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RES JUDICATA—WILL IT STOP INSTREAM FLOWS FROM BEING THE WAVE OF THE FUTURE?

HAROLD A. RANQUIST*

I. INTRODUCTION

The adjudication of relative rights to the use of water in the West under the appropriation doctrine has had a stormy history. Originating in the conflict between miners and farmers struggling over the use of a limited water supply,¹ the doctrine and a limited supply of water have spawned litigation between individuals, among the states of the union, and between the states and the United States government. More of the same is threatened. One of the great battles bred by the doctrine has grown out of a reluctance of the states to recognize the role of the federal sovereign in protecting a portion of that limited water supply for its own use in accomplishing its purposes² under the “implied-reservation of water doctrine.”³ That battle still rages.⁴

This article identifies another question that is presenting a hesitant toe on the stage of water rights litigation. This is the issue of in-stream flows.⁵ Until recent years, the western states have denied that instream flows—that misbegotten child of the hated riparian doctrine—had any place in the appropriation system.⁶ As the move to

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¹ A newspaper reporter aptly stated that “every time a drop of water falls, they examine it, name it, dam it and fight over it.” Resnick, Light at the End of the Water Pipe, Arizona Daily Star (Tucson), Sept. 2, 1973, § H, col. 1.


³ This is the term used by Justice Rehnquist in United States v. New Mexico, 438 U.S. 696, 700 (1978).


⁵ “Instream flow” is defined as the flow of water in its natural channels without diversion. “Instream use” is defined as the use of water in its natural channels without diversion.

⁶ The appropriation doctrine as it was developed in each of the western states required the diversion of water from the natural stream as one of the requirements that must be met...
establish instream flows increases, fueled by concern over the environment of man, fish, wildlife, plants, and animals in the watersheds of the West, present users of water are rising in opposition, and preparations are being made for the coming conflict.7

One of the barriers which the opponents of instream flows will erect is the claim that the streams of the West are fully appropriated and that many are adjudicated; therefore, there is little or no room for the exercise of instream flows.

They will argue that the sacred nature of their adjudicated rights and the protection provided by the bar to further litigation under the doctrines of res judicata and collateral estoppel are a shield against instream water claims.

This article stems from the author's experience in preparing some of the issues presented in the case of United States v. Truckee Carson Irrigation District (the Pyramid Lake case), which is pending now before the Court of Appeals for the Ninth Circuit.8 The case involves the claim of the Pyramid Lake Indian Tribe to certain flows of the Truckee River in the state of Nevada for the purposes of maintaining the level of a large desert lake within their reservation, and sustaining fish spawning runs in the river. The other major water users along the stream in Nevada defended against the claim of the tribe, and of the United States in the tribe's behalf, by asserting that the claim was barred by res judicata and collateral estoppel because the United States had participated in an earlier stipulated decree in an adjudication of the waters of the Truckee River.9 There the United States had asserted water rights for a large reclamation project and for the irrigation of land on the Indian reservation, but no claim had been made to a water right for the lake or for a fishery in the lake and the river. Historically, that fishery had been the major natural resource of the tribe.

This article discusses the application of the bar against further

in the acquisition of a water right. Under the concept of that doctrine the instream use of water for many years was not considered a beneficial use which could be acquired and protected against those having the right to divert the water pursuant to the provisions of state law. See R. DEWSNUP, LEGAL PROTECTION OF INSTREAM WATER VALUES 10 (1971) (Legal Study 8-A for the National Water Commission). Instream flows are discussed further in Part V.


action to water rights litigation under the appropriation doctrine. The unique nature of water and of the water adjudication process, particularly quiet title proceedings, results in many water uses not being subject to the bar against further litigation. Some uses not barred are discussed, among them instream flows.

This article will examine why instream flows can be viewed as an issue open to subsequent litigation, even though such flows could have been asserted in a prior proceeding. The reasons why instream flows can in some cases be exercised without devastating impacts on existing diversion rights from some streams also will be discussed. The ultimate conclusion is that, if diversion from streams of the West is restricted to effective beneficial use, water will be available to establish instream flows in some areas of some streams in spite of the argued applicability of the bar to further action. Legislative action will be required, however, to protect those instream flows from diversion by other appropriators. A challenge is issued to the states to eliminate waste and ineffective use and then to enact legislation which will make the establishment and protection of instream flows possible. 10

II. ADJUDICATION OF WATER RIGHTS UNDER THE APPROPRIATION DOCTRINE IN QUIET TITLE ACTIONS AS A UNIQUE LEGAL PROCEDURE

The adjudication of water rights in western states using the appropriation doctrine is a legal procedure with unique characteristics. It differs in significant ways from most other types of legal proceedings. One renowned author defined that adjudication procedure as follows:

The determination of [water] rights is a far different matter than the adjudication of relative rights between two or even dozens of contestants—not only in degree and amount, as obviously it is, but also in kind and specie. Only in the sense that any determination which necessarily results in a favoring of one party over another can be said to involve the exercise of a judicial capacity is this determination judicial. But in its essence it is not a judicial function at all; the problem is the ascertainment of the quantity of water in a drainage system, the finding of the dates and amounts of appropriations of all users, the careful arrangement of the data found in tabular order, all

10. The need to protect the environment of water courses for fishery and wildlife values to some reasonable extent was recognized by President Carter in his water policy statement. Water Policy Initiatives, H.R. DOC. NO. 95-347, 95th Cong. 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 1793.
as preliminary to the distribution of water . . . to those entitled. Actual controversy over the use of the water is not essential, nor are adversary interests as we normally employ that term. To seek an analogy, the determination is akin to a census taking or, better, the preparation of a list of those qualified to exercise the voting privilege.\textsuperscript{11}

A Texas jurist also recognized water rights adjudications as a unique kind of case when he began an opinion with the lament that the case presented "procedural problems of stream litigation occasioned by the absence of rules and statutes suited to this special class of case."\textsuperscript{12}

There are three different kinds of proceedings used to adjudicate the relative rights to the use of water among those having a right to divert water from a stream. These adjudication procedures were described by Edward W. Clyde as follows:

1. Administrative proceedings, as in Wyoming, with the right of review in the appellate court on question of law;
2. General statutory adjudications, which vary greatly from State to State; and
3. Actions in the nature of quiet title suits. . . .\textsuperscript{13}

Numerous authors agree that quiet title proceedings\textsuperscript{14} in water adjudication suits have special problems, including the applicability of the bar to further action.\textsuperscript{15} These suits differ from other types of litigation in the number and types of issues that are decided or might have been decided in a water adjudication and yet may not be subject to the bar to further action. The differences arise because of the nature of water, including the timing and the way in which water

\textsuperscript{11} Lasky, \textit{From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration} (pt. 1), 1 ROCKY MTN. L. REV. 161, 188 (1929) [hereinafter cited as Lasky].


\textsuperscript{13} 6 WATERS AND WATER RIGHTS § 530, at 507 (1972).

\textsuperscript{14} Many states have a provision for statutory proceedings but do not use it regularly. As an example, Nevada has a statutory proceeding, NEV. REV. STAT. § 533.090 (Repl. 1973), which permits an administrative determination of the relative rights of claimants to water of a stream or stream system. That procedure provides for an appeal through the state courts. See NEV. REV. STAT. §§ 533.160-210 (Repl. 1973). However, most proceedings are filed as quiet title actions to adjudicate the relative rights of various claimants to divert water for various specified uses. This is the usual procedure under Nevada water law. Problems similar to those occurring in quiet title actions may arise in applying the bar to further action to statutory proceedings authorized by most western states. This article does not address those types of proceedings.

\textsuperscript{15} Lasky, \textit{supra} note 11, at 189-90; see also Stone, \textit{Are There Any Adjudicated Streams in Montana}, 19 MONT. L. REV. 19 (1957).
becomes available for man's use in streams and groundwater basins. It comes in flood flows and summer trickles, wet years and dry years, and sometimes not at all during periods of drought. It comes from different sources, both ground and surface, at greatly different speeds and at different times of year. The use of return flows and the rules against waste, etc., all complicate the decision on how to provide for the maximum use of this vital resource and still provide a measure of certainty to the water user.

Differences also occur as a result of the nature of quiet title proceedings adjudicating relative rights to the use of water. Except in limited cases, such as the small watershed completely within one state, the quiet title form of stream adjudication cannot adjudicate all of the subject matter—i.e., relative rights and priorities to the use of water—among all of the claimants from the headwaters of the stream to the sea. All these considerations—plus the vast numbers of necessary parties to the proceedings, the lack of information concerning the hydrologic relationship between the surface and the groundwater in the particular area under consideration, the absence of the court's jurisdiction over water in another state, and the limitation of the appropriation doctrine to waters diverted from the stream as differentiated from instream water uses—have caused some writers to call quiet title actions inadequate and to describe their results as "ludicrous."

Quiet title proceedings vary from state to state depending upon the various provisions of state law. The use of this type of proceeding has been widespread, however, and much information can be gained from the various state courts as to what issues the adjudications do or do not decide and how the bar to further action has been applied to those issues which might have been decided but were not. This article will look at the kinds of issues that might have been but were not decided in various quiet title proceedings concerning water rights and will examine whether the bar to further action should be applied to the later litigation of such issues. As part of this effort, the author will discuss whether claims for instream uses of waters in rivers such as the Truckee River are barred because they might have been adjudicated in a prior proceeding. The decisions of the various

16. Id.
17. Lasky, supra note 11, at 190.
state courts will be cited with some emphasis on the state of Nevada.19

III. RES JUDICATA IN WATER RIGHTS LITIGATION

The doctrine of res judicata has two parts. The first, which applies to repetitious suits involving the same cause of action, is based upon considerations of judicial economy and the need for certainty in legal relations.20 This is the general rule of res judicata, which provides that:

[W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."21

Thus, any subsequent litigation on the same cause of action may be barred.

But where the parties subsequently litigate a different cause or demand,

[T]he judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." ... [T]he parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. ... In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel.22

This principle has been restated recently by the United States Supreme Court.23

In water adjudications using quiet title proceedings, the courts have adopted a narrow construction of the bar to further proceed-

19. The author uses the state of Nevada, the adjudication of the Truckee River in the quiet title proceeding United States v. Orr Water Ditch Co., In Equity A-3 (D. Nev. Sept. 8, 1944) and the attack made on that decree in the case of United States v. Truckee Carson Irrigation Dist., supra note 8, as an example because the issues of that case are, in his opinion, illustrative of the situation on other streams in other areas. Reference to testimony and exhibits herein refers to the testimony and exhibits in that case.
21. Id., quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).
22. Id. at 598, quoting Cromwell v. County of Sac, 94 U.S. at 353.
The root of this view, after adoption of the appropriation doctrine by western states, occurs in *Union Mill & Mining Co. v. Dangberg.*\(^2\)\(^4\) There the court said:

> The decrees in the former suits, being final and unreversed, are res judicata of the subject-matter of the suits as then decided, between the parties thereto and their successors in interest. This is true whether the courts based their opinions and decrees upon a correct or an erroneous view, either of the law or of the facts. They are not conclusive as to matters which might have been decided therein, but only as to such matters as were in fact decided, within the issues raised by the pleadings.\(^2\)\(^5\)

It is pertinent to recognize that there were times when the courts used the injunctive language of a prior decree to deny a litigant the opportunity for a second suit on some separate issue that might have been litigated in the prior proceeding. An example is the Montana case of *Kramer v. Deer Lodge Farms Co.*\(^2\)\(^6\) The court held:

> The doctrine of res adjudicata applies to water cases. The final decree of 1892 is binding and conclusive between all the parties to the suit and their privies and successors in interest, as to all matters adjudicated therein and as to all issues which could have been properly raised irrespective of whether the particular matter was in fact litigated.\(^2\)\(^7\)

However, Justice Morris in that case dissented in part and was joined by two other justices on the point concerning what could have been litigated. According to the dissenters, the majority opinion went "beyond the better reasoned rule and the one generally accepted. . . . It is only issues properly brought within the pleadings in the particular case and determined by the decree that are res adjudicata in a subsequent action between the same parties."\(^2\)\(^8\) It is important to note that with the joinder of the two dissenting justices, Justice Morris' position on this question becomes the majority position of that case.\(^2\)\(^9\)

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\(^1\) 81 F. 73 (C.C.D. Nev. 1897).
\(^2\) Id. at 116.
\(^3\) 116 Mont. 152, 151 P.2d 483 (1944).
\(^4\) Id. at 151 P.2d at 484.
\(^5\) Id. at 151 P.2d at 493.
\(^6\) Professor Albert W. Stone called the *Kramer* case "an aberration, an example of treating an adjudication as broad, firm and conclusive, and an exception to the usual narrowness and inconclusiveness of a decree." He then goes on to describe the usual pattern which in effect rejects barring those things which might have been litigated. Stone, *Montana Water Rights—A New Opportunity,* 34 MONT. L. REV. 57, 65 (1973).
Perhaps the most careful refinement in distinguishing those issues that might have been litigated in water adjudication suits that are subject to the bar against further litigation from those that are not appears in *Bijou Irrigation District v. Weldon Valley Ditch Co.* In that case, the plaintiffs filed an action against the defendant irrigation district alleging the abandonment of part of the water right. Judgment was given for the plaintiffs and the defendant appealed. The defendant claimed that by the introduction of extrinsic evidence it could prove that the court, in a previous decree, had passed on the facts or issues upon which the plaintiff had based its case. The Colorado Supreme Court reversed, holding that the defendant had been entitled to a hearing on the particular issue. In reaching its decision, the court stated:

It is well settled that questions litigated in one action may not be again litigated by the same parties in another action, and whether or not they were litigated in the first action may be shown by extrinsic evidence, under proper allegations in the plea, if such fact does not appear from the record. There is a recognized difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment is a bar, not only as to matters offered and received to sustain or defeat the claim or demand, but as to other admissible matters which might have been offered for that purpose. Where there is a second action between the same parties, but upon a different demand, the estoppel operates only as to those matters in issue or points controverted upon the determination of which a finding or verdict was rendered.

Thus the court had to determine whether the later suit was based on a "different claim or cause of action." In making its determination, the court posed the issue as "whether or not in the diversion suit the same facts, relied upon here to show abandonment, were controverted, and examined and passed upon by the court." Similarly, the Supreme Court of Oregon in *Masterson v. Pacific Live Stock Co.* explained that in order for a judgment to be a bar against further action, "it must appear either upon the face of the record or by extrinsic evidence that the same matter was in issue and determined in the previous action. It is not enough that the matter

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30. 67 Colo. 336, 184 P. 382 (1919).
31. *Id.* at ——, 184 P. at 385.
32. *Id.*
33. 144 Or. 396, 24 P.2d 1046 (1933).
was in issue, but it must clearly appear to have been adjudicated.”

To determine what was adjudicated in order to apply the bar to further litigation, the Colorado Supreme Court has stated: “The best and most accurate test . . . is whether the same evidence would sustain both [judgments], and if it would the two actions are the same, and this is true, although the two actions are different in form.”

That same court, in the case of Henderlider v. Canon Heights Irrigation & Reservoir Co., pithily commented:

A decree is not woven of thin air; it is a determination of a specific issue presented to the court. It is grounded on the facts creating that issue; and, where construction is necessary, it must be construed in the light of the facts which gave it birth and limited by the issue it resolved.

This principle has a significant impact when applied to instream flows.

IV. LIMITATIONS ON THE BAR TO FURTHER LITIGATION

A better understanding of the limitations placed by courts on the bar to further litigation in water cases may be obtained from a discussion of some of the specific issues which the courts have held were not subject to the bar. Then the issue of instream flows will be added to the list and compared to see if it is entitled to the same treatment.

There are many issues that might have been adjudicated in a given proceeding which the courts have held were not barred from further litigation. The following discussion covers some of them.

Inchoate or Conditional Water Rights

In many decrees there are some rights which have not yet been perfected; the water user is in the process of putting the water to beneficial use but has not completed the project. Nevertheless, the court recognizes the right and includes it in the ladder of priorities. The measure of the right is usually stated in very general terms.

Moses Lasky, in a discussion of conditional decrees and adjudication of water claims which had been initiated but not completed, stated:

34. Id. at ___, 24 P.2d at 1049.
37. Id. at ___, 185 P.2d at 327.
Frequently, when at the time of adjudication claims had been initiated but not completed nor the greatest amount of water to be used yet applied to beneficial use, the court gave a conditional decree; i.e., fixed the date of the priority and the maximum amount of water allowed to the claimant, the actual amount to become absolute being conditioned on beneficial application with due diligence in a reasonable time, if ever or if any.38

When such conditional decrees occur a collateral attack may be brought by anyone in an independent action or suit in equity at any time for the purpose of defining the limits of the water right vis-a-vis the other water rights in the watershed.39

A conditional provision in a decree may permit the diversion of water for the purpose of developing lands not yet irrigated. In discussing whether or not such a provision can act as a bar under the doctrine of res judicata, the Supreme Court of Oregon held: "Rights not complete at the time the decree is rendered, the work being still in progress, are left open by the decree. The decree is not res judicata as to them."40 In an early case, the Colorado Supreme Court held that any right obtained under the conditional provisions of a decree constitutes an inchoate right or interest.41

As an example, the Orr Ditch Decree entered in the adjudication of the Truckee River42 allocated 232,800 acre-feet of water to the Newlands Project, a federal reclamation project. That project had irrigated up to 72,000 acres over a 70-year period but has never served more than about 63,000 acres in one year. The realities of the

38. Lasky, supra note 11, at 196.
40. Masterson v. Pacific Live Stock Co., 144 Or. 396, 399, 24 P.2d 1046, 1049 (1933).
41. In Drach v. Isola, 48 Colo. 134, 137, 109 P. 748, 751 (1910), the court said:
   When the decree was entered, defendants had a ditch with a carrying capacity of 3.2 cubic feet of water per second of time; ... they had land which, if irrigated, would require that amount of water, but had brought under irrigation not to exceed 80 acres, and had, therefore, applied to beneficial use not over 1.6 cubic feet of water per second. Under these circumstances, the court was without authority to decree an absolute right to a greater amount than was then actually applied to beneficial use. An absolute decree for more would, at least, be voidable, if attacked in appropriate proceedings brought within proper time.
Nevada has embraced the same principle. See Prosole v. Streamboat Canal Co., 37 Nev. 154, 158, 140 P. 720, 724 (1914) (holding in effect that where a canal company diverted water for distribution among farmers, the appropriation was not complete until the application of the water to the land had occurred). Concerning this subject, see also 3 KINNEY ON IRRIGATION AND WATER RIGHTS §1577, at 2811 (2d ed. 1912); 2 S. WIEL, WATER RIGHTS IN THE WESTERN STATES §1233, at 1137-38 (3d ed. 1911).
physical situation make it clear that the project cannot ever serve the 232,800 acres mentioned in the decree. Thus, those conditional provisions of the decree cannot be used as a basis for asserting the bar against further litigation.

Another issue related to inchoate water rights that remained undecided by the Orr Ditch Decree was the number of acres in the project which had established water rights by applying the water to beneficial use within a reasonable time after inception of the project. Those areas actually irrigated would appear to be covered by the doctrine of relation back.43 The claimed date of priority of the project was 1902.

What constitutes a reasonable time within which water must be applied to beneficial use is different in each case.44 However, whether the doctrine of “relation back” is applicable to the water rights of reclamation projects and how the water for the project is affected by delay in applying the water to beneficial use for a period longer than 40 or 50 years are matters upon which the author ventures no opinion at this time. Nevertheless, that matter certainly should not be closed by the doctrine of res judicata or collateral estoppel.

Demonstrably Excessive Claims to Water by Some Parties in a Decree

Closely akin to the claims for water made in a conditional decree is the attempt of some, when faced with an adjudication proceeding, to assert a right to use the maximum amount of water possible under all circumstances. They trust to luck to be able to prove beneficial use of the water if ever challenged. This opportunity in water adjudications leads to excessive water claims.45 When those claims are incorporated into a decree, the benefit of the bar against further proceedings is greatly weakened and sometimes lost.

43. NEVADA STATE ENGINEER & DEPT OF AGRICULTURE, NEVADA LAW OF WATER RIGHTS 15 (1955) states:
   The principle of relation back was established early in the judicial history of water rights in Nevada. If the work of construction facilities, diverting and using water, is prosecuted with reasonable diligence, the date or priority of the right relates back to the time when the first step was taken to obtain the right. Ophir Silver Mining Company v. Carpenter, 4 Nev. 534, 543-544 (1869). If, however, the work is not prosecuted with reasonable diligence, then the priority of the work does not relate back, but generally dates from the time when the work is completed or the appropriation fully perfected.


45. Lasky quotes numerous comments by authors of the time condemning the practice of making excessive claims to the use of water in water suits and deploiring the litigation it engendered. Lasky concluded, “instead of a cesser of litigation, we find an enormous increase.” Lasky, supra note 11, at 196-97.
An example of an excessive claim is contained in the Orr Ditch Decree. The enormity of the Newlands Project's claim of a water right to irrigate 232,800 acres of land with 1500 cubic feet per second of water is highlighted by comparing the language of the decree where it describes the water right for the irrigation of lands on the Pyramid Lake Indian Reservation with the language describing the water right for the Newlands Project. The Orr Ditch Decree in Claims No. 1 and 2 very carefully establishes each element that can limit a water right for the irrigation of Indian lands, but when it describes the water right of the Newlands Project in Claim No. 3, the right to use water is stated in the broadest possible terms, and excessive amounts of water are claimed for the irrigation of vast amounts of land which are not susceptible to productive irrigation. The bar against further litigation should not be used to prevent correction of these situations.\footnote{46}{New Mercer Ditch Co. v. Armstrong, 21 Colo. 237, 40 P. 989 (1895).}  \footnote{47}{The Sept. 8, 1944 Orr Ditch Decree was stipulated, following the adoption of the 1935 Truckee River Agreement by the Department of the Interior and the major water users on the river.}

The harm from this situation arises when a water user is permitted to divert water based upon the capacity of his ditch and not upon the effective, reasonable water requirements of the land actually served. The broad general language of decrees like Claim No. 3 in the Orr Ditch Decree does not furnish the tools for effective administration and should be subject to challenge for that reason alone.

Many court decrees which contain the conditional water rights are stipulated decrees entered by the court after agreement is reached between the parties.\footnote{48}{The bar to further litigation is an equitable doctrine which should not be applied if an inequitable result would occur. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 230, 537 P.2d 1250, 1273, 123 Cal. Rptr. 1, 24 (1975).} Courts should be careful in applying the bar of res judicata or collateral estoppel to the provisions of stipulated decrees. Frequently, the political and economic power of the parties in the negotiations may not be equal, and the resulting stipulation may reflect a bias which favors the economically or politically more powerful party. Equity requires that the bar to further proceedings not be used to perpetuate the bias.\footnote{48}{The bar to further litigation is an equitable doctrine which should not be applied if an inequitable result would occur. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 230, 537 P.2d 1250, 1273, 123 Cal. Rptr. 1, 24 (1975).}

A Decreed Right for the Irrigation of Lands That Identifies Two Sources of Water but Does Not Determine How Much Water Is To Be Diverted from Each Source

Water for the Newlands Project is obtained from both the Carson and Truckee Rivers. The Carson River empties directly into Lahon-
tan Reservoir and the waters of the Truckee River are transported over the divide from the Truckee River watershed by the Truckee Canal to that same reservoir. These waters are used to irrigate the lands of the North and South Carson divisions of that project.

The decree on the Carson River watershed is a temporary restraining order dated June 9, 1949. It was issued in United States v. Alpine Land and Reservoir Company, et al. That decree provides for irrigation of all the lands in those two divisions from the Carson River. The Orr Ditch Decree assumes that all lands will be irrigated with Truckee River water. It sets a different duty of water from that set in the Carson River Decree.

There is nothing in either decree which identifies how much water is to be taken from either source or how many acres of land are to be irrigated with the water from each river. The Truckee-Carson Irrigation District is attempting to irrigate approximately 60,000 acres from the waters of both rivers which are stored in that reservoir. Surely there is no bar to the determination of such an unresolved issue in connection with determining the amount of water that can legally be diverted from the Truckee River. That legal proposition should be particularly true in view of the Nevada statutes which prohibit the diversion of excess water from streams in the state.

Under similar circumstances the state of Oregon, the supreme court of that state held that the bar to further action did not apply. In that case the decree had given waters from two creeks to irrigate a single block of land without deciding how much water could be taken from each creek or how much of the land was to be irrigated from each source. The court said:

We take the decree in the adjudication pleaded as a verity as far as it goes. That leaves the question of how much water should be taken from Cottonwood creek and how much from Otis creek under the award to the Pacific Live Stock Company, with the priority of 1884, 165 acres, still to be determined.

The court held that the decree was a bar to further action only on those matters that it actually decided, such as date of priority, and not as to matters that might have been decided, such as the amount of water to be diverted from each source.

52. Id. at ____, 24 P.2d at 1049.
Use of Water Before and After the Irrigation Season

Ordinarily a decree permitting the diversion of water for the irrigation of agricultural land does not prevent the appropriation and use of the water in the stream before and after the irrigation season through the balance of the year.\(^5\)\(^3\) Hence, those water uses that occur outside of the irrigation season, such as instream flows used for the preservation of a fishery, have an excellent opportunity to establish a right during that period which will not interfere seriously with decreed rights. However, some decrees do not limit the water right to the natural irrigation season in the area.\(^5\)\(^4\) In those cases, an attack under the beneficial use requirements of the decree in order to prevent the waste of water should have a reasonable degree of success.

Insofar as the Orr Ditch Decree is concerned, the right of those parties diverting water from the Truckee River is limited to that amount required to meet their reasonable and economical requirements for beneficial use. The decree provides:

Except as herein specially provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water herein-before allowed are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.\(^5\)\(^5\)

While this provision appears to leave some latitude on the subject of non-irrigation season diversion, Nevada statutes do not. The Nevada statutes which govern the appropriation of water provide that the balance of the water in a stream above the reasonable and economical requirements of existing rights shall not be considered as having been appropriated by the holder of such rights, but that the water shall be left in the stream.\(^5\)\(^6\) The Supreme Court of Nevada

\[\text{References}\]


54. The natural irrigation season is defined as that period during which the crops are growing and in need of water to sustain that growth. It is ordinarily identified in the reports of the Soil Conservation Service of the Department of Agriculture for each area as the period of recommended irrigation. The practice of some farmers to irrigate late in the fall and early in the spring to improve the water content of the soil is not an efficient water practice in most areas. See DEP'T OF INTERIOR, DRAFT ENVIRONMENTAL STATEMENT OF THE PROPOSED OPERATING CRITERIA FOR THE LOWER TRUCKEE-LOWER CARSON RIVER BASINS (1977).

55. Orr Ditch Decree, supra note 47.

has determined that other appropriators are entitled to appropriate and divert waters in excess of quantities to which prior appropriators are entitled.\textsuperscript{57} Since beneficial use is the basic measure and limit of the right to the use of water,\textsuperscript{58} a prior appropriator cannot prevent others from using the surplus above his own economical and reasonable needs.\textsuperscript{59}

\textit{Waste}

The other side of the coin in enforcing effective beneficial use is the prevention of waste. The Nevada statutes are specific in declaring the waste of water to be unlawful.\textsuperscript{60}

The report prepared for the Pyramid Lake Task Force by Clyde-Criddle-Woodward, Inc., on the diversion of water from the Truckee River for use in the Newlands Project\textsuperscript{61} stated that the average spill of water from the Lahontan Reservoir for the years of record was 39,000 acre feet of water per year. That calculation was based upon the Bureau of Reclamation's reconstruction of the 1918-1970 flows. The United States Geological Survey Report by Howard Mathai\textsuperscript{62} demonstrated that the average flow of the Truckee River for the total period of record, 1900-1974, was substantially greater than the Bureau of Reclamation's calculation. However, there has been no record made of the diversions from the Truckee River prior to 1967. Therefore, we do not know how much of the flood flow of the Truckee River has been taken to Lahontan Reservoir and spilled in years past. But we do know that during the period 1967-1974, an average 44,000 acre foot spill (or "precautionary drawdown," in the language of the Bureau of Reclamation) occurred annually at Lahontan Reservoir.\textsuperscript{63} Some of the water spilled from that reservoir may

\begin{footnotes}
\footnote{57. Anderson Land & Stock Co. v. McConnell, 188 F. 818 (C.C.D. Nev. 1910); Twaddle v. Winters, 29 Nev. 88, 85 P. 280 (1906), \textit{aff'd on rehearing}, 89 P. 289 (1907); Walsh v. Wallace, 26 Nev. 299, 67 P. 914 (1902).}
\footnote{58. NEV. REV. STAT. \textsection 533.035 (Repl. 1973); 6 WATERS AND WATER RIGHTS \textsection 514.4 (1972), where the limitation to beneficial use is fully explained and annotated.}
\footnote{59. Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917); Doherty v. Pratt, 34 Nev. 343, 124 P. 574 (1912); Roeder v. Stein, 23 Nev. 92, 42 P. 867 (1895).}
\footnote{60. NEV. REV. STAT. \textsection\textsection 533.460, .530 (Repls. 1977, 1973).}
\footnote{62. A report of the U.S. Geological Survey by H. Mathai, "Long Term Flow of the Truckee River in California and Nevada," 1974, Menlo Park Regional Office, Menlo Park, California, shows an average flow of 680,000 acre feet per year whereas previous reports had used the figure of 479,400 acre feet per year. See also DEPT OF INTERIOR, DRAFT ENVIRONMENTAL STATEMENT OF THE PROPOSED OPERATING CRITERIA FOR THE LOWER TRUCKEE-LOWER CARSON RIVER BASINS II-102 (1977).}
\footnote{63. \textit{Id.} at II-96.}
\end{footnotes}
have been beneficial to the Stillwater Wildlife Refuge, but the majority was wasted.

More significant was the report of Claude Dukes, watermaster under the Orr Ditch Decree, which established that large amounts of water in excess of the decreed rights have historically been diverted from the Truckee River and circulated through the ditches in the Truckee Meadows during the irrigation season. Some of the excess diversions were the result of urban sprawl encompassing irrigated lands without a reduction in the amount of water diverted. Mr. Dukes testified that no attempt was made to control the diversion in the Truckee Meadows except in times of water shortage and that, to his knowledge, over 200,000 acre feet per annum was often diverted to meet a current decreed demand of 67,000 acre feet per year. Diversion to ditches in that area had been regulated to their decreed amounts in only three months since the entry of the decree in 1944. Even though some of that water returns to the Truckee River, a substantial amount is lost.

The historic practices of diverting an excessive amount of Truckee River water to Lahontan Reservoir and diverting excess water through the ditches in the Truckee Meadow were wasteful in the extreme. Those practices were a violation of Nevada law. Because of that waste, when an attempt is made to preserve instream flows in the Truckee River it appears reasonable to assert that the issues concerning the reasonable requirements of effective beneficial use and the elimination of waste in the Truckee River watershed and in the Newlands Reclamation Project should not be barred by the doctrine of res judicata or collateral estoppel. Another action can be maintained to try those issues and to keep the resulting flows in the Truckee River by enforcing the Nevada law on waste.

In the Dangberg case, the federal court set aside three previous decrees on the Carson River which had adjudicated various amounts of water to parties in the suit based on the application of the riparian doctrine. The court held that the amounts of water so adjudicated were wasteful and that adoption of the principles of the appropriation doctrine required such waste to be eliminated. In reaching its decision, the court placed great weight upon the need to conserve water in arid regions.

64. NEV. REV. STAT. §§ 533.045, .060(1) (Repl. 1973) (on diversion limitations); id. § 533.035 (on beneficial use); id. §§ 533.460, .530 (Repl. 1977, 1973) (on penalties for waste).
65. See generally Union Mill & Mining Co. v. Dangberg, 81 F. 73 (C.C.D. Nev. 1897).
66. Id.
Rights of Water Users on Unadjudicated Tributaries, Users of Groundwater, and Users Upstream and Downstream from the Adjudicated Area

An adjudication proceeding such as a quiet title action is a finite thing. It must by its nature be limited to a specific area of a given stream that is placed in issue by the pleadings and that is within the jurisdiction of the court. The water rights of persons outside the adjudicated area or from a source within the area which was not adjudicated should not be barred.

At the time of the proceedings leading up to the Orr Ditch Decree, there were a substantial number of water users diverting from the Truckee River, its tributaries, and from Lake Tahoe (the source of the Truckee River) who were not parties to the Orr Ditch proceedings. These water users may be divided into two groups:

Group 1. Those water users whose use was located in the state of Nevada, including the users on the tributaries to the Truckee River not listed in the decree and those who lived in Nevada around Lake Tahoe.

Group 2. The water users from the Truckee River, its tributaries, and the Lake Tahoe area who were located in the state of California. The court in the Orr Ditch Decree had jurisdiction over both the water and water users in the first group, but those persons and their rights were not addressed in the litigation. Since a quiet title suit is local and not transitory, the federal court in the Orr Ditch proceedings did not have jurisdiction over the water of the Truckee River tributaries or of Lake Tahoe located in the state of California, as long as the California users of that water did not appear in the Nevada court.

With respect to the first group, the law is clear that the equal right of the residents of both California and Nevada to divert water from

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67. See Lynch v. Kempt, 4 Cal. 2d 440, 49 P.2d 817 (1935), wherein the court held that the issues in water adjudication cases are limited to those things placed in issue by plaintiff's complaint and counter-claims of the defendant, if any.

68. The Truckee River flows out of the top six feet of Lake Tahoe. Any use of water out of that lake or any use of water from any of the tributaries will have a direct effect upon the amount of water available in the Truckee River for use by the parties to the Orr Ditch Decree. This effect will be particularly important during periods of drought. A review of the Orr Ditch Decree reveals that none of the water users on the tributaries not listed or around Lake Tahoe were included as parties.

69. See Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co., 245 F. 30, 35 (9th Cir. 1917); Rickey Land & Cattle Co. v. Miller & Lux, 152 F. 11 (9th Cir. 1907), aff'd, 218 U.S. 258 (1910); Anderson v. Bassman, 140 F. 14, 15, 20-21 (N.D. Calif. 1905).

70. Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9, 25-29 (9th Cir. 1917).

71. Id.
an interstate stream such as the Truckee River must be recognized. But persons on one side of the boundary line have no right to divert waters of the stream to the injury of those on the other side of the boundary.\textsuperscript{72} Where a person or his predecessor was not a party to an earlier adjudication and his water rights were not part of the adjudicatory process, then any action that would delegate that person's water right to an inferior position with respect to other water users on the stream would deprive him of a property right without due process of law.\textsuperscript{73} With respect to the second group, the courts in the state of Nevada had no jurisdiction. Therefore, the Orr Ditch Decree is not a bar to the adjudication of either the priority or the measure of the water rights of either the first or the second group. Any attempt to subject those rights to that bar would deprive those water users of their property rights without due process of law.

\textit{Changes in Place and Nature of Use}

The bar against further proceedings in decrees issued through water adjudication suits does not preclude redetermination of the amount of water which a transferee can remove from the stream when the water is separated from the land and the nature of the use is changed. In those circumstances, the right received by the transferee is limited to the actual historical use in the hands of the transferor. The provisions of the decree setting the amount of the water the transferor could have used are not protected by res judicata or collateral estoppel in a proceeding between the transferee and third parties having an interest in the water.

In the case of \textit{City of Westminster v. Church},\textsuperscript{74} the City of Westminster acquired certain water rights which had been subjected to agricultural use. The amount of the water rights had been established in various decrees, including a 1958 decree in which both present parties had participated. When sued, the city contended that the 1958 decree was a complete bar to the suit.

The court disagreed. It held that res judicata constituted an absolute bar only when there is in both the prior and subsequent suits identity of subject matter, identity of cause of action, identity of parties to the action, and identity of capacity of the persons for which or against whom the claim is made. The court explained that the subject matter of that action was clearly a different cause of action that had not been presented in the prior proceeding. Then the court said:

\textsuperscript{72} Anderson v. Bassman, 140 F. 14 (N.D. Calif. 1905).
\textsuperscript{73} State ex rel. Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935).
\textsuperscript{74} 167 Colo. 1, 445 P.2d 52 (1968).
Where an owner of decreed rights, after obtaining a decree permitting a change in point of diversion, enlarges or attempts to enlarge the use of his water rights to the injury of other appropriators, the permissive decree does not bar relief to the latter.\(^5\)

The court stated that the municipality had the legal right to devote its acquired water rights to municipal uses, provided that no injury accrues to the vested rights of other appropriators.\(^6\)

The court recognized that the principal danger attending the municipality's altered use was that the city would attempt to use a continuous flow where the city's grantor only used the water for intermittent irrigation, and that such action by the municipality would enlarge its use of the water to the full extent of the decreed right, regardless of historical usage. To protect against the possibility of such extended use of the water rights, courts should impose conditions on the change of use and the point of diversion sufficient to protect the rights of others. The court noted that it had upheld such restrictive positions in numerous cases.\(^7\)

In the Pyramid Lake case, the Sierra Pacific Power Company held a substantial number of water rights transferred to it by persons who had used the water for agricultural purposes in the vicinity of the expanding city. These were acquired as the city population expanded into agricultural land. Sierra Pacific claimed the full amount of water decreed to the prior owner.\(^8\) The cases cited above have limited the amount of water that could be transferred to the historical consumptive use that occurred while the water was being used by the transferor. Those cases held that junior appropriators had a right to the return flows. Therefore, one of the issues that could reduce the diversions from streams and is not subject to the bar against further litigation is the question of the amount of historical consumptive use by the transferors of a water right when there are return flows to the ground water basin or to surface streams. These other rights may not be jeopardized or diminished by the transfer.\(^9\) In cases where the diversion by the transferee is limited to the consumptive use of the transferor, the difference between the diversions by the transferor and the transferee will result in less diversion from the stream.\(^10\) This increase in stream flows has

\(^{75}\) Id. at ----, 445 P.2d at 55.

\(^{76}\) Id. at ----, 445 P.2d at 58.

\(^{77}\) Id.

\(^{78}\) Testimony of Mr. Leighton, Engineer for Sierra Pacific Power Co., Pyramid Lake case, supra note 8.

\(^{79}\) 1 HUTCHINS, WATER RIGHTS IN THE 19 WESTERN STATES 631 (1971).

\(^{80}\) Whether or not the transferee is entitled to credit for his return flows from the new use, usually at a different place and amount, is a subject of unresolved controversy in most states.
some interesting possibilities where a claim for instream flows can be enforced.

**Matters Not Intended To Be Covered by Injunctive Language in the General Provisions of a Decree**

The Orr Ditch Decree adjudicated the rights to divert water from the Truckee River for certain specific uses. In order to understand what was decided and what water uses, if any, were barred by the injunctive provision of the decree, it is necessary to consider the decree as a whole. The injunctive provisions of that decree read as follows:

The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree, and each and all of said parties, persons, corporations, intervenors, agents, attorneys, servants, assigns and successors in interest; and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Truckee River or its tributaries or with water of any of the creeks or streams, or with any of the other waters hereinbefore mentioned, so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree, having due regard to the relative priorities herein set forth; and each of the said parties and persons and each of their agents, servants, attorneys and employees is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner, or at any time so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree, as herein set forth, until such persons or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them. 81

When considering the effect of this type of injunctive provision barring further proceedings on the right to the use of water, the courts have held that it is necessary to consider the decree as a

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whole.\textsuperscript{82} To achieve a consistent interpretation, the facts and circumstances surrounding the litigation of the issues of the decree may be supported by extrinsic evidence.\textsuperscript{83} Where possible, the decree is to be interpreted in that manner which will make all of its provisions consistent.\textsuperscript{84}

Careful consideration of the Orr Ditch Decree demonstrates how the decree was intended to be a bar to further litigation only as to those things which were actually decided therein and not as to those things which might have been litigated. The salient points are as follows:

(1) The final provision of the decree reads as follows:

The foregoing adjudications set forth in Claims Numbers 1 to 744, inclusive, of this Decree are based upon conditions existing at or prior to the entry of said Temporary Restraining Order herein on February 13, 1926: and such adjudication shall not be deemed to limit, reestablish, or otherwise affect any rights acquired, created or lost subsequently thereto by conveyance, transfer, abandonment, non-user, contract (including said Truckee River Agreement) or otherwise, but the rights of the United States shall be as herein adjudicated as of the date of this decree save only as the same may be affected by said Truckee River Agreement.\textsuperscript{85}

The proviso makes it clear that the rights to divert water determined in that decree in 1944 are based upon the conditions existing at or before February 13, 1926, and no right to the diversion of water from the Truckee River acquired, created, or lost thereafter was either established or affected in any manner. This proviso specifically includes the Truckee River Agreement.\textsuperscript{86} Thus, it is clear that such

\textsuperscript{82} Drach v. Isola, 48 Colo. 134, 109 P. 748 (1910).
\textsuperscript{84} 46 AM. JUR. 2d Judgments § 73, at 363 (1969) states:

\textquote{In construing a judgment, it should be examined and considered in its entirety. Such construction should be given to a judgment as will give force and effect to every word of it, if possible, and make it as a whole consistent and reasonable. In applying this rule, effect must be given to that which is unavoidably and necessarily implied in a judgment, as well as to that which is expressed in the most appropriate language.}
\textsuperscript{85} Orr Ditch Decree, supra note 47.
\textsuperscript{86} Why the right of the United States to divert its water under Claims No. 1, 2 and 3 is established on a different date from other water users is peculiar. Nevertheless, it is clear that no rights with respect to the Truckee River Agreement were adjudicated in the decree. If the court had done so, the decree would have been inconsistent. The diversion rights of the various parties set in Section VII of that agreement are substantially different from the diversion rights in the decree. Inconsistent decrees are subject to further litigation or reversal or modification. Pacific Livestock Co. v. Ellison Ranching Co., 52 Nev. 279, 296, 286 P. 120 (1930); 3 KINNEY ON IRRIGATION AND WATER RIGHTS § 1577, at 2811 (2d ed. 1912).
claims, including those based on the Truckee River Agreement, are not established or barred by the decree, but are simply undetermined.\textsuperscript{87}

(2) The court recognized that there were other users of water from the stream than those persons who were parties to this proceeding, and it sought to protect the rights of such parties by the inclusion of the following provision: "When any other user will thereby be deprived of any part of the water to which he is entitled, no ditch owner or user shall be allowed to divert away from the stream extra water for regulating the flow in any ditch." If the court had been limiting its protection to those water users who were parties to the decree, it would have identified them with the language that it used in the preceding and the following paragraphs, such as "the person or party entitled to use under this decree." This provision is consistent with the requirements of the Nevada statutes that restrict the diversion of water from streams to the reasonable economic requirements of beneficial use.

(3) Part of the decree reads: "In any case where water is obtained from two or more sources, the aggregate amount of the combined waters from such sources which may be used, shall not exceed the amount required for such use as herein determined." By this proviso, besides preventing waste, the court recognized that it had not adjudicated the rights to use water as those rights are affected by the other sources of water such as:

- The groundwater as it affects the flows of the Truckee River.
- The relative rights to the flows of the Truckee River as it is commingled with the flows of the Carson River in Lahontan Reservoir to irrigate the lands of the Carson Division.
- The rights on unadjudicated tributaries of the Truckee River.

(4) The most significant provision concerning what the decree did and did not decide is contained in the following paragraph:

Whenever in this decree words of ownership are used in connection with any irrigated lands, such words shall not adjudicate, determine or affect any property rights therein, and this decree does not and shall not in any way determine the title to or rights in any property whatsoever, other than the rights to the diversion and use of water as herein determined and established. In the cases where, by this de-

\textsuperscript{87} When the defendants claim that all the waters of the Truckee River have been adjudicated, they are really relying upon the provisions of the Truckee River Agreement and not the Orr Ditch Decree.
\textsuperscript{88} Orr Ditch Decree, supra note 47.
\textsuperscript{89} NEV. REV. STAT. §§ 533.045, .060(1) (Repl. 1973).
\textsuperscript{90} Orr Ditch Decree, supra note 47.
cree, water is allowed to be diverted through any ditch by the owner thereof for another party the conditions of any contractual relations existing between them are not hereby determined.91

The Nevada Supreme Court makes it clear that a water right under Nevada law is in the nature of realty.92 Further, the instream use of water for the purpose of preserving Pyramid Lake, which is the major natural resource of Pyramid Lake Indian Reservation, is every bit as much a property right under federal law as an appropriative water right is under state law. Indian water rights have also been held to partake of the nature of realty.93 It could be argued that the court may not have had this latter definition of property in mind when it used the language of the decree, but it must be presumed to know the effect of Nevada water law.

The qualification in the above paragraphs is in addition to the first statement in that paragraph, so it does not refer to the title to real estate as such, but refers to all property rights including water rights. The court was specifically limiting the effect of its decree to the diversion rights therein determined and established. In other words, it was not barring anything that might have been decided but had not been determined.

The injunctive provisions cited above which restrict the assertion of any rights in or to the waters of the Truckee River by the parties to that proceeding must be construed in light of the foregoing provisions in order that the total decree will be consistent. If in interpreting the decree res judicata or collateral estoppel is applied against those things that might have been determined, then the above-cited provisions of the decree are inconsistent with the injunctive provision. Further, if the decree is a bar to all further proceedings to determine the use of water from the Truckee River, then the undetermined conditional provisions of the decree—the relationship of water users on the other sources of water that contribute to the waters of the Truckee River, the rights to the use of water before and after the irrigation season, and the instream right to the use of the waters of the Truckee River—could never be addressed because they might have been determined in the original proceeding. That is inconsistent with prevailing law, and such a construction of the decree

91. Id.


should be rejected. On the other hand, if the decree is interpreted so that the bar to further action is applied only to those facts and issues actually decided therein and not to matters that might have been decided, then all the provisions of the decree are consistent.

V. THE ISSUE OF INSTREAM FLOWS

The Orr Ditch Decree, just as most decrees under the appropriation doctrine, adjudicated only the right to *divert* water from the Truckee River. Inquiry reveals that the appropriation doctrine as developed in the West did not recognize the instream use of water as a right that could be protected. 94

At the time of the Orr Ditch proceedings, the diversion of water for beneficial use was required to establish a water right under the law of a state which used the appropriation doctrine. In the case of *Colorado Water Conservation District v. Rocky Mountain Power Company*, 95 the water conservation district claimed that, pursuant to a Colorado statute, water need not be diverted from the natural stream but could be kept in the stream to the extent necessary for the preservation and propagation of fish. It was argued that since the propagation and preservation of fish had occurred for more than 40 years, and since the public had used the area to fish and for recreational activities connected therewith during all this period of time, appropriation had been accomplished by the members of the public and certain state and federal officials. The power company protested the claim and moved to dismiss. The court did so, and the Colorado Supreme Court in affirming stated:

94. The principal ideas in the discussion immediately following were drawn from R. DEWSNUP, *LEGAL PROTECTION OF INSTREAM WATER VALUES* (1971) (Legal Study 8-A for the National Water Commission), wherein Mr. Dewsnup states:

*The law of appropriation was designed to encourage people to withdraw water from the stream and apply it to beneficial uses to promote economic development. This is to be contrasted with the riparian rights system of the East, which was concerned with protecting landowners who held property and quality of the flow—and this automatically resulted in a substantial measure of protection to the natural watercourse, its scenic attractions, and the aquatic life in it.*

But the appropriation regime was a rejection of riparian concepts—a rejection of protection of instream uses. Since water rights were perfected only if water was diverted from and taken out of the stream, even if it was caused to go dry. As a result, it is not surprising that little or no protection was given to natural stream values in the early cases. On the other hand, in view of present day pressures to preserve recreational and environmental values, it is not surprising that marked changes have been brought about in appropriation doctrines—so that some measure of protection of natural stream values is now afforded in most of the states.

Numerous opinions of this court have defined the essential requirements of an "appropriation" of water. . . .

There is no support in the law of this state for the proposition that a minimum flow of water may be "appropriated" in a natural stream for piscatorial purposes without diversion of any portion . . . of the stream. By the enactment of [the statute in question] the legislature did not intend to bring about such an extreme departure from well established doctrine, and we hold that no such departure was brought about by said statute.96

A similar case arose in Montana. The state had enacted a statute intended to protect its highly prized trout fishery waters. In a case involving that statute, the issue was whether the public could acquire a prior right to the stream such as a fishery resource by using it for that purpose, thus preventing subsequent appropriations which would damage the fishery. The court held that such public rights could not be established. The following language expressed the court's views:

The Commission does maintain that the public has a prior right in the waters of the creek which would require DePuy to release some water through a fishladder. The public right urged by the Commission would be based on the fact that the public had used the creek as a fishing stream and natural fish hatchery before DePuy built his dam. . . .

Such a public right has never been declared in the case law of this state.97

The same requirement of diversion exists under Utah law98 and in the state of Nevada.99 The only exception applies to stock watering.100

While the right to instream uses of water was not recognized or adjudicated in quiet title proceedings in the Orr Ditch Decree or under most court proceedings which have applied the appropriation doctrine, instream water rights have been recognized under federal

96. Id. at , 406 P.2d at 799, 800.
98. See UTAH STATE ENGINEER & DEPT OF AGRICULTURE, UTAH LAW OF WATER RIGHTS 48-50 (1965).
Reserved water rights under federal law arise when the federal sovereign withdraws land from the public domain and reserves it for purposes which require the use of water. In *Cappaert v. United States*, the Supreme Court stated:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water... to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. The doctrine applies to Indian Reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

One of the primary authorities cited by the Court was *Federal Power Commission v. Oregon*, also known as the Pelton Dam case. That case is an example of the withdrawal of the lands and the federal reservation of instream water uses. There public lands and the lands of an Indian reservation were withdrawn as an instream power site for a high-rise dam. The Supreme Court held that the water rights for the power project and plans for the preservation or replacement of the runs of anadromous fish utilizing the nonnavigable stream were the subject of federal jurisdiction and would be determined pursuant to federal law. State laws on the subject were held inapplicable.

In the recent case of *United States v. New Mexico*, however, Justice Rehnquist spoke for a divided Court in holding that instream flows for environmental, recreational, or wildlife preservation uses

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101. Those cases discussing the power of the federal sovereign over navigation and associated interests on navigable streams are too well known to require citation here. However, whether the stream is navigable or non-navigable is irrelevant insofar as the creation of a reserved water right for the benefit of a reservation of the United States is concerned. *See Cappaert v. United States*, 426 U.S. 128, 145 (1976).

103. *Id.* at 138.
105. Other examples, such as *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), are pertinent, but the best example is the *Wild and Scenic Rivers Act*, 16 U.S.C. §§ 1271-1287 (1976). This act preserves the free-flowing characteristics of the waters of the wild scenic or recreational rivers which are added to the National Wild and Scenic Rivers Systems. A current case in New Mexico, *State v. Moly Corp. Inc.*, Civil No. 9780 (D.N.M., filed Nov. 2, 1972), is addressing the flows of the Red River. That river was specifically designated as a wild and scenic river in the original act.

were not required to fulfill the primary purpose of the federal sovereign in the creation of the Mimbres National Forest in southern New Mexico.\textsuperscript{108} The dissent in the 5-4 decision made a cogent argument that a forest includes flora and fauna and that water should be reserved for their needs as well as for the growing of trees and the prevention of erosion of the watershed.\textsuperscript{109} But the majority, adopting a narrow view of the primary purpose of Congress in creating national forests, held that instream flows for recreation, fish and wildlife, and environmental uses were necessary only to fulfill the secondary purposes of Congress, and that the United States would be required to comply with the provisions of state law to obtain water rights for the fulfillment of such secondary purposes.\textsuperscript{110} Just how that could be accomplished when New Mexico law does not recognize instream flows as a beneficial use of water\textsuperscript{111} was not discussed. The implication, in view of the references to California \textit{v.} United States,\textsuperscript{112} appears to be that instream flows will be recognized as a water right only if state law recognizes it, unless the primary purpose of the federal sovereign requires instream use of the water or unless there is specific congressional legislation on the subject.\textsuperscript{113}

The Supreme Court in the \textit{Cappaert} case found that waters may be reserved by the United States for the purpose of preserving a fishery.\textsuperscript{114} It held further that, "Federal water rights are not dependent upon state law or state procedures."\textsuperscript{115} How this concept is going to be made consistent with the holding of the court in \textit{United States v. New Mexico} and California \textit{v.} United States is not clear.

In one case concerning Pyramid Lake, the question of whether an instream water right was reserved by the United States for the benefit of the Pyramid Lake and its fishery when the Pyramid Lake Indian Reservation was created was held to be a matter of federal and not state law.\textsuperscript{116} Therefore, application to the precepts of the bar

\textsuperscript{108.} \textit{Id.}
\textsuperscript{109.} \textit{Id.} at 719-24 (Powell, J., dissenting in part).
\textsuperscript{110.} \textit{Id.} at 715. The issue of instream flows for environmental needs was included along with the discussion of water for the needs of fish and wildlife, cattle grazing, etc. as a secondary use subject to state law!
\textsuperscript{111.} While the State Game Commission has general authority for the protection and propagation of fish and game resources in New Mexico (N.M. Stat. Ann. § 17-1-14 (1978)) and recreation and fishing are beneficial uses of water under the New Mexico Constitution, art. 16, a diversion from the stream is required to establish a protected right to such use of water. \textit{See State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).}
\textsuperscript{112.} 438 U.S. 645 (1978).
\textsuperscript{113.} \textit{Id.}
\textsuperscript{114.} 426 U.S. 128 (1976).
\textsuperscript{115.} \textit{Id.} at 145.
against further litigation developed in state law to determine rights to divert water from streams may not be justified where instream flows are established by federal law. The ultimate resolution of that issue is unclear. Even if this distinction exists, however, it does not provide any help when the proceedings involve state law exclusively.

Some of the problems posed by the states’ refusal to recognize instream flows as a beneficial use pursuant to the appropriation doctrine may be solved by the growing trend among the states to provide some degree of environmental protection along watercourses by reversing old rules and recognizing instream flows by legislative action. If recognition of instream flows is to be effective, however, a way must be found to deal with the bar against further litigation that will be asserted as a defense to these claims. The prior discussion in this article shows the basis for arguing that the bar should not apply to litigation over instream flows.

VI. THE INAPPLICABILITY OF RES JUDICATA TO INSTREAM FLOWS

As stated earlier, the way to determine whether the bar to further litigation applies requires an examination of the specific issue and evidence presented to the court in the prior proceedings, for the purpose of comparison to the evidence necessary to prove the new claim. The facts required to prove the needs of spawning fish or the requirements of the flora and fauna in a given stretch of stream are so clearly different from the facts required to prove a right to divert water for agriculture, power purposes, or municipal and industrial uses that instream use must constitute a different claim or cause of action. Therefore, such a claim will not be subject to the bar against further adjudication on a stream system unless it was specifically addressed in the first proceeding.

117. COLO. REV. STAT. §§ 37-82-103 to 105 (1973); UTAH CODE ANN. §§ 73-3-8 to 29 (Supp. 1979); WASH. REV. CODE § 90.22.010 (Supp. 1979). The legislation cited above is an example of the ways in which the various states are attempting to find ways of matching the need to preserve minimum stream flows and protect the environment or ecology of streams within the concepts of the appropriation doctrine. For further discussion of this matter, see R. DEWSNUP & D. JENSEN, STRATEGY FOR PRESERVING INSTREAM FLOW RIGHTS, REPORT TO THE NATIONAL WATER COMM’N (W.E.L.U.T. Project 22, prepared for the United States Fish & Wildlife Service Cooperative Instream Flow Service Group at Colorado State University). That report discusses in detail various possible strategies for preserving instream flows for fish and wildlife uses.

Idaho has recognized an instream use for recreation and scenic purposes as an appropriation, and pursuant to the terms of specific statutes has set aside specified areas as health resorts and recreation areas. No diversion is required. IDAHO CODE §§ 67-4301 to 4312 (Supp. 1979). In State Dep’t of Parks v. Idaho Dep’t of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974), a divided court held that there was no constitutional requirement to divert the water from its natural channel and that recreational and scenic instream values were a beneficial use.
Further, it is easy to see from the previous discussion that many of the exceptions to the bar against further action that were developed in water rights cases can apply to litigation over instream flows. The most important thing to remember about instream flows when a right to such a use is claimed is that in most cases, except for some seepage, evap-transpiration along the stream edges, and evaporation, instream flows are not consumptive uses. After being used to preserve the habitat for a fishery in a given stretch of stream, the same water is available for diversion and use downstream with very little diminution. Many instream flow needs, such as the maintenance of a fishery that needs water for spring-spawning fish, can exercise that right when irrigation demands are at their lowest. In many cases, efficient management of stream systems which results in limiting diversions to the effective beneficial use\textsuperscript{118} will result in a significant increase in the amount of water in parts of some streams. This water should be available for other uses, including instream flows. However, without some action by the states to protect the instream flows, the water saved by limiting present diversions from the streams will be appropriated and diverted by others.

VII. CONCLUSION

Water adjudication suits are a unique type of legal proceeding, in part because of the unique nature of water and the method of administering its use. This uniqueness makes the bar to further proceedings inapplicable in some cases. Quiet title actions in water cases are also subject to certain limitations which restrict the applicability of that bar. Among those issues that are not subject to the bar against further action is instream flows for the preservation of the ecology of a stream bed and its fishery.

Res judicata and collateral estoppel do not constitute a bar to the establishment of instream flows because that issue requires proof of different facts and those facts constitute a separate cause of action.

\textsuperscript{118} In the author's opinion "beneficial use" as used in western water law has been a method of defining the acceptable uses of water. Very seldom have the courts addressed the effective use of water except in the context of the "duty of water"—i.e., the amount of water required to sustain successful agriculture on the land in question. The recent trend in water decrees to establish the amount of consumptive use of each water user as well as the amount of diversion right, see, e.g., the decree in Arizona v. California, 376 U.S. 340 (1964), modified, 383 U.S. 268 (1966), and the most recent modification of that decree on January 9, 1979, \textit{\ldots} U.S. \textit{\ldots}, 99 S.Ct. 995 (1979), may change the system. If the principles involved in limiting a water right to its consumptive use, with a determination of the return flow which is available for use by others, were applied to existing decrees, the elimination of waste caused by inefficient practices could make significant amounts of water available for other uses.
from the facts used to prove a right to divert water from the stream for agricultural or similar purposes. One major premise of this article is that there is water available for use as instream flows if wasteful diversions are eliminated, methods of making effective beneficial use of water are adopted, and flows of stream systems are carefully managed for multiple uses, not just for the benefit of those who divert. The experience that convinced this author of that possibility is the Truckee River and the Pyramid Lake litigation.

The stream management studies on the Truckee River demonstrated that there was sufficient water in the stream in most years to provide instream flows sufficient to meet the requirements of the fishery and other existing uses. An extended drought could require close management of the streams and all storage reservoirs and an adjustment of some water uses. But with the operation of fish hatcheries to assist the law of natural reproduction, a viable natural fishery using instream flows could be achieved if the instream flow was protected.

The author believes that the situation on the Truckee River is not unique. Serious inspection will reveal many places where enforcement of effective beneficial use will significantly reduce diversions from stream systems of the West. In addition, as more effective methods of irrigation such as sprinklers and drip irrigation are used on a large scale, the opportunity for improvement of instream flows increases.

Tighter administration of stream systems, construction of some storage dams, and the implementation of water savings techniques is the inevitable future of the West. Those who seek to preserve the fisheries of the West and the environment of some of its stream systems can obtain the benefit of some of the water that will be saved if they take early action. This objective can be achieved if the fish and wildlife interests of each state seek legislation similar to that in Nevada which restricts diversions to effective beneficial use and makes it unlawful to divert water in excess of that amount. Then comes the hard task: the state legislatures must be persuaded to recognize the need for instream flows by implementing legislation. That legislation can be the recognition of instream flows as a beneficial use which can be protected under the law of appropriation, as occurred in Idaho, or the designation of various areas of streams where minimum flows are to be obtained and preserved, as occurred in Washington.

With either of those legislative acts in force, the litigation that will be filed by public or private parties can be used as a forum to enforce the rule of effective beneficial use of water, and instream flows can
be increased. At times the federal or state governments may need to initiate action to reduce waste and protect instream flows against the claims of diverters. In this way, the opportunity to reduce diversions from streams and, with timely action, to obtain the right to instream flows can be generated in some areas.

It is recognized that the course of action recommended in this article is involved, even complex, and will require an extensive period of time to implement. But it is the author's belief that litigation and legislation requiring conservation of water are the wave of the future, and instream flows have a legitimate place in that wave.119 If the western states really intend to have state law be the basis for the administration of water rights in streams of the West, as United States v. New Mexico and California v. United States seem to offer, they will need to demonstrate their ability to resolve the issues of waste, ineffective use, and the preservation of instream flows.

119. Since this article was written, three cases involving instream flows or the right to use water in place for fish and wildlife purposes on Indian lands have been decided. Each is listed below with a short discussion. These cases do not change the reasoning nor the thrust of this article, but two of them do add weight to the effort to preserve the values inherent in preserving the use of some water in place in streams and wildlife areas. They are:

(1) United States & Spokane Tribe of Indians v. Anderson, No. 3643 (E.D. Wash. July 23, 1979). The court sustained the claim of the Spokane Indian Tribe to a reserved water right, with an immemorial priority, to sufficient water to maintain minimum instream flows in a creek partially within their reservation. That water right included water to preserve the ecology in a portion of that creek for fish and wildlife.

(2) Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978). The court denied the tribes' claim of instream flow rights in No Name Creek, a stream entirely within the Colville Indian Reservation. It held that the evidence failed to prove the existence of a fishery in that stream that was within the purposes for which the Colville Reservation was established. In fact it held that the evidence established that a fishery requiring significant instream flows had never existed in the stream until artificially started there by the tribes at a much later date. (The cutthroat trout fishery had been established after the inception of the lawsuit.)

(3) United States v. Adair, 478 F. Supp. 336 (D. Or. 1979). The court upheld the claim of the tribe to an immemorial water right, in place, to preserve the fish and wildlife values in the streams and marshes of the upper Klamath River in Oregon. Those areas were traditionally used as hunting and fishing grounds of the tribe. An earlier related case, Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979), petition for cert. filed, 47 U.S.L.W. 3766 (May 22, 1979), had determined that the members of this tribe held a continuing interest in that wildlife area, even though their reservation had been terminated.