ineffective. For example, the Snake River Salmon Recovery Team stated "[t]he dewatering of salmon breeding and rearing habitat must be eliminated. . . . The monitoring of screen use, screen performance, and the quantity of water diverted must be greatly improved."[66] But most of the

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sources refused surface irrigators' repeated demands to regulate pumping by junior groundwater users on the Snake plain aquifer, arguing that such regulation must await a formal hydrologic determination on conjunctive management of ground and surface waters in that area. *See* Musser v. Higginson, 871 P.2d 809, 810-11 (Idaho 1994). The Idaho Supreme Court, however, ruled that the Department had a clear legal duty to act. *Id.* at 812.

[59] In the early 1990s, the Ecology briefly pursued a program of investigating water uses based on an active enforcement strategy, rather than on complaints. "In our recent enforcement history, there were a couple of years when we actually had resources for enforcement," said an Ecology official. Interview with Linda Pilkey-Jarvis, *supra* note 56.

[60] Ecology is unsure of how many users might be taking water illegally in Whatcom County. Estimates have ranged from 500 to 2000. *Id.*

[61] Telephone interview with Lloyd Moody, Executive Fellow, Office of Washington Governor Gary Locke (Feb. 21, 1997).

[62] *Id.* According to one Ecology official, "we enforced against them in the sense of asking their voluntary compliance to stop using water illegally." Interview with Linda Pilkey-Jarvis, *supra* note 56. Ecology could not tell whether voluntary compliance was occurring, however, because the agency no longer had the enforcement resources to check on water use in Whatcom County. *Id.*

[63] The bill would have authorized continued water use by those who had beneficially used water for irrigation, stock watering, or domestic purposes before January 1, 1993. H.R. 1111, 55th Leg., Reg. Sess. (Wash. 1997) (vetoed May 20, 1997).

[64] *See infra* notes 96-99 and accompanying text.

[65] Karen A. Russell, *Wasting Water in the Northwest: Eliminating Waste as a Way of Restoring Streamflows*, 27 ENVTL. L. 151, 201 (1997).

[66] SNAKE RIVER SALMON RECOVERY TEAM, FINAL RECOMMENDATIONS TO THE NATIONAL MARINE FISHERIES SERVICE V-11 (May 1994). The Northwest Power Planning Council's 1994 Fish and Wildlife Program urges the Northwest states to "[i]mprove enforcement of existing water rights and duties for diversions and use from the mainstreams of the Columbia and Snake Rivers and tributaries." NORTHWEST POWER PLANNING COUNCIL, DRAFT ANADROMOUS FISH AMENDMENTS TO THE 1994 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM 7-50 (1994).

information is anecdotal, and there has been no systematic study of water law violations and enforcement.

Recent events in the Wallowa River Basin of northeast Oregon illustrate the problems of ascertaining noncompliance. An anonymous writer claiming to work for the Oregon Department of Fish and Wildlife sent a series of letters to state officials and a Portland television station alleging widespread and serious water right violations in the Wallowa Basin. The letters claimed that data obtained from state sources showed actual diversions often far exceeding legal limits.[67] The Oregon Water Resources Department (OWRD) responded that these allegations were based on mistaken assumptions about the limits of Wallowa Basin water rights, and denied that there was significant illegal use in the area.[68] Department officials acknowledged, however, that they had very limited enforcement staff in the Wallowa Basin since the basin's watermaster position had been discontinued in the 1980s.[69] Given this lack of staff, the Department itself may not know whether all water users are in compliance.[70]

The environmental group WaterWatch approached state officials in 1996 with concerns about excessive water diversions in the Wood River Basin of southern Oregon, but the Water Resources Department essentially denied that illegal diversions were occurring.[71] WaterWatch then employed a hydrologist who used a flow meter to take measurements of Wood River diversions. The hydrologist reported back to the state that there did appear to be serious illegal water use in that basin.[72] State officials continued to dispute the WaterWatch findings, but acknowledged that "the concerns raised by WaterWatch have some merit. We believe, as does WaterWatch, that the lack of adjustable headgates in some cases, or lack of easily read measuring devices in other cases, can result in excessive diversions."[73] Shortly thereafter, the agency ordered Wood River irrigators to install adequate headgates.[74]

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[67] Two of these letters compared "water right amounts" for various diversions against flow meter data showing actual diversion amounts on unspecified dates. Anonymous letters to: John Kitzhaber, Governor of Oregon (Feb. 4, 1995); and *Town Hall*, KATU Channel 2, (Mar. 14, 1995) (on file with author).

[68] Telephone interview with Kent Searles, Regional Manager, OWRD, Baker City, Oregon (May 23, 1995); letter from Martha O. Pagel, Oregon Water Resources Director, to Jeff Curtis, Executive Director, WaterWatch of Oregon (Dec. 13, 1995) (on file with author). Searles stated that the old Wallowa River Decree did not specify any maximum rate for irrigation diversions, contrary to the anonymous writer's unstated assumption.

[69] Telephone Interview with Kent Searles, *supra* note 68. Searles noted that the Water Resources Department had declined repeatedly to re-establish the Wallowa watermaster's position. The Department recently proposed to restore the position, but that proposal was not included in the Governor's proposed budget for 1997. Telephone interview with Tom Paul, *supra* note 56.

[70] *See infra* note 84 and accompanying text.

[71] Telephone interview with Jeff Curtis, WaterWatch Executive Director (Mar. 20, 1997).

[72] *Id.*

[73] Memorandum from Bob Main, OWRD Regional Manager, Bend, Oregon, to Martha Pagel, OWRD Director (Oct. 9, 1996) (on file with author).

[74] Letter from Bob Main, OWRD Regional Manager, Bend, to Jeff Curtis, WaterWatch Executive Director (Dec. 3, 1996) (on file with author). Attached to this letter were undated

Oregon law actually authorizes the Water Resources Department to allow illegal water uses to continue temporarily. Specifically, the Water Resources Director may issue a "limited license," a sort of revocable temporary water right,[75] in connection with an enforcement order to address an illegal water use.[76] Essentially, the law authorizes the director to condone an otherwise illegal water use, provided the director orders the user to comply with the law within a specified period of time.[77]

The Montana Department of Natural Resources and Conservation (DNRC) has an unofficial policy of deferring to informal arrangements (such as water-right pooling or rotation agreements) among local water users on a stream, even when those arrangements are "extralegal."[78] DNRC staff believe that such arrangements are common in Montana.[79] DNRC not only tolerates these "extralegal" arrangements, but actually supports them, primarily because DNRC believes they are usually well tailored to the hydrologic conditions of the watershed, and local water users like them.[80]

None of the Northwest states have taken strong action to implement the requirement of beneficial use without waste.[81] As one commentator recently concluded:

> The law in Idaho, Montana, Oregon and Washington requires that water not be wasted . . . [but] there has been no meaningful enforcement of this requirement in any of the states. In all four states, the failure to enforce appears to be because the states lack 1) information on actual water use, 2) a clear waste definition, and 3) political support or wherewithal for anti-waste enforcement. The consequences of this failure include injury to other legal water right holders, both instream and out-of-stream, as well as harm to the public's rights as the owners of the water resource.[82]

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copies of notices to six water users, requiring them to install headgates on their diversions from Sevenmile Creek and the Wood River.

[75] OR. REV. STAT. § 537.143 (1997).

[76] *Id.* § 537.143(4). The director may take this step only if she finds that the user did not knowingly violate the law, that "immediate termination of the illegal use would cause serious and undue hardship" to the user, and that "[t]he continued use under a limited license outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source." *Id.* This final provision is somewhat confounding: *what* about the continued use must outweigh "the public benefits of termination"? The private benefits of using the water? The benefit to the agency of avoiding confrontation with an illegal water user?

[77] *Id.* § 537.143(4)-(5).

[78] Telephone interview with Jack Stults, *supra* note 56. Pooling or rotation agreements provide for the sharing of water rights by several users from a particular water source. Such agreements may allow some appropriators, especially those with junior rights, to use water when they otherwise could not.

[79] *Id.*

[80] *Id.* DNRC also may like these arrangements because they allocate water among users without the need for state agency intervention. *See infra* notes 143-152 and accompanying text.

[81] *See* Russell, *supra* note 65, at 151.

[82] *Id.* at 201.

When the Northwest states have made limited efforts to encourage efficient water use, they have been very deferential to current water uses and practices.[83]

None of the four state water resource agencies in the Northwest believes it has adequate resources to do its job.[84] When asked by agency headquarters for an estimate of additional staffing needs, one OWRD field manager responded as follows:

> You asked for a "Cadillac" and a "Citron" [sic] version of what staffing additions are needed to regulate to rate and duty on all Snake River tributaries. . . . Our needs estimate is more of what you might call a "Chevy" or "Dodge" version, like the earlier Grande Ronde proposal. This "Chevy" version is believed to allow us to regulate to rate and duty in two years. We think that this is reasonable and justifiable. The minimum needs estimate is just that, a minimum. This staffing level will not get us to rate and duty, but is hoped to be sufficient to let us identify problem areas. Not much more than [the watermaster's] description of our current program, "a one speed bicycle."[85]

Despite increasing pressures on water resources in the 1990s, none of the state legislatures have provided any significant increases in agency enforcement resources.[86]

The states are not the only water managers in the Northwest with a poor record of enforcing legal requirements; the U.S. Bureau of Reclamation (Bureau), too, has been passive in ensuring compliance with federal laws and contracts. The Bureau has known for well over a decade of widespread misuse, or unauthorized use, of water from federal reclamation projects.[87] This "water spreading" arose in part because the Bureau had consistently failed to ensure that project water was being delivered in accordance with legal and contractual requirements.[88] In 1994, the Bureau

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[83] As stated by Russell,

> In general, the four Columbia Basin states only look at water use efficiency when they review applications for new uses of water or participate in basin adjudications. However, the states have not attempted to change the proposed method of diversion, conveyance, and application of water through these standards. . . . [S]tates continue to view waste as the amount of flow diverted in excess of reasonable needs using customary irrigation practices rather than using the most efficient irrigation practices.

Id. at 158 (citations omitted).

[84] The enforcement program managers of the four state water resource agencies, when asked individually if their agency had enough enforcement resources to its job, all answered "no." Telephone Interviews with Tom Paul, Tim Luke, Jack Stults, and Linda Pilkey-Jarvis, *supra* note 56.

[85] Memorandum from Kent Searles, OWRD Regional Manager, Baker City, Oregon, to John Borden, OWRD, Salem, Oregon (June 12, 1992) (on file with author). Searles said that no additional resources had been allocated in response to his request. Telephone Interview with Kent Searles, OWRD Regional Manager (Mar. 26, 1997).

[86] In Idaho, Montana, and Oregon, enforcement resources have been roughly stable over the 1990s, while in Washington, they have decreased. Telephone Interviews with Tom Paul, Tim Luke, Jack Stults and Linda Pilkey-Jarvis, *supra* note 56.

[87] U.S. DEP'T OF THE INTERIOR, OFFICE OF INSPECTOR GENERAL, IRRIGATION OF INELIGIBLE LANDS, BUREAU OF RECLAMATION 4-6 (Audit Report No. 94-I-930, July 1994).

[88] *Id.* at 4-5.

promised that it would act to resolve water spreading,[89] but soon its officials were assuring project irrigators that it had taken the wrong approach.[90] Shortly thereafter, the Bureau quietly abandoned the issue over the protests of environmentalists.[91]

The agencies' failure to enforce is somewhat understandable, in part because any efforts they make to curtail existing water uses may be vitiated by the legislatures or courts. Consider the experience of OWRD in its attempts to regulate certain groundwater users whose pumping affected surface flows in the Umatilla River.[92] Two water users filed suit, and the district court for Umatilla County blocked the Department from regulating them in conjunction with surface water.[93] In addition, the 1995 Oregon legislature approved a bill intended to block such regulation, although the governor vetoed it.[94]

B. Change the Law Where Needed to Protect Existing Uses

Central to the status quo policy is the notion that existing laws are generally less important than existing water uses.[95] As explained in the following paragraphs, the Northwest states in the 1990s enacted numerous revisions to their water laws that help preserve established water uses. In addition, the 1997 Washington legislature approved several bills that would have significantly altered state water law in favor of status quo water uses, although Governor Locke vetoed all or part of ten such bills.[96]

The Idaho Supreme Court's 1994 decision of *Musser v. Higginson*[97] created something of a crisis in the state. Under prior appropriation law, the *Musser* case was hardly revolutionary; the court unanimously held

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[89] Reed D. Benson & Kimberley J. Priestley, *Making a Wrong Thing Right: Ending the "Spread" of Reclamation Project Water*, 9 J. ENVTL. L. & LITIG. 89, 103-04 (1994), *reprinted in* WATER LAW TRENDS, POLICIES AND PRACTICE 269, 273 (Kathleen Marion Carr & James D. Crammond eds., 1995).

[90] *Cole: Curbing Water-Spreading Won't Boost Stream Flows for Fish*, EAST OREGONIAN, Sept. 28, 1995, at A3.

[91] Letter from American Rivers, Idaho Rivers United, Natural Resources Defense Council, and WaterWatch, to Bruce Babbitt, Secretary of the Interior (July 18, 1995) (on file with author). In Oregon, however, the Bureau is making some efforts to resolve long-standing problems of unauthorized water use, particularly those concerning the Umatilla Project. JOHN W. KEYS III, STATEMENT TO THE WATER & POWER RESOURCES SUBCOMM., HOUSE RESOURCES COMM. (Oct. 4, 1995) (on file with author).

[92] *See, e.g.*, Letter from David Williams, OWRD, to Kris McCullough, water user (Mar. 31, 1994) (on file with author).

[93] Snow v. State of Oregon, No. CV-95-0537 (Umatilla Cty. Cir. Ct., June 13, 1995) (temporary restraining order) (on file with author).

[94] Letter from John Kitzhaber, Governor of Oregon, to Phil Keisling, Secretary of State (July 21, 1995) (vetoing H.R. 3091, 68th Leg., 1st Sess. (Or. 1995)) (on file with author).

[95] *See infra* notes 97-136 and accompanying text.

[96] Veto letters from Gary Locke, Governor of Washington, to the Washington House Speaker and members (May 14, 1997) (vetoing H.R. 1729, 1730), (May 20, 1997) (vetoing H.R. 1111, 1118, 1272, 2050, 2054); veto letters from Gary Locke, Governor of Washington, to the Washington Senate President and members (May 14, 1997) (vetoing S. 5276), (May 20, 1997) (vetoing S. 5030, 5783, 5079) (on file with author).

[97] 871 P.2d 809 (Idaho 1994).

that the Idaho Department of Water Resources (IDWR) had a clear legal duty to distribute water in accordance with rights of prior appropriation.[98] *Musser* threatened a serious upset of the status quo because it called on the state to curtail groundwater use from the Snake plain aquifer in favor of senior surface water appropriators.[99] Consequently, IDWR quickly adopted conjunctive use rules[100] that, while giving a nod toward prior appropriation, authorized (continued) "reasonable use" of both surface and groundwater resources.[101] Thus, after the Idaho Supreme Court forced a reluctant IDWR to curtail junior groundwater users, IDWR established more "reasonable" rules, that is, rules more favorable to junior pumpers than the traditional tenets of prior appropriation.[102]

The Idaho Legislature has also acted repeatedly to legitimize existing, otherwise illegal irrigation uses through the Snake River Basin Adjudication (SRBA). The legislature protected water users who had irrigated an excessive number of acres, or who had changed their place of use without the necessary state approval.[103] Idaho enacted statutes in 1985 and 1989, attempting to grant such illegal uses a presumption of validity,[104] but the meaning of these laws was exceptionally opaque,[105] and the court in *In re SRBA* declared them unconstitutionally vague in 1994.[106] Within weeks,

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[98] *Id.* at 812.

[99] Laird J. Lucas, Conjunctive Management of Surface and Groundwater in Idaho: A Conservationist Perspective, Paper Presented at 1995 Water Policy Conference, Northwestern School of Law of Lewis & Clark College, Portland, Oregon, at 1-3 (May 19-20, 1995).

[100] Rules Governing Conjunctive Management of Surface and Groundwater, 94-10 IDAHO ADMIN. BULL. 436 (Oct. 5, 1994).

[101] The rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho Law." *Id.* Rule 20.02 at 440. But the following section, headed "Reasonable Use of Surface and Groundwater," states:

> These rules integrate the administration and use of surface and groundwater in a manner consistent with the traditional policy of reasonable use of both surface and groundwater. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or groundwater source to support his appropriation contrary to the public policy of reasonable use as described in this rule.

Id. Rule 20.03.

[102] By subjecting appropriative rights to a test of reasonableness, Idaho water law took a big step in the direction of riparianism, which provides that all owners of riparian property may use a river's water, provided the use is reasonable. *See* NATIONAL WATER COMM'N, *supra* note 27, at 32.

[103] IDAHO CODE §§ 42-1416(2), 42-1416A (repealed 1994).

[104] *Id.*

[105] *See* Phillip J. Rassier, *Idaho Adjudication Presumption Statutes*, 28 IDAHO L. REV. 507 (1992).

[106] *In re* SRBA, Case No. 39576 (Twin Falls Cty., 5th Dist. Idaho, Feb. 4, 1994) (memorandum decision and order on basin-wide issue number 1). The Idaho Supreme Court would later observe that the "presumption" statute, IDAHO CODE § 42-1416(2) (repealed 1994), "was an attempt to provide 'amnesty' for illegal expansions." Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Groundwater Appropriators, Inc., 926 P.2d 1301, 1303 (Idaho

the Idaho legislature passed new statutes that clarified and strengthened protection for otherwise illegal uses in the SRBA. The legislature declared that the public interest was served by confirming past expansions and transfers of water rights that had been made out of compliance with state law.[107] The Idaho Supreme Court upheld the new statutes as constitutional.[108]

Montana and Washington also changed state statutes to resurrect certain forfeited water rights. Montana law originally prescribed a deadline of June 30, 1983 to file claims of existing rights in the statewide general adjudication.[109] Users filed a mind-boggling 216,000 claims,[110] and the adjudication rumbled forward. Nevertheless, in 1993 the Montana legislature authorized the filing of "late claims," essentially granting amnesty to those who had lost their rights by failing to file ten years earlier.[111] Washington took the same action three times, enacting statutes in 1979,[112] 1985,[113] and 1997[114] to allow the filing of precode water right claims, even though state law had provided that such claims were conclusively deemed waived and relinquished if not filed by 1974.[115] Both states thus reinstated old water rights that had already been forfeited by operation of law.[116]

1996). According to the supreme court, the "accomplished transfer" statute, IDAHO CODE § 42-1416A (repealed 1994), "permitted users who had undertaken transfers of water rights without compliance with the statutory provisions of I.C. § 42-222 to have the transfer confirmed in the course of the general SRBA adjudication." *Id.*

107 IDAHO CODE §§ 42-1425, 42-1426 (1994). Section 1426 legitimized past expansions of the volume of water used, but did not allow increases in the rate of diversion, or reductions in the "quantity of water available to other water rights existing on the date of the enlargement in use." *Id.* § 42-1426. Section 1425 allowed approval of past transfers, provided they did not enlarge the right or injure other existing water rights. *Id.* § 42-1425.

108 The court found that these statutes adequately protected the rights of junior appropriators, partly because they provided for subordination of water rights if a junior would otherwise be injured. *Fremont-Madison Irrigation Dist.*, 926 P.2d at 1307.

109 MONT. CODE ANN. § 85-2-221(1) (1997).

110 DAR CRAMMOND, COUNTING RAINDROPS: PROSPECTS FOR NORTHWESTERN WATER RIGHT ADJUDICATIONS 31 (1996) (completed for the Northwest Water Law & Policy Project, Northwestern School of Law of Lewis & Clark College).

111 "'Late claim' means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226." MONT. CODE ANN. § 85-2-102(11) (1997). In authorizing the filing of late claims, the statute stated, "[s]ubject to certain terms and conditions, the legislature intends to provide for the remission of the forfeiture of existing rights to the use of water caused by the failure to comply" with the original filing deadline. *Id.* § 85-2-221(3).

112 1979 Wash. Laws 216; *see* Dave Mastin, *Fairness is the Goal when Approaching Water Rights Issues*, CAPITAL PRESS, Sept. 26, 1997, at 11 (noting that the Legislature had reopened the filing period in 1979).

113 WASH. REV. CODE §§ 90.14.043-044 (1996) (allowing late claims to be filed during a five-week period in 1985 if authorized by the Pollution Control Hearings Board).

114 H.R. 1118, 55th Leg., Reg. Sess. §§ 1-3 (Wash. 1997) (allowing late claims to be filed during a ten-month period beginning September 1, 1997).

115 WASH. REV. CODE §§ 90.14.041, 90.14.071 (1996). The revived precode claims predate June 7, 1917 (surface water) or June 7, 1945 (groundwater). H.R. 1118, 55th Leg., Reg. Sess. § 1 (Wash. 1997).

116 The Washington legislator who sponsored the 1997 bill argued that the legislation was necessary to protect innocent water users against "unfair" state laws. By terminating the

The Oregon legislature acted specifically to preserve existing water use by the Grants Pass Irrigation District, and to save the district's embattled Savage Rapids Dam.[117] Savage Rapids is an aging diversion dam on the Rogue River that poses a serious barrier to salmon passage, and also diverts water at a far greater rate than the district needs to irrigate its acreage.[118] Oregon officials found that the district's diversions exceeded its water rights, and refused to issue a new right allowing the practice to continue.[119] After years of conflict, the district struck a deal with the Oregon Water Resources Commission and dam opponents: the district would receive a temporary water right, allowing continued diversions at a somewhat excessive rate, while the district had to begin taking steps to remove the dam and replace it with pumps.[120] The Commission issued a permit on the basis of that agreement in 1994.[121] But the following year, the Oregon legislature approved two bills in an effort to save Savage Rapids Dam. The first would have legislatively issued the district a new water right with no conditions regarding dam removal.[122] Oregon Governor John Kitzhaber vetoed that bill, chiefly on the grounds that the legislature should not issue water rights.[123] The second bill blocked dam removal temporarily while a new task force, established by the bill, studied the matter.[124] Kitzhaber

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water rights of those users who failed to meet filing requirements in 1969, 1979, and 1985, he wrote the following:

> The government made thieves of those who had the strongest, oldest claims in the state—if they are indeed thieves.
>
> Now we come to 1997. This year, the Legislature acknowledged (in a bill I sponsored) that the brief permit refiling periods in 1979 and 1985 were unfair to those who were "outside the loop of government." We voted to reopen the permit process for 10 months . . . .
>
> [W]e are not providing "amnesty" to so-called "water thieves" . . . . In fact, we are allowing a small group of people to continue to use water as they have for most of this century.

Mastin, *supra* note 112, at 11.

117 Historical information regarding the Savage Rapids Dam is briefly stated in a memorandum from Martha Pagel, Oregon Water Resources Director, to the Oregon Water Resources Commission, and titled Informational Report and Proposed Review Schedule on GPID Submittal of Plan to Meet Permit Conditions (Apr. 8, 1994) (on file with author).

118 *Id.* attachment 1, at 1-2.

119 *Id.*

120 *Id.*

121 *Id.*

122 S. 1005, 68th Leg., 1st Sess. (Or. 1995).

123 The Governor's veto message stated the following:

> The Oregon water rights system is based on the doctrine of prior appropriation, a doctrine that has governed the development of water throughout the West. While I have serious concerns about the ability of this system to assure necessary instream flows for future generations, I have not advocated changes that would disrupt the fundamental concepts governing our water management system. SB 1005 would do just that by suggesting to the public that the legislature is the proper forum for establishing water rights, rather than the system that has been in place for nearly a century.

Letter from John Kitzhaber, Governor or Oregon, to Phil Keisling, Secretary of State (July 21, 1995) (on file with author).

124 1995 Or. Laws 586.

signed that bill into law, effectively derailing the water right/dam removal agreement.[125]

The Oregon legislature first authorized "amnesty" for water users in 1989, establishing a process whereby irrigation districts could legitimize otherwise illegal changes in their water use, subject to certain conditions.[126] By the end of 1995, Oregon had created several more exceptions to the appurtenancy requirement,[127] particularly for irrigation districts. Among other things, Oregon established a streamlined process for the transfer of water rights within irrigation districts, including water rights already subject to forfeiture for five successive years of nonuse.[128] A 1995 statute allowed districts to obtain a certificate of water right for irrigation of lands not covered by the underlying permit.[129] The legislature did, however, preserve the "no injury" test for all these changes.[130]

C. Avoid the Position of Having to Curtail Uses

Agencies, courts, and legislatures have recognized that they can often preserve the status quo quite effectively by limiting state involvement in water rights controversies.[131] This approach not only allows existing uses to continue, but also saves agency resources and reduces state entanglement in potentially nasty matters. Limiting state involvement may not be good public policy,[132] but it often makes sense in both bureaucratic and political terms by keeping agencies and elected officials from taking unpopular stands against established water uses.

The Washington Supreme Court's 1993 Sinking Creek decision, *Rettkowski v. Department of Ecology*,[133] severely constrained Ecology's authority to administer water rights. In the Sinking Creek case, Ecology

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[125] *Id.* A majority of the task force authorized by that statute voted in 1996 to retain the dam. *See* Cindy Long, *Dam Decision: Let's Keep It*, GRANTS PASS DAILY COURIER, Oct. 10, 1996, at A1.

[126] The process was given the name of "district water rights mapping." OR. REV. STAT. §§ 541.327-333 (1997). Districts could change the place and purpose of use of their water rights, provided the changes did not expand those rights or injure other users. *Id.*

[127] *See supra* notes 33-35 and accompanying text.

[128] OR. REV. STAT. §§ 540.572-540.580 (1997).

[129] *Id.* § 537.252. Some Oregon irrigators argued that they already had the right to irrigate lands not listed in the permit, based on state law and prior agency practice, but their lawsuit on that issue was dismissed on procedural grounds. Teel Irrigation Dist. v. Water Resources Dep't of the State of Oregon, 919 P.2d 1172 (Or. 1996).

[130] OR. REV. STAT. §§ 541.331, 540.578, 537.252(1)(d) (1997).

[131] Charles F. Wilkinson, *Implementing Wise Water Policy in Washington State*, 11 ILLAHEE 24, 27 (1995).

[132] *Id.* Criticizing the Sinking Creek decision, *see infra* notes 133-35 and accompanying text, Wilkinson stated:

> I find it hard to imagine how, in this complicated age, you can deal with water and not have a modern water management agency. Yet the Sinking Creek decision leaves Washington State in exactly that position. Even without a sweeping overhaul of legislation, some interim or permanent regulatory power must be given to the Department of Ecology so that it can get on with the necessary business of regulating water use.

Wilkinson, *supra* note 131, at 27.

[133] 858 P.2d 232 (Wash. 1993).

had stepped in (after about twenty years) to regulate junior groundwater irrigators in favor of senior surface-water ranchers. A majority of the Washington court, however, held that Ecology had no statutory authority to regulate water use until a general stream adjudication had been conducted in the basin.[134] Two justices entered a persuasive dissent on legal, practical, and policy grounds. Among the points made by the dissent:

> The majority correctly points out that its decision will not provide for a "cheap and easy" water adjudication solution. Prohibitively expensive and interminable litigation is what the majority has fashioned as a solution, and to no purpose. The relief sought by neither party was for a general adjudication, and yet that is now the only relief which the majority opines is available. The director of Ecology, upon reading the majority opinion, will surely scratch her head in wonderment that she has the responsibility for issuance of water use permits but no authority to regulate those permits.[135]

In the years since the Sinking Creek decision, the Washington legislature has done nothing to restore Ecology's regulatory authority over water use.[136] Thus, for the majority of Washington river basins not yet adjudicated, the state exercises no significant control over existing water uses.

Idaho is currently undergoing its own "expensive and interminable litigation" to adjudicate the water rights of the Snake River Basin, which covers nearly the entire state.[137] A 1996 decision of the *SRBA* court, however, raised profound questions about whether the adjudication would actually scrutinize current water use in any meaningful way, or simply

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[134] *Id.* at 240.

[135] *Id.* at 242 (Guy, J., dissenting) (citations omitted). The dissent continued:

> Interpreting Ecology's power to regulate water rights as encompassing adjudicated water rights solely is bad policy. At the present time, only a small fraction of Washington's waters have been adjudicated. For example, the *Acquavella* litigation involves a general adjudication of water rights in the Yakima River. This litigation began in 1977, involves thousands of parties, and has twice appeared before this court. The general adjudication process continues. Its complexity and longevity demonstrate why it is bad policy to limit Ecology's regulatory powers to adjudicated water rights. Doing so leaves the great majority of the state's waters outside of Ecology's regulatory authority until there is a general adjudication as to those waters.

Id. (citations omitted).

[136] Telephone Interview with Lloyd Moody, *supra* note 61. Rather than expand or clarify Ecology's authority over water, the Washington legislature in the 1990s has chosen to emphasize planning and decisionmaking at the local watershed level. The 1997 Legislature approved two bills to increase local control over water resource decisions. H.R. 1272, 55th Leg., Reg. Sess (Wash. 1997) (increasing local involvement in water right transfers); H.R. 2054, 55th Leg., Reg. Sess. (Wash. 1997) (providing for locally-controlled water resource planning). Washington Governor Gary Locke vetoed portions of both bills. Letters from Gary Locke, Governor of Washington, to the Washington House Speaker and members (May 20, 1997) (explaining veto of specified sections of H.R. 1272 and H.R. 2054) (on file with author). Washington's earlier efforts toward greater local involvement in watershed planning are discussed in Reed D. Benson, *A Watershed Issue: The Role of Streamflow Protection in Northwest River Basin Management*, 26 ENVTL. L. 175, 185, 215-18 (1996).

[137] By February 1996, over 174,000 claims had been filed in the SRBA. CRAMMOND, *supra* note 110, at A-6 to A-9.

confirm "paper rights."[138] *SRBA*-Judge Hurlbutt ruled that Idaho statutes did not allow for "partial forfeiture" of water rights.[139] In other words, forfeiture of a water right for nonuse would be an all-or-nothing proposition; unless completely forfeited, water rights would not shrink after obtaining their maximum size. The Idaho Supreme Court overturned this decision, holding that Idaho law does provide for partial forfeiture.[140] Had Judge Hurlbutt's ruling stood, it would have resulted in SRBA decrees for water rights considerably in excess of current uses.[141] At the very least, it would have reduced agency and court involvement in major disputes over forfeiture, which would not have become an issue unless a right had been entirely unused for several years.[142]

In Montana's massive statewide adjudication, DNRC has scaled back its efforts to evaluate and oppose water use claims. The agency is less active and aggressive than it used to be, largely due to pressure from the water court itself.[143] Such a policy may in fact speed up the adjudication, which has long been an interest in Montana,[144] but it also protects existing users who generally have the most to lose from a thorough evaluation of their water rights. As one commentator has stated:

> Water right adjudications promise secure rights, finality, and better management of water resources. But uncertainty and ineffectual state control favor the *status quo ante* users, most of whom are also in a position to control the pace of adjudications through litigation and the effectiveness of adjudications through state legislatures. Claimants in control of large blocks of water have only lukewarm enthusiasm for decrees and stridently challenge any decision or order that diminishes their claimed rights. Every set of water users faces the possibility that a final decree and better administration may limit or interfere with their accustomed water use.[145]

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138 Janis E. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 ENVTL. L. 127, 138 (1997).

139 *In re* SRBA, Case No. 39576 (Twin Falls County., 5th Dist. Idaho Apr. 26, 1996) (memorandum decision on basin-wide issue 10).

140 Idaho v. Hagerman Water Rights Owners, 947 P.2d 400 (Idaho 1997).

141 By authorizing water rights in excess of recent water use, the Hurlbutt ruling would have allowed appropriators to expand their water use beyond current levels, thereby reducing the amount of water available to existing junior users. Thus, the Idaho Supreme Court ruling actually protected the status quo.

142 In a somewhat similar development, the Washington Supreme Court recently reversed a Yakima County Superior Court ruling which had awarded a water right to an irrigation district for more water than the district had ever actually used. Department of Ecology v. Acquavella, 935 P.2d 595 (Wash. 1997). The supreme court ruled that the district's water right must be based on actual evidence of beneficial use, rather than on how much the district could have diverted through its irrigation system in a full season. Here again, had the trial court ruling stood, it might have threatened the status quo by allowing an expansion of current water use.

143 CRAMMOND, *supra* note 110, at D-4, D-7; telephone interview with Stan Bradshaw, Helena water attorney (Feb. 6, 1997). Crammond also noted that the agency seeks to work out its differences informally with claimants before filing its report on a water use claim. CRAMMOND, *supra* note 110, at 34.

144 *Id.* at D-3, D-4, D-8.

145 *Id.* at 25.

The State of Oregon, as a policy matter, has chosen not to regulate water use in the Klamath Basin until the Klamath adjudication is complete.[146] At the same time, Oregon has essentially taken the position that the U.S. Bureau of Reclamation, which owns and manages the Klamath reclamation project, may not deliver water for any purpose but irrigation until the adjudication is complete.[147] According to the state, the Bureau lacks authority to deliver water for fish, tribal needs, or wildlife refuges in the Klamath Basin, because the project's water rights are exclusively for irrigation.[148] Thus, the state claimed that it had the sole authority to allocate water and regulate its use, but declined to exercise that authority. Oregon's stance may be legally suspect,[149] but it is politically and bureaucratically expedient. The state's position is at once pro-existing user and anti-federal government, and while asserting state authority, it actually limits state involvement.

Some observers believe that watershed councils and other locally driven, consensus-based efforts have gained popularity in the Northwest largely because they can help guard the status quo.[150] Whatever their potential benefits for resource protection and restoration, local consensus efforts seem likely to protect existing water uses, limit state involvement, and reduce controversy on contentious issues.[151] The trend toward local empowerment runs counter to traditional western water law, however, in that it tends to "localize" a resource that is legally controlled by the state and owned by the public.[152]

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146 Letter from Stephen E.A. Sanders, Oregon Assistant Attorney General, to Martha Pagel, Oregon Water Resources Director (Mar. 18, 1996) (on file with author). The letter does not explain the legal or policy rationale for Oregon's decision.

147 *Id.* at 7-11.

148 *Id.*

149 The U.S. Department of Interior responded that it does indeed have both the authority and the responsibility to manage the project in accordance with the federal environmental laws and the senior water rights of Indian Tribes in the Klamath Basin. Memorandum from David Nawi, Pacific Southwest Region Interior Solicitor, and Lynn Peterson, Pacific Northwest Region Interior Solicitor, to various Department of Interior officials (Jan. 9, 1997) (on file with author).

150 *See* Russ Lehman, *Abdicating Responsibility for the Holy Grail of Consensus*, 11 ILLAHEE 18 (1995). Lehman argued that "[t]hose groups that have historically fought to keep the status quo—those whom antiquated laws and policies have served very well—will be the first to argue for consensus approaches when political power is held by those they consider a threat to business as usual." *Id.* at 21. *See also* Benson, *supra* note 136, at 195-97.

151 *See* Benson, *supra* note 136, at 194-99.

152 Consider the following section of a Washington statute, enacted in 1997, which provides for locally developed water resource plans:

> The legislature finds that the local development of watershed plans for managing water resources and for protecting existing water rights is vital to both state and local interests. The local development of these plans serves vital local interests by placing it in the hands of people: Who have the greatest knowledge of both the resources and the aspirations of those who live and work in the watershed; and who have the greatest stake in the proper, long-term management of the resources. The development of such plans serves the state's vital interests by ensuring that the state's water resources are used wisely, by protecting existing water rights, by protecting instream flows for fish, and by providing for the economic well-being of the state's citizenry

D. Prevent Instream Demands from Threatening Existing Uses

Water users often voice support for instream flows, but user groups typically do not want to see streamflows protected and restored at their expense. Thus, the status quo policy moves states to ensure that instream flow demands do not threaten existing uses, either through some specialized legal approach or under the traditional rules.

This aspect of the status quo policy is perhaps best illustrated by the basic character of state instream flow programs in the Northwest. The laws of Idaho, Oregon, and Washington all essentially limit the establishment of minimum protected streamflows to state agencies,[153] while Montana's law is just slightly less restrictive.[154] These arrangements effectively allow politically powerful user groups, with their influence in state government, to maintain considerable control over instream flow protections.[155] These programs also relegate instream rights to second-class status in a system that one commentator has deemed "socialist":

> Barriers still stand . . . to the full integration of instream uses into state water allocation systems. Barriers (such as the "second class" treatment of instream flows . . .) are not due to any natural incompatibility between instream rights and the prior appropriation doctrine. Far from it; the doctrine is fully up to the task of accommodating modern needs. All that remains is to eliminate those legislative restrictions which are essentially alien to the doctrine's nature.
>
> The most pervasive and frustrating limitation on instream water rights in most western states is the prohibition against ownership of instream rights by persons other than a designated state entity. This prohibition is a curious twist on the prior appropriation doctrine. It reflects a basic discomfort with the concept of instream rights and an underlying distrust of those entities which may seek to acquire them, particularly environmental groups and the federal government. . . .

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and communities. Therefore, the legislature believes it necessary for units of local government throughout the state to engage in the orderly development of these watershed plans.

H.R. 2054, 55th Leg., Reg. Sess. § 102 (Wash. 1997). While this section names four "state" interests, at least two, protecting existing water rights, and securing the economic well-being of citizens and communities, could just as easily be characterized as private or local interests. Thus, Washington has significantly shifted its water policy toward local decision-making on the basis of local interests and away from traditional state control over public water resources.

153 IDAHO CODE §§ 42-1501, 42-1503 (1996); OR. REV. STAT. § 537.336 (1997); WASH. REV. CODE §§ 90.03.247, 90.22.010 (1992).

154 Montana allows state agencies, federal agencies, and political subdivisions of the state to apply for instream flow reservations in six specific basins. MONT. CODE ANN. § 85-2-316(1) (1997).

155 *See generally* James D. Crammond, *Leasing Water Rights for Instream Flow Uses: A Survey of Water Transfer Policy, Practices, and Problems in the Pacific Northwest*, 26 ENVTL. L. 225, 240 (1996) (discussing private arrangements regarding instream rights); Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 217-19 (1997) (discussing obstacles to enforcing, and the bureaucracy involved in securing, instream rights).

> Ironically, then, the drafters of such programs have turned away from the market-based principles which underlie the prior appropriation system, and have embraced principles of command-and-control resource allocation—socialism, if you will—with respect to instream rights.[156]

Conceptual problems aside, the Northwest states' instream flow programs face many practical obstacles. These programs must overcome procedural burdens, inadequate enforcement, minimal funding, and political pressure in order to protect streamflows in any meaningful way.[157] These limitations undoubtedly reflect existing users' discomfort with instream flow rights, even where those rights would be later in time and thus lower in priority.[158]

Washington Governor John Locke vetoed portions of a bill passed by the 1997 Washington Legislature that would have largely transferred instream flow protections into local hands.[159] The bill would have established local "planning units," with multiple votes for local governments and water users, but only one vote for the Washington state government.[160] These planning units would have had the authority not only to determine future instream flows, but to "adjust" streamflow protections already established by the state.[161] But for the Locke veto, all of Washington's existing minimum flows could have been eliminated, watershed by watershed, by vote of local governments, water users, and property own-

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156 Christopher H. Meyer, *Instream Flows: Integrating New Uses and New Players Into the Prior Appropriation System*, *in* INSTREAM FLOW PROTECTION IN THE WEST 2-1, 2-13 (Lawrence J. MacDonnell & Teresa A. Rice eds., 1993).

157 Sterne, *supra* note 155, at 216-19.

158 *Id.* at 222-26.

159 H.R. 2054, 55th Leg., Reg. Sess. (Wash. 1997). Part I of the bill provides for water resource plans developed at the local (watershed) level. Locke signed sections 101 to 106, which provided generally for local planning on water resources, but vetoed sections 107 to 116, which specified the composition of local planning units, the elements of water resource plans, the effect of the plans, and other matters. Letter from Gary Locke, Governor of the State of Washington, to the Washington House Speaker and Members (May 20, 1997) (on file with author).

160 The size of these planning units would have varied depending upon several factors, including the number of counties within the watershed. For each county, there would have been 1) a representative of the county, 2) a representative of cities within that county, and 3) a representative of water supply utilities within that county. There also would have been one representative of all conservation districts within the watershed, and one member representing the "general citizenry" appointed by the cities of the watershed. In addition, the planning units would have included nine representatives of "various special interest groups" appointed by the cities and counties, and three members representing the "general citizenry" appointed by the counties, but of these three, at least two must have been water right holders or claimants. In watersheds containing an Indian reservation, the tribe also would have had a seat. Finally, three state agencies, Transportation, Fish and Wildlife, and Ecology, all would have been members, but with only one vote among them. H.R. 2054, 55th Leg., Reg. Sess. §§ 107-08 (Wash. 1997) (vetoed May 20, 1997).

161 *Id.* § 110(2)(c). Ecology would have had to approve these plans with very limited authority to demand changes. *Id.* § 112.

ers.[162] The vetoed legislation would have shifted to the local level a large measure of the state's traditional control over a public resource, although the legislation would not have allowed local planning units to "adjust" existing out-of-stream water rights.

Private transactions to convert existing water rights to instream use, whether permanently or temporarily, could provide some senior water for flow restoration.[163] Each of the Northwest states makes some provision for such transactions, while maintaining significant limitations.[164] The 1995 Montana legislature authorized a time-limited program allowing temporary transfers of water for instream flow use;[165] a cautious step, certainly, but still a step in the direction of expanding options for flow protection. In Oregon, by contrast, bills were introduced in the 1995 and 1997 legislative sessions to prohibit any transfer of water from irrigation to any other use.[166] The U.S. Bureau of Reclamation supported changing Idaho law to allow the transfer of natural flow water rights for instream purposes, but it could not even get the bill introduced in the 1997 Idaho legislature.[167]

Environmentalists sometimes suggest eliminating wasteful water use as a promising method for restoring depleted streamflows.[168] The Washington Supreme Court recognized that possibility in *State Department of Ecology v. Grimes*,[169] but seemed to foreclose it. In *Grimes*, the court reviewed a referee's report that seemed to consider environmental factors in evaluating the Grimes' claims in a water rights adjudication. The court noted that, while considering environmental impacts is consistent with certain state obligations under the water laws, "these factors cannot operate to impair existing water rights."[170] In fact, the court specifically rejected the use of a "reasonable efficiency" test for reviewing existing

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[162] Except for the state agency representatives, each member of the planning units would have had to be "a resident and a property owner of the [basin] for at least three years." *Id.* § 107(4), 108(1)(c).

[163] *See generally* Sterne, *supra* note 155, at 219-26.

[164] *Id.* at 240-43, 256-59.

[165] MONT. CODE ANN. §§ 85-2-407 to 85-2-408 (1998).

[166] H.R. 2628, 69th Leg., 1st Sess. (Or. 1997); H.R. 3100, 68th Leg., 1st Sess. (Or. 1995). H.R. 3100 passed the House in 1995 despite opposition from environmentalists, urban water interests, and even some in the agricultural community. *Farmers' Water Rights Bill Passes House*, EAST OREGONIAN, May 17, 1995, at A1.

[167] Telephone interview with Rich Rigby, U.S. Bureau of Reclamation, Boise, Idaho (Mar. 26, 1997).

[168] *See, e.g.*, Russell, *supra* note 65, at 153.

[169] 852 P.2d 1044 (Wash. 1993).

[170] *Id.* at 1053. The court determined that consideration of aquatic impacts was consistent with WASH. REV. CODE § 90.03.005, § 90.054.010(1)(a), and § 90.054.101(2), but could not impair existing rights. The court also noted, however, that other laws may "operate to define existing rights in light of environmental values," and cited WASH. REV. CODE § 90.03.005 and § 90.03.010, thus seemingly contradicting itself as to the applicability of § 90.03.005 to existing rights. *Id.* Section 90.03.005 calls for the State Department of Ecology to reduce wasteful practices to the maximum extent possible, and establishes state policy of "obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within stream and lakes in sufficient quantity and quality to protect instream and natural values and rights." WASH. REV. CODE § 90.03.005 (1998).

water rights, saying it was inappropriate in the context of an adjudication.[171]

The Idaho Supreme Court similarly rejected the application of the public trust doctrine in the Snake River Basin Adjudication (SRBA).[172] The court confirmed that water rights in Idaho are held subject to the public trust, which can take precedence over vested water rights.[173] But according to the court, the public trust was not an element of a water right, and therefore not an issue to be determined in the SRBA.[174] The Idaho legislature acted quickly to address a perceived threat to established water uses by passing a statute in 1996 that purports to preclude application of the public trust doctrine to water rights.[175]

III. Effects of the Status Quo Policy

The basic rules of western water law work to the benefit of some groups of people and the detriment of others.[176] Whatever else might be said about them, the traditional rules at least give all interest groups a clear sense of what to expect—if the rules were in fact applied. Senior users would have a reliable water supply, but would be limited to the terms and conditions of their water rights.[177] Junior users' diversions would be curtailed, if needed, to satisfy senior rights, but senior rights could not be changed or expanded to the juniors' detriment.[178] Instream flows would have very late priorities, but they would nonetheless be protected to that extent. They would benefit over time as rules, such as waste and abandonment, were applied against consumptive rights.[179] Prospective new users would be unable to obtain a new water right from a fully appropriated source. However, they would have an opportunity to acquire

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171 *Grimes*, 852 P.2d at 1053-54.

172 Idaho Conservation League v. Idaho, 911 P.2d 748 (Idaho 1995). A long line of court cases establishes that certain resources are held by state governments in trust for the public. The public trust doctrine essentially dictates that a state must protect the public interest in these resources; the state cannot completely give them away. Thus, the doctrine checks the power of state government to transfer ownership and control of certain public resources into private hands. *See* National Audubon Soc'y v. Superior Ct. of Alpine County, 658 P.2d 709 (Cal. 1983).

173 *Idaho Conservation League*, 911 P.2d at 750.

174 *Id.* The court withdrew its original opinion in *Idaho Conservation League*, which questioned whether the public trust doctrine was even "a valid element of Idaho Law" despite earlier Idaho Supreme Court cases adopting the doctrine. Idaho Conservation League, Inc. v. Idaho, S. Ct. No. 21144, 94.14 ISCR 694, 696 (Idaho June 8, 1994), *withdrawn*, 911 P.2d 748 (Idaho 1995).

175 Idaho Code § 58-1203(2) (1997). Experts on the public trust doctrine have seriously questioned the legality of this Idaho statute. Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 Ecology L.Q. 461 (1997).

176 *See* Charles F. Wilkinson, Crossing the Next Meridian 259-74 (1992) (discussing disparate benefits and impacts of water use under prior appropriation).

177 *See supra* notes 29-39 and accompanying text.

178 *See supra* notes 29-32 and accompanying text.

179 *See generally* Meyer, *supra* note 156, at 2-4 (discussing the administration of priorities among instream flow water rights).

an existing right and change its use, perhaps transferring the water to a new type of consumptive use or even instream use.[180] But under the status quo policy, the results are often quite different from these expectations.

A. Winners and Losers Change

When compared to what would happen if the traditional water law rules were applied, if a state preserves the water use status quo, it often helps one class of existing water users to the detriment of another. A legislature, court, or agency may understand that it is helping one interest at another's expense, but in some instances may not realize that it is effectively redistributing water from one group to another.

Many decisions essentially have involved a choice among irrigators: surface water users versus groundwater users, juniors versus seniors. Between these classes, the winners have not been consistent, but the states have consistently preserved the status quo. In other words, the states have chosen to allow water users to continue their established practices, rather than apply the traditional rules of prior appropriation in a manner that would change those practices. The Oregon and Idaho legislatures effectively chose seniors over juniors (who would have benefited from the enforcement of water laws and water rights) when they offered a sort of amnesty to many existing water uses.[181] On the other hand, the Idaho Department of Water Resources's conjunctive use rules, issued in response to the *Musser* decision, effectively favored junior users who pumped groundwater over seniors using surface water.[182] The Washington Supreme Court maintained the status quo, thereby helping junior irrigators at the expense of seniors, when it took a narrow view of the Department of Ecology's authority in the Sinking Creek case.[183] In these latter two instances, both seniors and juniors had long used water with little state involvement. The seniors would have benefited from curtailment of the juniors' pumping in times of shortage, but the Idaho rules and the Sinking Creek decision created obstacles to state regulatory action.

The Sinking Creek decision illustrates how the status quo policy can harm even senior water users who have tried to defend their rights. The Sinking Creek ranchers held senior rights to surface water, and, although they began complaining to Ecology in the mid-1960s that they were being

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[180] This last statement assumes that an evenhanded application of the traditional rules of western water law would allow water rights to be freely transferable for any purpose, including instream flow, which often is not the case. *Id.* at 2-13.

[181] *See supra* notes 103-08, 126-30 and accompanying text.

[182] *See supra* notes 97-102 and accompanying text. These rules helped protect the status quo because the junior users were accustomed to pumping groundwater without regard to their possible effect on surface water flows, or on the senior irrigators who used those flows. The *Musser* decision, applying traditional prior appropriation rules, ordered the Idaho Department of Water Resources to curtail pumping to satisfy senior users, thereby disrupting the juniors' established use of groundwater. The conjunctive use rules, however, favored the juniors and the status quo by imposing a "reasonableness" test on senior appropriators' water use. Therefore the rules provided an element of legal protection to the juniors' continued pumping. Musser v. Higginson, 871 P.2d 809 (Idaho 1994).

[183] *See supra* notes 133-34 and accompanying text.

harmed by junior irrigators' groundwater withdrawals, the agency took no action until 1989.[184] When the agency did take action, the junior pumpers sued to block regulation, and the Supreme Court ultimately held that Ecology lacked statutory authority to act.[185] Thus, as the Sinking Creek dissenters noted,[186] the seniors were left with no good options to settle their long-running dispute. The dissenters openly urged the Washington legislature to fill the management void created by the majority opinion,[187] but so far the legislature has not done so.[188]

Protection of established water uses may also harm prospective new users. By refusing to apply laws that would reduce the quantity of water legally held by existing users, states limit the amount of water potentially available for new appropriations. For example, Montana and Washington could have freed up some water for new uses by applying their forfeiture laws against users who had failed to submit timely claims, but the states chose instead to protect the status quo by allowing the filing of late claims.[189] Even though improving efficiency could provide water for new uses, none of the Northwestern states has taken serious action against waste.[190]

States also may disadvantage prospective new uses by restricting transfers of existing water rights. For example, Montana prohibits the transfer of large water rights unless the applicant can prove that several conditions are satisfied.[191] Oregon constrains interbasin water transfers to protect the basin of origin.[192] Idaho law prohibits changing the purpose of use of agricultural rights if the change "would significantly affect the agricultural base of the local area."[193] Bills introduced in the past two sessions of the Oregon legislature would prohibit *any* water transfers from irrigation to any other use.[194]

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184 Rettkowski v. Department of Ecology, 858 P.2d 232, 234 (Wash. 1993).

185 *Id.* at 236-38.

186 *Id.* at 242 (Guy, J., dissenting).

187 *Id.* at 245.

188 The 1997 Legislature did note that "the lack of certainty regarding water rights within a water resource basin may impede management and planning for water resources." H.R. 2054, 55th Leg., Reg. Sess. § 301 (Wash. 1997). But rather than restore Ecology's authority to regulate water prior to the completion of a general adjudication, the legislature merely directed Ecology to "give high priority" to an adjudication request submitted by a local basin planning group. *Id.*

189 *See supra* notes 109-16 and accompanying text. The 1997 Washington statute specifies that any new late claims "shall not affect or impair in any respect whatsoever any water right existing prior to the effective date" of the act, but they still may disadvantage prospective new users. H.R. 1118, 55th Leg., Reg. Sess. § 1(1) (Wash. 1997).

190 *See* Russell, *supra* note 65, at 153-54.

191 These conditions relate to effects on other water users, the water source, and the environment. MONT. CODE ANN. § 85-2-402(4) (1997). If the proposed transfer involves a right that consumes at least 4000 acre-feet annually and 5.5 cubic feet per second (cfs), it must be approved by both the Department of Natural Resources and Conservation and the legislature. *Id.* § 85-2-402(5).

192 OR. REV. STAT. §§ 537.801-537.809 (1997).

193 IDAHO CODE § 42-222 (1995).

194 *See supra* note 166 and accompanying text.

Instream uses probably suffer most under the status quo policy. Like prospective new consumptive uses, instream flows generally lose out when states refuse to require existing uses to comply with established laws and water right conditions.[195] Flow restoration efforts are also undermined by laws and attitudes restricting water right transfers and leases for instream use.[196] For example, Idaho law precludes transfer of consumptive water rights for instream use, even though the state water plan calls for that prohibition to be changed.[197] Moreover, states sometimes disarm instream flow advocates by preventing them from employing certain legal tools. For example, the Idaho legislature effectively shut conservation groups out of the Snake River Basin Adjudication.[198] Similarly, the Washington Supreme Court in *Grimes* held that consideration of environmental values could not "operate to impair existing water rights."[199]

Even in a crisis atmosphere arising from the prospects of salmon run extinction and increased federal regulation, the Northwestern states seem unlikely to take strong enforcement action against existing users in order to protect streamflows. A recent "crisis" in Oregon arose from the proposed listing of two stocks of coho salmon under the federal Endangered Species Act.[200] State political leaders pushed hard against a listing,[201] urg-

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195 This may be especially true where states refuse to curtail groundwater withdrawals despite their evident effects on surface water, as Idaho did for many years. *See* Steve Stuebner, *No More Ignoring the Obvious: Idaho Sucks Itself Dry*, HIGH COUNTRY NEWS, Feb. 20, 1995, at 1, 8-11 (noting environmental and other impacts of Idaho's failure to enforce prior appropriation against groundwater users in the Big Lost River Basin).

196 As stated recently in an annual synopsis of water transaction activity throughout the West, "[e]xperiments in Oregon and Washington to acquire water for fish and wildlife habitat have raised the possibility of water sales—but political and social acceptance of transferring water out of agricultural communities are slowing development." *1996 Annual Transaction Review: Markets Evolving to Include Public Trust Purposes*, WATER STRATEGIST, Winter 1997, at 3, 17. *See* CRAMMOND, *supra* note 110, at 247.

197 As the plan states:

> In some instances, it is in the public interest to allow changes from traditional uses to instream flow purposes. In highly developed areas, the potential to protect or restore fish and wildlife, water quality, aesthetic, or recreation resources may depend upon the transferability of water rights. To make such transfers substantive, the priority date of the original water right should be retained if other water rights are not injured. Chapter 15, Title 42, Idaho code needs to be expanded to enable the Idaho Water Resource Board to apply for a change in the nature of use when a water right is acquired that is best used for minimum or instream flow purposes.

IDAHO WATER PLAN, *supra* note 6, at 5.

198 The 1994 Legislature eliminated the requirement that transfers adjudicated in the SRBA comply with the "local public interest" which, combined with the Idaho Supreme Court's decision on the public trust, effectively blocked environmental groups from participating in the SRBA. Idaho Conservation League, Inc. v. Idaho, 911 P.2d 748, 750 (Idaho 1995).

199 State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1053 (Wash. 1993). *Grimes* is somewhat ambiguous on the question of how environmental values may relate to existing water rights.

200 Threatened Fish and Wildlife, Enumeration of Threatened Species, 60 Fed. Reg. 38,029 (July 25, 1995).

201 Ed Merriman, *Gov. Works to Sell Salmon Plan in D.C.*, THE CAPITAL PRESS, Feb. 7, 1997, at 3.

ing the federal government to defer to Oregon's own plan, the Oregon Coastal Salmon Restoration Initiative.[202] The state initiative contained several measures relating to water quantity and instream flows, addressing new instream and consumptive water rights, enforcement of existing rights and laws, increased water use efficiency, and other matters.[203] Oregon's plan did not commit the state to taking aggressive measures on existing uses. For example, the initiative stopped short of requiring water users to measure and report their withdrawals, promising only that the state would consider it.[204] The initiative called for four additional Water Resources Department field employees, but did not commit the Department to taking controversial enforcement actions such as limiting water users to their annual duty or regulating groundwater in conjunction with surface water.[205] The state agreed to convene "collaborative" local groups to develop water use efficiency standards, but was vague as to whether it would establish standards in the absence of local consensus, or how it would use them in any event.[206]

Continued protection of existing user groups will likely prevent meaningful progress toward restoring streamflows in most of the Northwest. The water use status quo means seriously depleted (even nonexistent) flows in many rivers and streams. New or recently established streamflow protections, at best, will merely prevent the situation from getting worse. Water right acquisitions for instream flows and public funding for water conservation offer win-win solutions that seem likely to work far better in theory than in practice, given the massive amounts of money required to restore flows in even one river.[207] Economic and environmental costs will also limit new storage projects and other "structural solu-

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[202] STATE OF OREGON, OREGON COASTAL SALMON RESTORATION INITIATIVE (Legislative Review Draft, Feb. 24, 1997) (on file with author).

[203] *Id.* ch. 3, at 1-13.

[204] *Id.* at 28-29 (Measure 22).

[205] *Id.* at 21-22 (Measure 10).

[206] *Id.* at 24-25 (Measure 14).

[207] The high price of restoring flows through water conservation measures or water right acquisitions is illustrated by a 1994 federal statute pertaining to Washington's Yakima Basin, and two recent cost estimates relating to Oregon's Deschutes River. The Yakima River Basin Water Enhancement Project Act authorized federal funding of water conservation measures with the goal of saving at least 110,000 acre-feet annually for instream flows within eight years. Pub. L. No. 103-434, § 1201(4), 108 Stat. 4550 (1994). For these purposes, the bill authorized $5 million to plan and study conservation measures and $67.5 million to implement them. *Id.* § 1203(j), 108 Stat. at 4555. The bill also authorized up to $10 million for water right leases and acquisitions from willing sellers. *Id.* §§ 1203(i)(3), 1203(j)(4), 108 Stat. at 4555.

The federal government proposed a voluntary approach to restoring flows in the upper Deschutes River, a federally designated wild and scenic river, by funding half the cost of irrigation districts' water conservation projects, and obtaining half of the salvaged water for instream use. *Id.* § 1203(d)(1), 108 Stat. at 4553. To implement this strategy, the total capital cost alone was estimated to exceed $64 million. U.S. FOREST SERV., UPPER DESCHUTES WILD AND SCENIC RIVER, RECORD OF DECISION AND FINAL ENVIRONMENTAL IMPACT STATEMENT 288, tbls. 4-10 (1996). The Environmental Defense Fund estimated that a 30-year lease of 250 cfs for instream flows in the middle Deschutes would cost $21 million. DEBORAH MOORE ET AL., RESTORING OREGON'S DESCHUTES RIVER 83 (1995).

tions" to flow restoration.[208] Cooperative local efforts based on consensus, for all their promise and recent popularity, offer little hope of addressing instream flow problems effectively.[209] The conclusion is unpleasant but inescapable: protecting the water use status quo means accepting the continued dewatering of Northwest rivers and streams for the foreseeable future.

In general, existing water users in the Northwest have been remarkably successful at continuing their established practices even where these practices violate venerable principles of western water law, and even though applying that law would often benefit other interests. The reason for existing users' influence in maintaining the status quo is open to debate, but public choice theory[210] offers an interesting insight. One branch of public choice theory suggests that groups representing narrow economic interests are often remarkably effective in securing favorable results from public bodies.[211] Research on interest groups' influence in Congress shows that a group is most likely to succeed when the group 1) is attempting to block, rather than obtain legislation; 2) has goals that are narrow, with little public visibility; 3) is supported by other groups and public officials; and 4) can shift the issue to a favorable forum, such as a friendly congressional committee.[212] This research suggests some of the reasons why existing users often win; they seek to preserve the status quo (although they sometimes have done so by having legislation passed, rather than blocking it), they have limited goals in low-visibility issues, they typically have strong support from their legislators and other political figures, and they often have favorable venues in legislative water committees and local courts, if not in the state agencies themselves.[213]

B. Economic Questions Persist

The state and federal governments commonly justify the protection of the water use status quo on economic grounds. Thus, Idaho offered "amnesty" to otherwise vulnerable uses in the Snake River Basin Adjudication to protect "significant investments by water users and tax base for local governments."[214] Similarly, the U.S. Department of the Interior has been

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[208] *See* Hal Bernton, *County Swims Upstream to Build a New Dam*, THE OREGONIAN, Feb. 21, 1997, at A1, A16 (describing opposition to a new dam on a tributary of the Umpqua River, despite proponents' claims that the project would benefit fish by releasing cool water during the summer).

[209] This issue is explored extensively in Benson, *supra* note 136, at 201-06.

[210] Public choice theory essentially applies economic methods to the study of public policy decision making. *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 415 (1994); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1 (1991).

[211] FARBER & FRICKEY, *supra* note 210, at 17-21.

[212] *Id.* at 19.

[213] Michael Blumm has stated that these same factors help explain why industry groups retain disproportionate control over public lands decisions of the Bureau of Land Management and U.S. Forest Service. Blumm, *supra* note 210, at 420-21.

[214] *See* Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Groundwater Appropriators, 926 P.2d 1301, 1304 (Idaho 1996).

reluctant to attack subsidies or even unauthorized water uses, because users have come to depend on them.[215] The rationale appears to be that individual livelihoods and local communities have come to rely on existing water use arrangements and it would be unfair or unduly costly to disrupt them, regardless of the problems they pose.

Certainly there *are* some people who have come to depend (directly and indirectly) on existing water uses, and their lives *would* be disrupted if those uses were discontinued. In other contexts, however, this rationale is not enough to justify continued violation of the law, or especially continued expenditure of public funds. The Umatilla Tribes have noted the disparity in treatment between illegal tribal fishing and illegal irrigation: "When Indians fish illegally, we are sent to federal prison. When irrigators kill fish by illegally taking water, they are not punished. Instead, we are told by the United States Government that we must consider the impacts to the irrigation economy of making them stop their illegal activity."[216] Military bases, too, have closed despite their economic importance to local communities. The fairness of protecting existing uses based on economic reliance is arguable, depending on one's point of view.[217]

Even from a purely economic standpoint, the status quo policy seems unsound in many cases. On one hand, existing water uses certainly provide economic benefits to their users, their local communities, and the Northwest states. User groups and their allies emphasize these benefits in defending the status quo.[218] On the other hand, existing uses impose various kinds of costs on society, both by causing harm to valued resources (such as dewatering salmon habitat or degrading water quality)[219] and by preventing water from being used for other purposes (such as hydropower generation, new businesses, or instream flows).[220] A comprehensive and

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[215] Bureau official Frank Gunner raised concerns over the economic impacts of terminating unauthorized water uses on Oregon's Umatilla Project, saying it "would have a big effect on an awful lot of people." Richard Cockle, *Hermiston-Area Irrigation Threat Imperils Jobs*, THE OREGONIAN (2d ed. 1993), Oct. 20, 1993, at C08, *available in* 1993 WL 11700089. The Department of Interior has defended continued subsidies to reclamation project irrigators because those subsidies are "responsible for much of the current character of the western United States." Letter from Wayne Merchant, Assistant Secretary for Water & Science, to Congressman George Miller III (D-Cal.) (Feb. 1988) (quoted in PALMER, *supra* note 21, at 64).

[216] CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, WATER SPREADING POLICY 1 (1994), *reprinted in Water Use Practices on Bureau of Reclamation Projects, Oversight Hearing Before the Subcomm. on Oversight and Investigation of the House Comm. on Natural Resources*, 103d Cong., 2d Sess. 72 (1994).

[217] *See* PALMER, *supra* note 21, at 135-39 (noting a variety of viewpoints regarding irrigation in the western United States).

[218] In the Umatilla Basin of eastern Oregon, for example, irrigators claimed in 1993 that unless Bureau of Reclamation water continued flowing to around 15,000 unauthorized acres, over 2000 jobs would be lost, with a total economic impact of over $90 million in two rural counties. *See* Cockle, *supra* note 215, at C08.

[219] DAVID H. GETCHES ET AL., CONTROLLING WATER USE: THE UNFINISHED BUSINESS OF WATER QUALITY PROTECTION 7 (Natural Resources Law Center, University of Colorado School of Law ed., 1991).

[220] David M. Gillilan, *Will There Be Water for the National Forests?*, 69 U. COLO. L. REV. 533, 561-63 (1998).

accurate look at the costs and benefits of water uses may show that many current uses are far from optimal.[221]

Critics of the status quo point to a variety of natural resource problems associated with current water uses.[222] Such problems carry economic costs, although these costs are hard to quantify because of difficulties in valuing ecosystem services and other benefits of resources "in place."[223] Clear identification and valuation of such costs and benefits

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221 A National Research Council report on groundwater valuation, in assessing water uses in the Treasure Valley region of eastern Oregon and southwestern Idaho, recognized that current water use patterns are not ideal:

> The interplay of surface water use, groundwater quality, and, ultimately, stream flow, creates challenges for public water resource managers as they try to achieve multiple objectives. . . . A plan that achieved optimal use across all water resources in the basin would likely vary dramatically from the use pattern typically observed in such settings. Assessment of the values from one type of water resource, such as groundwater, in isolation will lead to suboptimal resource use.

COMMITTEE ON VALUING GROUNDWATER, VALUING GROUNDWATER: ECONOMIC CONCEPTS AND APPROACHES 125 (1997) (prepublication copy) (on file with author).

222 A 1994 report by the majority staff of the House Natural Resources Committee summarizes this point:

> The use of water for irrigation substantially expands the productive capacity of agricultural lands in the arid West, but it also has substantial natural resource impacts. These impacts vary from project to project, but often include:
> - damage to fisheries and recreation on depleted streams;
> - destruction of anadromous fish stocks, warm water fisheries and whitewater recreation due to the construction of dams;
> - loss of sediment as silt settles out of reservoirs;
> - fish mortality from unscreened diversions;
> - reduction of groundwater tables, leading to well closures and ground subsidence;
> - pollution of water and wetlands with pesticides, fertilizers, salts and trace metals from irrigation tail water and drain water; and
> - salt build-up in irrigated soils.

TAKING FROM THE TAXPAYER: PUBLIC SUBSIDIES FOR NATURAL RESOURCE DEVELOPMENT, SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE NATURAL RESOURCES COMM., MAJORITY STAFF REPORT 43 (1994) (on file with author).

223 In announcing a new study on determining the value of groundwater, the National Research Council noted the difficulty of the task:

> Groundwater is used for more than half of the nation's supply of drinking water and substantial amounts are allocated for agricultural and industrial purposes. It also plays a crucial but often overlooked role in sustaining wetlands and other ecosystems. Yet it is undervalued because no widely accepted means exist to measure its inherent benefits to society. . . .
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> . . .
>
> A fundamental step in valuing groundwater is recognizing and quantifying its worth both when extracted from the ground and when left in place—its "total economic value," as defined by the committee. This approach entails recognizing not only its obvious purposes, such as for irrigation and drinking water, but also its less apparent but important role in supporting ecosystems. Subsurface water maintains stream flows and replenishes wetlands and lakes. These, in turn, preserve threatened or endangered species and support drinking and irrigation supplies. Groundwater provides a "derived" value through its contributions to the larger environment.

National Research Council, New Framework Proposed for Determining Value of Groundwater, Publication Announcement (Apr. 2, 1997) (on file with author) (announcing publication of COMMITTEE ON VALUING GROUNDWATER: ECONOMIC CONCEPTS AND APPROACHES, *supra* note 221 (unavailable to the public as of this writing)).

would force the Northwest to reassess the economic worth of many current water uses. The public value of some uses may be far lower than commonly believed.[224] Even economically beneficial uses, for example, irrigation of high-value crops in Idaho, may prove suboptimal at the margin, because society might benefit if some portion of the water used for irrigation went to other purposes instead.[225]

Critics also maintain that, compared with alternative water uses, existing uses often generate little economic return per unit of water.[226] Irrigation of alfalfa and other forage crops is most easily questioned, because these crops have relatively low values and high water demands.[227] The marginal value of irrigation water in the West is commonly estimated to be less than fifty dollars per acre-foot.[228] Meanwhile, municipal water suppli-

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[224] Consider the following statements regarding the value at the margin of irrigation water in the Rio Grande Basin:

> [Published data] indicate that, at the margin, the value of water used for irrigation is no greater than zero [in the Middle Rio Grande area]. That is, increasing the supply of water for the lowest-value irrigated crop, pasture, does not yield an increase in output that is more valuable than the costs of capital, labor, and other factors of production. . . .
>
> This conclusion is not unique to the Middle Rio Grande Valley. . . .
>
> Another factor reinforces the conclusion that the marginal value of water used for irrigation is zero. Most irrigators in the [Rio Grande] Basin use water made available through extensive federal expenditures on dams, channel maintenance, and other items. The irrigators do not incur the full costs of obtaining, storing, and delivering water to their fields and, hence, the federal expenditures, in effect, subsidize use of the water.

ERNIE NIEMI & TOM MCGUCKIN, WATER MANAGEMENT STUDY: UPPER RIO GRANDE BASIN, REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION 57 (1997) (on file with author).

[225] Tim Palmer also makes essentially this point:

> Irrigation with Snake River water created a productive agricultural economy. Nobody says it's necessary to alter the society held tightly by people who benefit from livelihoods based on irrigation. What people do say is that the system of water and resource use that has made the irrigation society possible should be reconsidered in light of what has been lost, and should be regarded with a new concern for the future of the river, the fish, the wildlife, the recreation, the environmental vitality, and the people of Idaho.

PALMER, *supra* note 21, at 138.

[226] *See generally* Daniel F. Luecke, *The Role of Markets in the Allocation of Water Among Agricultural and Urban Users in the Western United States* 3-6 (Dec. 11, 1992) (discussing the relationship between water availability and regional growth) (paper presented at the University of Barcelona, Spain) (on file with author).

[227] Of all irrigated lands in the West, around 30% grow alfalfa and other forage, while approximately 40% grow cereal grains. U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, ACREAGE LIMITATION AND WATER CONSERVATION RULES AND REGULATIONS 3-34 (1996).

[228] As one author noted:

> Empirical estimates of the direct marginal value productivity of irrigation water in the western United States usually fall in the range of $25 to $75 per acre-foot . . . . For the majority of crops the estimates are in the lower part of this range. Some even fail to reach the lower bound. . . . In the intermountain states the value of water in irrigation can be as low as $10 per acre-foot. . . .

Luecke, *supra* note 226, at 6. NIEMI & MCGUCKIN, *supra* note 224, concluded that the marginal value of irrigation water in parts of the Rio Grande Basin is no greater than zero.

ers have been willing to pay upwards of $2000 per acre-foot in recent transactions across the West.[229] In some places, the highest economic use of water may be instream.[230] From a purely economic point of view, perpetuating lower valued water uses is not efficient. As one commentator has stated, "[a]lthough individual users, whether in cities or in rural areas, are probably efficient from their point of view, at the system level the vast differences in the relative value of water and often neglected instream values suggest that inefficiencies abound."[231] Facilitating transfers from current uses to new uses of higher value, including instream uses, could produce real economic and environmental benefits.[232]

Here again, public choice theory recognizes that special interest groups may obtain outcomes that are not economically efficient from society's point of view.[233] As scholars point out, this is not necessarily a bad result, because economic analysis is an imperfect tool for evaluating public policy[234]—questions of fairness and other issues must also be considered. But if the status quo policy produces economically inefficient results, decision makers should openly and clearly explain why protecting existing users is in society's best interests.[235]

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[229] *Transaction Update*, WATER STRATEGIST, Winter 1997, at 11-15; Bonnie G. Colby, *Water Reallocation and Valuation: Voluntary and Involuntary Transfers in the Western United States*, *in* WATER LAW TRENDS, POLICIES AND PRACTICE 112, 116-19 (Kathleen Marion Carr & James D. Crammond eds., 1995).

[230] As one researcher has stated:

> Using a variety of valuation methods, the economic value of water for environmental uses can be estimated and compared with the value of water for offstream uses. In some instances, the benefits generated by keeping an acre-foot of water in a stream, lake, or wetland is greater than the marginal value of that water for agriculture and other competing offstream uses.

Colby, *supra* note 229, at 119 (citation omitted). Instream flow benefits include improved water quality and enhanced recreational opportunities, as well as "nonuse" values such as preserving unique ecosystems and specied habitat. *Id.* *See* NIEMI & MCGUCKIN, *supra* note 224, at 61-67; Luecke, *supra* note 226, at 7-10.

[231] Luecke, *supra* note 226, at 12-13.

[232] U.S. GENERAL ACCOUNTING OFFICE, WATER TRANSFERS: MORE EFFICIENT WATER USE POSSIBLE, IF PROBLEMS ARE ADDRESSED 19-24 (May 1994).

[233] *See* FARBER & FRICKEY, *supra* note 210, at 34.

[234] As stated by Farber and Frickey:

> When economists describe special interest legislation as "rent-seeking," they mean that the legislation is not justified on a cost-benefit basis: it costs the public more than it benefits the special interest, so society as a whole is worse off. We agree that, all other things being equal, this is undesirable. But all other things are not always equal. . . . Cost-benefit analysis cannot be the only standard for evaluating government decisions. For technical reasons, cost-benefit analysis—or more specifically, the underlying standard of economic efficiency—cannot be applied until a prior decision is made about how to distribute social entitlements.

Id. (citation omitted).

[235] Farber and Frickey summarize as follows:

> [T]he fact that interest groups obtain rent-seeking legislation does not *necessarily* mean that interest group politics is [sic] undesirable. Realistically, however, we must concede that at least some of the resulting legislation may be hard to justify based on *anybody's* view of social justice. As a society, we are made poorer by such legislation with no countervailing moral benefit.

One interesting aspect of the status quo policy is that it sometimes contradicts that commonly stated maxim: "water flows uphill toward money."[236] While that maxim seems likely to hold true over the long run, the current trend is to preserve existing uses. One commentator has observed that recent attempts to block out-of-stream or basin transfers amount to "quasi-riparianism."[237] Money can sometimes make water move uphill, but existing users often can stop water from moving anywhere. Thus, existing water users may be even more influential than money.

IV. Conclusion—Implications of the Status Quo Policy

Despite the pressures of population growth, environmental restoration, and economic transformation, established water uses have remained solidly protected in the Northwest. In order to perpetuate current uses, state legislatures, courts, and agencies alike have refused to apply, and sometimes have even changed, legal requirements. The record clearly shows that the states have been extremely reluctant to implement the traditional rules of western water law if doing so would mean upsetting the water use status quo. Today, those traditional rules are often honored in the breach; if they ever were sacred, certainly they are not any longer.

In managing water resources, the Northwest states rarely deviate from the status-quo policy. Like it or not, anyone with a stake in the resource should recognize that the states generally will do what they must in order to protect existing water uses. Legal rules, agency mission statements, and even the interests of other water users usually are not enough to force action that would threaten established uses. Given this reality, stakeholders and decisionmakers should approach water-resource issues somewhat differently than they would under the traditional rules.

No one, not even the owner of vested senior water rights, should assume that her interests are safe simply because she is entitled to protec-

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Id. at 35.

236 Marc Reisner, Cadillac Desert 13 (1986).

237 Dan Tarlock, *Reallocation: It Really Is Here*, *in* Water Law Trends, Policies and Practice 104, 110 (Kathleen Marion Carr & James D. Crammond eds., 1995). Tarlock offers the following explanation for this phenomenon:

> Many water rights transfers remove water from agricultural use and dedicate the rights to urban use. Rural communities consider themselves at risk from these transfers because they threaten the community's economic base and way of life. While water law has traditionally provided little protection for these communities beyond the political process, these communities are increasingly successful, even after reapportionment, in achieving direct legislative protection for these interests. Nostalgia for a mythic past is a powerful political weapon worldwide. These interests will be asserted in the courts as well. In response to these concerns, modern water law is developing a number of *ad hoc* mechanisms to assess costs and benefits of large-scale transfers to address and mitigate the environmental and social equity issues. Many new state and federal water laws may be used to restrain transfers to protect the area of origin or the status quo among existing users. Collectively, these new laws pose significant new constraints on transfers, and perhaps on the efficient allocation of water resources.

Id. at 105.

tion under basic water law rules. Those rules routinely have not been applied or have been changed, harming junior appropriators sometimes,[238] seniors sometimes,[239] and instream flows nearly every time.[240] Anyone with an interest in a water-resource must actively and vigilantly defend it, or risk having that interest impaired for the sake of some other user group.

In addition, anyone considering a proposal, strategy, or scenario involving water use should evaluate it on the assumption that the status quo will be protected. For example, in evaluating whether a state management plan that emphasizes water law enforcement is sufficient to avert an Endangered Species Act listing, the federal government should ask: Is this likely to work? Will the state actively enforce the law against existing water users and make it stick? A group of irrigators considering a lawsuit to protect their water supply against other users should ask: Can I expect a court to shut off existing users? If so, will the legislature step in to protect them? A state agency establishing policy for water use during droughts should ask: If we waive certain rules for water users during drought periods, will we be able to reinstate those rules when the drought is over? Or will the users find a way to continue the practices they started during the drought? Obviously, it would be foolish to assume that the law will never mean anything at all. But one should question any approach that relies on any level or any branch of government to enforce the law against established water uses.

Finally, while the states obviously have great concern with protecting existing water uses, they otherwise seem to have little regard for preserving western water *law*. The elements of traditional water law that remain most strong and vital—water rights as property rights, which last forever unless abandoned, with priority based on seniority—are the elements that most effectively safeguard established uses. Most of the other elements are either moribund (such as the prohibition against waste),[241] rarely enforced (forfeiture),[242] or readily changed (appurtenancy).[243] To the extent that the traditional rules remain relevant, it is not because they provide a legal framework of any inherent rightness or power. Instead, they persist largely because water politics in the 1990s still favors existing water users who defend their current practices and continuing entitlements based on economics and equity.[244]

Traditional western water law does not directly recognize political, economic, or equitable concerns.[245] But by managing water based largely on these factors, states tacitly recognize that prior appropriation forms an imperfect and incomplete basis for water policy and management. In a

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238 *See supra* notes 97-102, 133-36 and accompanying text.

239 *See supra* notes 168-74 and accompanying text.

240 *See supra* notes 155-67 and accompanying text.

241 *See supra* note 32 and accompanying text.

242 *See supra* note 38 and accompanying text.

243 *See supra* notes 33-35 and accompanying text.

244 See Mastin, *supra* note 112, for an argument that equity requires preserving established water uses against "unfair" state laws.

245 *See* Tarlock, *supra* note 237, at 104.

sense, when states go outside the traditional rules of western water law to preserve the status quo, they sacrifice prior appropriation for a kind of "public interest," even where the interest being protected is a private water use that actually violates current laws.[246]

In sum, by consistently choosing to protect established water uses rather than applying the familiar rules of prior appropriation, the Northwest states have significantly undermined those rules. The region's water law and policy is now based more on today's notions of politics, economics, and equity than on any set of long-standing, bedrock principles. These notions will eventually change, however, and the water users now benefiting from the status quo policy may someday wish that the states had been more faithful to the traditional rules of western water law.

[246] The Idaho legislature expressly declared that it was in the public interest to preserve current water uses that resulted from past illegal enlargements and transfers. IDAHO CODE §§ 42-1425(1)(b), 42-1426(1) (1994). And Idaho Department of Water Resources Director Keith Higginson had argued against cutting off junior groundwater users for the benefit of senior appropriators, stating that "a decision has to be made in the public interest as to whether those who are impacted by groundwater development are unreasonably blocking full use of the resource." Musser v. Higginson, 871 P.2d 809, 813 (Idaho 1994).