Can Western Agricultural Water Users Accommodate Instream Flows?

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In order to better understand the relationship of the ranching industry to instream flow, it is useful to view it as a resource issue devoid of its political implications and legal ramifications. To do so effectively, I would like to momentarily drop the use of the terminology "instream flow". As a rancher I am now talking about an adequate level of water flowing down the stream. It is necessary to provide water for my livestock. It enhances the condition of the forage on the adjacent riparian areas for the same stock. It provides improved habitat for fish and wildlife. All of these are resource values to which I am committed as a livestock producer and steward of the land. I am a beneficiary of these flows.

Now allow me to reintroduce "instream flow" into the equation. Suddenly I become alarmed over the potential threats to my water rights, my property rights and my permits. Suddenly I am concerned about the operational impacts of someone else's decisions on my ability to irrigate my lands and to graze my livestock. The economic benefits of adequate water flows have been transfigured into the economic threat of instream flow. Those of you with whom I share the bond of mutual concern for the management of our great natural resources now become my adversaries in the halls of state legislatures and in the courtrooms.

If, as my previous analysis would indicate, our broad goals are harmonious, opportunities for cooperation abound. Can we agree upon a common approach to dealing with the instream flow issue? Let me suggest some key elements of a workable approach.

First, instream flow must be viewed as a resource management opportunity, not as a multiple use conflict. This approach dictates that we seek ways to improve the resource that will result in mutual benefits. There can be little real progress if one group's gain is always another's loss, real or perceived. As water becomes an increasingly valued resource in the arid West, our efforts should be directed not toward intensifying the competition for its use, but rather toward enhancing the quality and quantity of water available for all potential users.

Second, we must not fall to the temptation to isolate instream flow as a niche issue. It is but a small part of overall wise resource management. The environmental community seems to have come to a recent realization that many individual resource issues have broad implications for an entire ecosystem. The rancher has long recognized that many of these same issues have broad implications for an entire ranch operation. Far too often we have been the victims of decisions by outside decision-makers who are either unwilling or unqualified to look beyond the immediate direct impact on our complex operations. This is particularly true with respect to the failure to anticipate how sheep or cattle will react to the changes in behavioral pattern which we choose to impose upon them.

Third, instream flow must remain a state issue. It is intrinsically tied to state water law and regulation. The workable approach will necessarily vary somewhat among states. The National Cattlemen's Association has a policy resolution stating that they oppose "Any federal effort to seek the establishment of instream flows on any river or stream in any state." (NCA, 1989 Policy). Both the American Sheep Industry Association and the Public Lands Council support this resolution. To create instream flows by federal law or policy would be a direct infringement upon the states' rights to control the waters within their boundaries.

Fourth, a workable approach should strenuously avoid the use of the judicial system. Court decisions addressing instream flow have produced some clear winners and losers. At the same time they have served to intensify the underlying conflicts. While the rights of the parties involved have been clarified, little attention has been given to principles of wise resource management. This step may well be an admission that we have allowed our own special interests to supersede our commitment to wise use.

Fifth, changes that are sought in legislation should generally be of a permissive nature. We must be careful not to change the basic tenets of the appropriation doctrine which guides water law in most western states. Changes should be those that are necessary to allow us to conduct those activities that are mutually agreed upon as being beneficial to the resource without unacceptable impact on any of the involved parties.

Finally, we must use an on-the-ground, site specific approach that maximizes the involvement of those most directly affected. Proposed actions must be analyzed first for their direct impact on the immediate resource, then for their economic and environmental impacts, both current and long term. We should seek the expertise of those with a long history of involvement with the specific resource as well as those trained in pertinent disciplines.
The ranching industry has often been perceived as being in broad total opposition to instream flow. In reality this opposition has been based on some very specific issues that arise each time there is an effort to impose instream flows by legislation, administrative action or judicial decision. I will review some of the concerns with which I am familiar in Wyoming and neighboring states. This list is by no means all inclusive.

The foremost concern is the preservation of western water law based on the doctrine of appropriation. It includes the principles of historical first use, beneficial use and, in Wyoming at least, abandonment through non-use.

Closely tied to preservation of the law is protection of existing water rights. This concern is, however, much broader than just protection under statute. With new legislation and competing demands comes an increased threat of expensive litigation and unfavorable court decisions. There is also the fear that once hallowed statutes are opened for acceptable revision, third parties may advocate other changes detrimental to agriculture.

The preservation of historical rights does not ensure the preservation of historical use patterns, particularly for irrigation. Any change in a prior upstream right may impact the downstream user through its effect on the timing and seasonality of downstream flows. This is particularly true when water that was previously used for irrigation resulting in a gradual return flow now flows directly down the stream. Indeed, a misguided effort to create an instream flow in one stream segment could potentially destroy an existing adequate flow in another segment.

We remain concerned about the potential impact of instream flow rights on the future needs of municipalities, agriculture and industry. Most existing water rights can shift to the highest and best use as determined by market forces. We view an instream flow right as a relatively permanent withdrawal of water from the marketplace. If the instream flow is only on a segment of the stream, this water may become available for other use, but only beyond that segment.

Our ability to coexist in harmony with instream flow can be threatened by the choice of which state agency will administer the program. This should be done by the same agency that administers the general water laws of the state. Agencies which are advocates for a particular resource use cannot be expected to be impartial administrators.

Several states with instream flow provisions have failed to clarify livestock watering rights. The ability of livestock to drink from any stream to which they otherwise have legal access must be preserved.

Ranchers are also watchful that the amount of water committed to an instream flow is not excessive beyond that which is reasonably needed to preserve a fisheries habitat. Similarly the length of stream segment for which the flow is protected should not be excessive.

Finally, we are concerned about some of the broader implications of creating an instream flow that did not previously exist. Will it result in an excess of game populations in area? Will it lead to increased demand for access across private lands? Ranchers remain skeptical that these related issues will be dealt with appropriately.

There are several tools that can be used successfully in the achievement of mutual goals. Perhaps the most effective is the construction of storage structures. In addition to providing for instream flows, such structures usually provide diverse benefits to wildlife, recreation, industry and agriculture.

Incentives for efficiency and conservation in the use of agricultural waters should be explored. The current "use it or lose it" approach of most western states may be encouraging excess use of water. A policy that would protect the full amount of a water right while permitting the actual use of a lesser amount would encourage projects designed to increase efficiency and conserve water, often resulting in a de facto instream flow.

Riparian enhancement and restoration projects are a useful tool for increasing both the quality and quantity of stream flows. Support for such efforts is widespread. Increasing numbers of our members are becoming involved in riparian enhancement on both public and private lands. Many of these efforts are being conducted in cooperation with groups such as Trout Unlimited. While recognizing that much remains to be done, we are proud of our successes.

Instream flow is but one of the many policy debates into which the livestock industry is drawn. The decisions that result from each debate impact our rights as land owners and ranchers just as they do the rights of other resource users. This process is part of the great American system. Meanwhile, out in the country many of you and many of us—we are carrying forward the real efforts that protect and enhance our natural resources. Can we do more?