

1-1-2017

## Update to a Survey of State Instream Flow Programs in the Western United States

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## Update to a Survey of State Instream Flow Programs in the Western United States

# UPDATE TO A SURVEY OF STATE INSTREAM FLOW PROGRAMS IN THE WESTERN UNITED STATES

CYNTHIA F. COVELL, WHITNEY PHILLIPS, AND ALYSON SCOTT

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## I. INTRODUCTION

In 1998, when the *Survey of State Instream Flow Programs in the Western United States* was published in this journal, instream flow rights in most western states were fairly timid newcomers to the family of “beneficial uses” for which protectable water rights could be obtained. The concept of an enforceable right to maintain specified amounts of water in streams had been hard to accept: the West’s prior appropriation systems typically required diversion of water out of a stream, and its application to a long-accepted beneficial use, such as irrigation, mining, domestic or industrial. Instream flow programs were viewed with suspicion, if not downright hostility: they were perceived as constraining development and also as not easily quantified and subject to abuse. Instream flow water rights were therefore typically subject to more restrictions and limitations than other water rights, including other non-consumptive rights such as hydroelectric rights. Out of fear of losing instream flow programs entirely, many holders of instream flow rights were reluctant to enforce them. By 1998, therefore, most western states were just beginning to integrate instream water rights into their traditional priority systems in a meaningful way, even though some instream rights had been on the books for many

years.

In the past twenty years, states have gained more experience with instream flows. Some programs have matured considerably as instream water rights have taken their place in states' priority systems. Although instream flow rights have indeed influenced the development and change of traditional water rights, new consumptive rights continue to be developed, water rights changed, and the western states themselves continue to grow and develop. Instream flow rights for a variety of uses are now an accepted type of water right in most western states, and have been integrated into water administration. This survey update again looks at the instream flow programs in western states, and the developments in these programs during the past two decades.

#### A. IDAHO

In 1925 and 1927, Idaho's legislature declared that leaving water in lakes and streams for the purposes of scenic beauty, health, and recreation is a beneficial use of water.<sup>1</sup> The first minimum stream flows were appropriated in 1971.<sup>2</sup> The state developed its first Water Plan in 1976, which called for the establishment of minimum stream flows at three points on the Snake River, a significant river in its own right and the largest tributary to the Columbia River.<sup>3</sup> In 1978, the legislature established a statutory program under which the Idaho Water Resources Board (the "Board") may file applications for minimum stream flows.<sup>4</sup> In order to obtain a minimum stream flow right, the Board must prove that the right: 1) "is in the public interest," 2) "does not adversely affect senior water rights," 3) "represent[s] the minimum flow and not the desirable flow," and 4) can be maintained.<sup>5</sup>

While the Board is the entity that has statutory authority to request minimum flows and lake levels, other parties may petition the Board to make that request.<sup>6</sup> The Board submits a request to the legislature, which then approves the submitted application by resolution. If the legislature fails to take action on an application before the end of that lawmaking session, the request is granted.<sup>7</sup> Petitions requesting the Board to file applications for minimum flows or lake levels were submitted to the Board by the Idaho Fish and Game and Idaho Parks and Recreation, individual counties, a power company, and a fly fishing group.<sup>8</sup> As of 2013, out of nearly three hundred applications submitted by the Board to the legislature, only four applications were denied or rejected — one requested by the Board, one requested by the Idaho Department of Fish and Game, another requested by a county, and one requested by a

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1. IDAHO WATER RES. BD., IDAHO STATE WATER PLAN 27 (2012), <https://www.idwr.idaho.gov/files/board/2012-State-Water-Plan.pdf>

2. *Id.*

3. NAT'L WILD AND SCENIC RIVERS SYS., *Snake River*, <https://www.rivers.gov/rivers/snake.php> (last visited Mar. 25, 2017).

4. IDAHO CODE § 42-1503 (2016).

5. IDAHO WATER RES. BD., *Minimum Streamflows*, [https://www.idwr.idaho.gov/water-board/WaterPlanning/Minimum%20Stream%20Flow/minimum\\_stream\\_flow.htm](https://www.idwr.idaho.gov/water-board/WaterPlanning/Minimum%20Stream%20Flow/minimum_stream_flow.htm) (last visited March 26, 2017).

6. IDAHO CODE § 42-1504.

7. *Id.* § 42-1503.

8. IDAHO WATER RES. BD., *supra* note 5.

private lake association.<sup>9</sup>

As of 2013, the Board held 294 minimum stream flow and minimum lake level rights, protecting about 994 miles of streams — about two percent of the total stream miles in the state.<sup>10</sup> The legislature itself also established a minimum stream flow right for 7.5 miles on the Lemhi River through a bill passed in 2001.<sup>11</sup> However, the majority of minimum flow rights, 205 to be exact, were established through an agreement between the United States and the Nez Perce Tribe as part of the Snake River Basin Adjudication.<sup>12</sup> That agreement provides for the Board to establish and hold instream flow rights for “streams of importance to the Nez Pearce Tribe.”<sup>13</sup> The Board will also hold decrees for minimum flows on the Snake River.<sup>14</sup>

Idaho’s water rights allocation regime does not allow water rights holders to permanently transfer their rights to minimum stream flow.<sup>15</sup> However, the state is experimenting with alternative transfer mechanisms in certain watersheds to allow water rights holders to temporarily dedicate their right to the stream, without being penalized for doing so. The state’s most recent Water Plan, promulgated in 2012, outlines “a suite of water supply acquisition tools [for instream flow protection] including short and long-term leases, permanent purchases, partial season leases, diversion reduction agreements, and water use efficiency measures, all of which are market-based and voluntary.”<sup>16</sup>

## B. OREGON

Oregon’s history of protecting its streams dates back to the 1920s, when the state protected certain scenic streams from further appropriation.<sup>17</sup> In 1955, the state enacted legislation to maintain minimum stream flows through

9. Idaho Water Res. Bd., *Minimum Stream Flow and Minimum Lake Level Summary 2013* 11 (2013), <https://www.idwr.idaho.gov/files/iwr/b/2013/2013-minimum-stream-flow-and-minimum-lake-level-summary.pdf>

10. Idaho Water Res. Bd., *Idaho Minimum Stream Flow Program 1* (2013), [https://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/PDFs/MSF\\_Brochure.pdf](https://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/PDFs/MSF_Brochure.pdf).

11. *Id.* at 3.

12. Idaho Dep’t of Water Res., *Agreement Summary 1*, 3 (2004), [http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf\\_files/agreement\\_summary.pdf](http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf_files/agreement_summary.pdf)

13. STATE OF IDAHO, *AGREEMENT SUMMARY* (2004), [http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf\\_files/agreement\\_summary.pdf](http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf_files/agreement_summary.pdf) (noting that there is insufficient water supply to meet this minimum stream flow requirement, the state established the “Idaho Water Transaction Program, which utilizes Idaho’s existing Water Bank and local rental pools to purchase water, create agreements not to divert, conduct source switches, and implement other water saving techniques that put more water in stream for listed aquatic species.”); Adell L. Amos & Christopher R. Swensen, *Evaluating Instream Flow Programs: Innovative Approaches and Persistent Challenges in the Western United States*, 61 *ROCKY MTN. MIN. L. INST.* 22-1, 22-20-22-21 (2015).

14. State of Idaho, *Agreement Summary* (2004), [http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf\\_files/agreement\\_summary.pdf](http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/pdf_files/agreement_summary.pdf).

15. Szeptycki et al., *Environmental Water Rights Transfers: A Review of State Laws*, *WATER IN THE WEST* 1, 18 (2015) <http://waterinthewest.stanford.edu/sites/default/files/WITW-WaterRightsLawReview-2015-FINAL.pdf>.

16. IDAHO WATER RES. BD., *THE STATE WATER PLAN 73* (2012), <https://www.idwr.idaho.gov/files/board/2012-State-Water-Plan.pdf>.

17. Joseph Q. Kaufman, *An Analysis of Developing Instream Water Rights in Oregon*, 28 *WILLAMETTE L. REV.* 285, 285 (1992).

an administrative process.<sup>18</sup> Under that law, the Department of Environmental Quality and the Department of Fish and Wildlife could apply for minimum perennial stream flows, and the Water Resources Commission had the authority to establish new minimum stream flows or modify existing ones.<sup>19</sup>

In 1987, the state enacted an instream water rights statute under which the Department of Fish and Wildlife, the Department of Environmental Quality, and the State Parks and Recreation Department may petition the Water Resources Commission for instream flow rights.<sup>20</sup> If a petition is granted, the Water Resources Department holds the right as trustee.<sup>21</sup> As of 2015, more than 500 of the minimum stream flows established pursuant to the 1955 law have been converted to instream flow rights thereby providing a mechanism for the enforcement of those rights.<sup>22</sup> The Commission has issued more than 900 instream flow rights requested by state agencies.<sup>23</sup>

Additionally, any water right holder may convert or lease an existing water right for instream flow purposes, and that instream flow right will carry with it the priority date of the original water right.<sup>24</sup> Leases are limited to five-year periods, but they may be renewed an unlimited number of times.<sup>25</sup> The state has also authorized split-season leases, where a holder may use a water right for a portion of the year and dedicate the same water right for instream flow purposes the rest of the year.<sup>26</sup> The split-season use is currently subject to a sunset provision effective in 2024.<sup>27</sup>

New instream flow rights are considered subordinate to certain water rights, including those for “multipurpose storage or municipal uses,” those held by a municipality, and those dedicated to hydroelectric projects.<sup>28</sup> However, that subordination does not apply to instream flow rights converted from minimum perennial flows, nor does it apply when an existing water right is converted or leased, permanently or temporarily, to an instream flow use.<sup>29</sup>

The state is also utilizing an innovative water conservation program to keep water in the stream.<sup>30</sup> Under the Allocation of Conserved Water Program, the state provides a portion of the funding for irrigation improvements that conserve water.<sup>31</sup> In exchange, at least twenty-five percent of the con-

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18. Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 180–81 (1998).

19. *Id.*

20. OR. REV. STAT. § 537.336 (2016).

21. *Id.* § 537.341.

22. OREGON WATER RES. DEP'T, 2015 INSTREAM ACCOMPLISHMENTS <http://www.oregon.gov/owrd/WR/docs/2015%20Instream%20Accomplishments-final-7-28-2016.pdf>; [http://arcweb.sos.state.or.us/pages/rules/oars\\_600/oar\\_690/690\\_077.html](http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_690/690_077.html).

23. *Id.*

24. OR. REV. STAT. § 537.348(1) (2016).

25. *Id.* § 537.348(2).

26. *Id.*

27. *Id.* § 537.348.

28. *Id.* § 537.352.

29. *Id.* § 537.348; *id.* § 537.352.

30. OREGON WATER RES. DEP'T, ALLOCATION OF CONSERVED WATER, [http://www.oregon.gov/owrd/pages/mgmt\\_conserved\\_water.aspx](http://www.oregon.gov/owrd/pages/mgmt_conserved_water.aspx).

31. OREGON WATER RES. DEP'T, ALLOCATION OF CONSERVED WATER, 2015–2017 GENERAL FUND GRANTS ALLOCATION PLAN (2015), <https://www.oregon.gov/LCD/docs/grants/>

served water must be allocated to the state for instream flow purposes.<sup>32</sup> The state's portion of the conserved water may be higher if the state or federal government provided more than twenty-five percent of the funding for the project or if the water user allocates more to the state for instream use.<sup>33</sup> As of 2015, the Water Resources Department had approved sixty-eight applications under that program, resulting in 366 cubic feet per second ("cfs") allocated for instream flow.<sup>34</sup>

### C. WASHINGTON

Like Idaho and Oregon, Washington has a long history of protecting its state water sources.<sup>35</sup> The state adopted its first instream flow protection legislation in 1949, by enacting a statute recognizing that a water right could be denied if it would decrease flow needed to support fish populations.<sup>36</sup> Its 1971 Water Resources Act recognized that beneficial use of water includes recreational, piscatorial, wildlife, and environmental uses.<sup>37</sup> Thus, anyone may obtain water rights for instream flow purposes, and water users may lease or transfer existing water rights to instream flow.<sup>38</sup>

Additionally, the Minimum Water Flows and Levels Act of 1967 tasked the Department of Ecology with promulgating rules to establish minimum stream flows in the state's watersheds.<sup>39</sup> However, Ecology is permitted to grant withdrawals of water that conflict with minimum stream flow rules "where it is clear that overriding considerations of the public interest ["OCPI"] will be served."<sup>40</sup> Ecology has made several attempts to broadly construe that "OCPI" exception, at one point establishing a three-step test that ultimately allowed "reservations" for new agricultural, residential, and commercial uses even though they conflicted with minimum stream flows.<sup>41</sup> However, the Washington Supreme Court ruled against Ecology's broad interpretation of the OCPI exception in two recent cases. In 2013, the Court stated that the exception is a very narrow one and that the statute "requires extraordinary circumstances before the minimum flow water right can be impaired."<sup>42</sup> The Court rejected Ecology's interpretation of the OCPI exception again in 2015, reversing the department's approval of a municipality's water right that would permanently impair minimum stream flows.<sup>43</sup>

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2015-17\_GrantsAllocationPlan\_LCDC\_final.pdf.

32. *Id.*

33. OREGON WATER RES. DEP'T, *supra* note 30.

34. OREGON WATER RES. DEP'T, *supra* note 22.

35. Covell, *supra* note 18.

36. *Id.*

37. Haylee J. Hurst, *Changing Course: Revisiting Instream Flow Rulemaking in Washington State Following Swinomish v. Ecology*, 90 WASH. L. REV. 1901, 1910-11 (2015).

38. Amos & Swensen, *supra* note 13, at 22-5, 22-6.

39. WASHINGTON DEP'T OF ECOLOGY, INSTREAM FLOW LAWS AND RULES, <http://www.ecy.wa.gov/programs/wr/instream-flows/isfrul.html> (last visited Mar. 21, 2017).

40. WASH. ADMIN. CODE 173-501-020 (1988).

41. *See Swinomish Indian Tribal Cmty. v. Washington State Dept. of Ecology*, 311 P.3d 6, 11-12 (Wash. 2013).

42. *Id.* at 8.

43. *Foster v. Washington State Dep't of Ecology*, 362 P.3d 959, 962 (Wash. 2015).

In addition to its statutory scheme, Washington developed two programs in the early 2000s, the Water Acquisition Program and the Irrigation Efficiencies Program, both of which aim to help replenish salmon populations in sixteen watersheds by encouraging water users to dedicate portions of their existing water rights to instream flow.<sup>44</sup> Under the Water Acquisition Program, Ecology buys and leases water rights to improve stream flow in ESA listed streams.<sup>45</sup> Water leased or temporarily donated to Ecology is not subject to relinquishment, although water rights that are temporarily “parked” in donation require proof of use within the previous five years.<sup>46</sup> The state goes through the process of changing that water right to an instream right, permanently or temporarily, and then holds that leased water in trust.<sup>47</sup>

The state’s Irrigation Efficiencies Program is similar to Oregon’s Allocation of Conserved Water Program in that it allows the state to provide funding for more efficient irrigation systems.<sup>48</sup> However, under Washington’s program, the entire amount of conserved water is converted for instream flow.<sup>49</sup> As of 2015, the state had completed sixty-two irrigation efficiency projects, which resulted in 66 cfs converted to instream flow.<sup>50</sup>

#### D. MONTANA

Montana first began protecting instream flows in 1969 through legislation that directed the Fish and Game Commission to file for water rights “to maintain stream flows necessary for the preservation of fish and wildlife habitat.”<sup>51</sup> That law was repealed in 1972,<sup>52</sup> but those water rights, dubbed Murphy Rights in honor of the bill’s sponsor, protect minimum stream flows on twelve streams.<sup>53</sup>

The state’s current system for protecting instream flows is much more diverse. The state’s regime includes: 1) a statutorily designated reservations program through which government agencies may reserve water for stream level or lake level protection; 2) private water-leasing agreements; 3) utilizing water stored in federal storage projects to augment stream flows; and 4) judicial determinations upholding instream flow water rights that predate the

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44. WASHINGTON DEP’T OF ECOLOGY, WATER ACQUISITION, <http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html> (last visited Mar. 21, 2017); WASHINGTON STATE CONSERVATION COMM’N, IRRIGATION EFFICIENCIES GRANT PROGRAM, <http://scc.wa.gov/iegp/> (last visited Mar. 21, 2017).

45. WASHINGTON DEP’T OF ECOLOGY, *supra* note 44.

46. Water Resources Program Guidance, 23 <https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecylcyfsvrfile/WaterRights/wrwebpdf/guid1220.pdf>.

47. *Id.*

48. WASHINGTON STATE CONSERVATION COMM’N, *supra* note 44.

49. *Id.*

50. *Id.*

51. MONTANA FISH, WILDLIFE & PARKS, INSTREAM FLOW, <http://fwp.mt.gov/fishAndWildlife/habitat/fish/waterManagement/instreamFlows.html> (last visited Mar. 21, 2017); MONTANA FISH, WILDLIFE & PARKS, MURPHY WATER RIGHTS, <http://fwp.mt.gov/fishAndWildlife/habitat/fish/waterManagement/murphyWaterRights.html> (last visited Mar. 21, 2017).

52. Amos & Swensen, *supra* note 13, at 22-22 n. 138.

53. MONTANA FISH, WILDLIFE & PARKS, MURPHY WATER RIGHTS, <http://fwp.mt.gov/fishAndWildlife/habitat/fish/waterManagement/murphyWaterRights.html> (last visited Mar. 21, 2017).



state's 1973 Water Use Act.<sup>54</sup>

The most common form of instream protection in the state is the water reservation.<sup>55</sup> Under the applicable statute,<sup>56</sup> any state or federal agency may reserve water to protect stream flow, lake levels, or water quality.<sup>57</sup> No agency may reserve more than fifty percent of the stream's average annual flow.<sup>58</sup> To date, the state's department of Fish, Wildlife & Parks, the Montana Department of Environmental Quality, and the U.S. Bureau of Land Management have applied for and/or established more than 700 reservations for minimum flows.<sup>59</sup> While other forms of reservation are subject to review every ten years, the legislature amended the statute in 2015<sup>60</sup> to specifically prevent reservations for "maintaining a minimum flow, level, or quality of water" from being revoked or diminished.<sup>61</sup>

A statute also authorizes the state Department of Fish, Wildlife, and Parks to lease water for instream flow purposes.<sup>62</sup> Each right may be leased for as long as ten years, but those leases may be renewed an unlimited number of times.<sup>63</sup> Moreover, "a lease of water made available from the development of a water conservation or storage project" may last for up to thirty years.<sup>64</sup> Each proposed lease must go through an administrative and public review before the Montana Department of Natural Resources and Conservation.<sup>65</sup> The same statute authorizes only the Department of Fish, Wildlife, and Parks to permanently convert a water right to instream flow.<sup>66</sup>

Montana is currently in the middle of a statewide adjudication, authorized by the 1973 Act to determine pre-1973 water rights, which include state-held rights for recreational purposes.<sup>67</sup> The Montana Supreme Court, in its *Bean Lake* decisions, has issued two important opinions related to how instream flow rights may be adjudicated in this process. First, the Court held that instream flow rights are not limited only to recreational rights.<sup>68</sup> Second, it held that the state is not the only party that may go before a water court to adjudicate an instream flow right.<sup>69</sup>

## E. ALASKA

Alaska has developed one of the more robust statutory instream flow pro-

54. MONTANA FISH, WILDLIFE & PARKS, INSTREAM FLOW, <http://fwp.mt.gov/fishAndWildlife/habitat/fish/waterManagement/instreamFlows.html> (last visited Mar. 21, 2017).

55. Amos & Swensen, *supra* note 13.

56. MONT. CODE ANN. § 85-2-316 (2016).

57. *Id.*

58. *Id.*

59. Amos & Swensen, *supra* note 13, at 22-23.

60. MT LEGIS 281 (2015), 2015 Montana Laws Ch. 281 (S.B. 330)

61. MONT. CODE ANN. § 85-2-316(6).

62. *Id.* § 85-2-436(1).

63. *Id.* § 85-2-436(3)(e).

64. *Id.*

65. *Id.* § 85-2-436(3)(a)-(b).

66. *Id.* § 85-2-436(6)(a).

67. Amos & Swensen, *supra* note 13, at 22-26.

68. *Id.*

69. *Id.*

grams.<sup>70</sup> Under its broad statute, enacted in 1980, any state agency, any federal agency, or any individual may:

reserve sufficient water to maintain a specified instream flow or level of water at a specified point on a stream or body of water, or in a specified part of a stream, throughout a year or for specified times, for (1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and (4) sanitary and water quality purposes.<sup>71</sup>

An applicant must prove that:

(1) the rights of prior appropriators will not be affected by the reservation; (2) the applicant has demonstrated that a need exists for the reservation; (3) there is unappropriated water in the stream or body of water sufficient for the reservation; and (4) the proposed reservation is in the public interest.<sup>72</sup>

The instream flow statute also requires that the Department of Natural Resources review instream flow reservations every ten years to determine whether they continue to meet the above criteria.<sup>73</sup>

While such a broad statute allowing anyone to hold an instream flow reservation seems ideal, the state's Department of Natural Resources has stated it does not have the funding to process all applications, leading to a backlog of applications before the Department of Natural Resources.<sup>74</sup> As of 2015, the Alaska Department of Fish and Game alone had filed for reservations on 265 river reaches and four lakes.<sup>75</sup> The DNR has approved less than half of the Department's applications.<sup>76</sup> In 2002, the DNR and Department of Fish and Game formulated a Memorandum of Understanding in hopes of reducing the backlog of applications.<sup>77</sup> While that agreement has seemed to speed up the process for that department's applications, the DNR is still unable to efficiently process requests from private applicants.<sup>78</sup>

## F. CALIFORNIA

While California still requires diversion for establishing a new water right and does not include an instream flow concept within the definition of a "diversion," state legislation does allow the transfer of an existing right for instream flow purposes.<sup>79</sup> Any water right holder may change an existing right "for purposes of preserving or enhancing wetlands habitat, fish and wildlife re-

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70. Covell, *supra* note 18.

71. ALASKA STAT. ANN. § 46.15.145(a) (2017).

72. *Id.* § 46.15.145(c).

73. *Id.* § 46.15.145(f).

74. Amos & Swensen, *supra* note 13, at 22-28.

75. ALASKA DEPARTMENT OF FISH AND GAME, INSTREAM FLOW PROTECTION IN ALASKA, No. 16-09, 5 (2015) <http://www.arlis.org/docs/vol1/K/951782475.pdf>.

76. Amos & Swensen, *supra* note 13, at 22-7-22-8.

77. *Id.*

78. *Id.*

79. CAL. WATER CODE § 1707(b) (2017).

sources, or recreation in, or on, the water.”<sup>80</sup> Thus far, that statute has been utilized sparingly, as the State Water Board has processed fewer than 40 petitions for transfers.<sup>81</sup>

The state also allows changes of existing rights to split-season instream flow rights, and the water right holder does not risk abandoning or forfeiting the water right he or she dedicates to that use.<sup>82</sup>

The state’s Fish and Game Code also provides for flow protection for fisheries.<sup>83</sup> The Department of Fish and Wildlife is currently tasked with “identify[ing] and list[ing] those streams and watercourses throughout the state for which minimum flow levels need to be established in order to assure the continued viability of stream-related fish and wildlife resources.” As of 2015, the department identified twenty-two streams and the necessary flows to maintain them.<sup>84</sup>

### G. COLORADO

Colorado’s statutory regime for replenishing and protecting streams changed a great deal over the last few decades, and the state has focused on developing innovative rules and programs. For a detailed discussion of the state’s evolving and robust toolbox for keeping water in natural streams, see Zach Smith, *Making Colorado’s Rivers a (Senior) Priority*, 20 U. Denv. Water L. Rev. 369 (2017).

### H. WYOMING

A Wyoming statute limits instream flow appropriation to the purpose of establishing or maintaining fisheries.<sup>85</sup> Only the State of Wyoming may hold an instream flow right for the minimum amount necessary to establish or maintain the fishery.<sup>86</sup> The statute requires a complex analysis for deciding where and how much water to appropriate.<sup>87</sup> The state currently holds 121 instream flow rights, covering 466 miles of stream.<sup>88</sup>

Over the last two decades, the legislature rejected many attempts to allow instream flows for other uses.<sup>89</sup> The legislature also rejected attempts to allow water right holders to temporarily dedicate water to instream flow purposes.<sup>90</sup>

Currently pending legislation would allow any person to acquire a water

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80. *Id.* § 1707(a); *A Practitioner’s Guide to Instream Flow Transactions in California*, California’s Small Watershed Instream Flow Transfers Working Group, [https://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/11/21092958/A-Practitioners-Guide-to-Instream-Flow-in-CA\\_March2016.pdf](https://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/11/21092958/A-Practitioners-Guide-to-Instream-Flow-in-CA_March2016.pdf).

81. Amos & Swensen, *supra* note 13, at 22-8.

82. *Id.*

83. *Id.*

84. *Id.*

85. WYO. STAT. ANN. § 41-3-1002.

86. *Id.* § 41-3-1006.

87. *Id.* § 41-3-1002.

88. Wyoming State Engineer’s Office, *Instream Flow Filings*, <http://seo.wyo.gov/surface-water/instream-flow> (instream flow spreadsheet).

89. Reed D. Benson, “Adequate Progress” or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws Since 2000*, 36 ENVTL. L. 1283, 1297-98 (2006).

90. *Id.*

right temporarily for instream flow purposes.<sup>91</sup>

### I. KANSAS

By 1980, Kansas lawmakers saw the need to protect the state's vulnerable streams and rivers.<sup>92</sup> To that end, the legislature enacted a minimum desirable streamflow law, which provided that, "whenever the legislature enacts legislation establishing a minimum desirable streamflow for any watercourse in the state, the chief engineer shall withhold from appropriation that amount of water deemed necessary to establish and maintain for the identified watercourse the desired minimum streamflow."<sup>93</sup> By codifying the goals of the minimum desirable streamflow program, the legislature sought to, "preserve, maintain or enhance baseflows for in-stream water uses relative to water quality, fish, wildlife, aquatic life, recreation, general aesthetics and domestic uses and for the protection of existing water rights."<sup>94</sup> The legislature updated the Kansas Water Appropriation Act in 1984 to include the first four streams protected by the minimum desirable streamflow law.<sup>95</sup> The Act was subsequently amended in 1985,<sup>96</sup> 1987, and 1989 to include a total of twenty-three applicable rivers and streams.<sup>97</sup>

In Kansas, minimum desirable streamflows are administered by withholding quantities of water from appropriation rather than granting instream flow water rights.<sup>98</sup> The rivers and streams to which minimum desirable streamflows apply must be designated by the legislature,<sup>99</sup> and the process for establishing the minimum desirable stream flow involves negotiations between various water agencies for the State of Kansas.<sup>100</sup> For the purpose of minimum desirable streamflows, junior water right holders are those whose water rights were appropriated after April 12, 1984.<sup>101</sup> If average daily streamflow identified at a gaging station falls below the established minimum desirable streamflow threshold set by the legislature for a particular river or stream for seven consecutive days, the Chief Engineer must determine whether to curtail use by junior water right holders.<sup>102</sup> Due to unique circumstances in the Lower Republican River, there is an additional criterion for the administration of mini-

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91. H.B. 264, 64th Leg., Gen. Sess. (Wyo. 2017).

92. John C. Peck & Doris K. Nagel, *Legal Aspects of Kansas Water Resource Planning*, 37 U. KAN. L. REV. 199, 217 (1988).

93. KAN. STAT. ANN. § 82a-703a.

94. *Id.* § 82a-928(i).

95. Act approved Apr. 6, 1984, ch. 376, § 1, 1984 Kan. Sess. Laws 1809 (setting minimum desirable streamflows for the following rivers and streams: Marais de Cygnes, Neosho, Cottonwood, and Little Arkansas).

96. 1985 Kan. Sess. Laws 1446, ch. 338, § 1 (setting minimum desirable streamflows for the following rivers and streams: Saline River, Smoky Hill River, Medicine Lodge River, Chikaskia River, Big Blue River, Little Blue River, Republican River, Mill Creek, and Delaware River) (codified as amended at KAN. STAT. ANN. § 82a-703a (2017)).

97. KAN. STAT. ANN. § 82a-703(a-c) (2017).

98. Peck & Nagel, *supra* note 92, at 220.

99. *Id.*

100. Covell, *supra* note 18, at 186.

101. *Id.*

102. KAN. STAT. ANN. § 82a-703(a-c).

most desirable streamflows on that river.<sup>103</sup> The additional criterion provides that the average daily streamflow must fall below 150 percent of the established monthly minimum streamflow criteria for sixty consecutive days.<sup>104</sup>

### J. NEBRASKA

Likely due to the state's agricultural background, instream flow rights have been a contentious topic in Nebraska. The state passed legislation in 1984 which explicitly recognizes protection of fish, wildlife, and recreation as beneficial uses of water.<sup>105</sup> Only the Game and Parks Commission, a natural resources district, or a public water supplier<sup>106</sup> may obtain instream flow rights for "recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance."<sup>107</sup> Those rights are limited to the minimum amount necessary to protect fish, wildlife, or recreation.<sup>108</sup>

Instream flow rights are subject to review every fifteen years.<sup>109</sup> At a hearing, the Director of the Department of Natural Resources is to determine whether the right still serves its original beneficial purposes and whether that right still serves the public interest.<sup>110</sup> The Director may cancel or modify the right.<sup>111</sup>

Thus far, the state instream flow program has been highly underutilized. As of 2013, only two segments of streams or rivers have been protected, resulting in about 285 miles of protected stretches.<sup>112</sup> Over 97.7 percent of the state's rivers and streams remain unprotected.<sup>113</sup>

### K. UTAH

Utah law does not allow any new instream flow rights to be established from unappropriated water.<sup>114</sup> However, the legislature vested in the Division of Wildlife Resources and Division of Parks and Recreation the ability to permanently or temporarily change an existing water right for "the propagation of fish; public recreation; or the reasonable preservation or enhancement of the natural stream environment."<sup>115</sup>

While the statute originally allowed only those two state entities to change water rights for instream flow uses, recent legislation allows "fishing groups" to "file a fixed time change application on a perfected, consumptive water right

103. See KAN. ADMIN. REGS. § 5-15-4.

104. *Id.*

105. NEB. REV. STAT. § 46-2,108.

106. *Id.* §§ 46-2,108, 111.

107. *Id.* § 46-2,116.

108. *Id.* § 46-2,108.

109. *Id.* § 46-2,112.

110. NEB. REV. STAT. § 46-2,112.

111. *Id.*

112. Neb. Game & Parks Comm'n, *Questions and Answers on Instream Flows* (Nov. 2015), [http://outdoornebraska.gov/wp-content/uploads/2015/11/Instream\\_Flows\\_Q\\_A.pdf](http://outdoornebraska.gov/wp-content/uploads/2015/11/Instream_Flows_Q_A.pdf).

113. *Id.*

114. Covell, *supra* note 18, at 188; UTAH CODE ANN. § 73-3-30 (West 2016).

115. UTAH CODE ANN. § 73-3-30 (West 2016).

for the purpose of providing water for an instream flow.<sup>116</sup> Fishing groups are defined as federally-tax exempt organizations that “promot[e] fishing opportunities in the state.”<sup>117</sup> For example, in 2016, Trout Unlimited obtained its first instream flow lease for 1.49 cfs on the Lower Weber River.<sup>118</sup>

#### L. ARIZONA

Instream flow rights in Arizona are grounded in the state’s water code, which provides for appropriation of water for recreation and wildlife.<sup>119</sup> In the hierarchy of preferred uses, rights pertaining to recreation and wildlife are out-ranked by domestic and municipal uses, irrigation and stock watering, and power and mining.<sup>120</sup>

The state has few restrictions on who may appropriate water for instream flow purposes,<sup>121</sup> and the Arizona Supreme Court has broadly interpreted the Department of Water Resource’s authority to issue instream flow rights.<sup>122</sup> Thus, individuals may hold instream flow rights. Water right holders may also transfer existing rights permanently or temporarily for instream flow purposes, but transferred rights must be approved by a state or local entity and must not cause injury.<sup>123</sup> However, it is the the United States Forest Service that currently holds the largest instream flow right in the state, along with nine other instream flow rights and nine more expected to be approved in the near future<sup>124</sup>.

In 2012, the legislature enacted specific requirements for obtaining an instream flow right. An applicant must provide “at least five years of continuous streamflow measurement data” with the application, along with a description of the amount of streamflow required for the instream flow right and the availability of water.<sup>125</sup>

#### M. NEVADA

Like Arizona, instream flow rights in Nevada are authorized through interpretations of the state’s overarching appropriation statute requiring beneficial use.<sup>126</sup> The statute specifies that recreation is a beneficial use, and the state supreme court has held that diversion is not required for an appropriation.<sup>127</sup> Additionally, the state’s Water Plan states that “[i]nstream beneficial uses in

116. *Id.*

117. *Id.*

118. Marie C. Kellner, *How A State Known for Its Rivers Ends Up with Dry Riverbeds Every Year: A Look into Idaho’s Minimum Stream Flow Law*, 58 *ADVOCATE* 23, 25 (2015); *Utah approves TU’s first in-stream flow lease*, Trout Unlimited, <https://www.tu.org/blog-posts/utah-approves-tus-first-in-stream-flow-lease>.

119. Amos & Swensen, *supra* note 13, at 22-15.

120. Covell, *supra* note 18, at 189.

121. *Id.* at 188-89.

122. Amos & Swensen, *supra* note 13, at 22-15.

123. *ARIZ. REV. STAT. ANN.* § 45-172.

124. *Instream Flow Water Rights Program*, U.S. Forest Service, [https://www.fs.usda.gov/detail/tonto/landmanagement/resourcemanagement/?cid=fsbdev3\\_018784](https://www.fs.usda.gov/detail/tonto/landmanagement/resourcemanagement/?cid=fsbdev3_018784).

125. *ARIZ. REV. STAT. ANN.* § 45-152.01.

126. Covell, *supra* note 18, at 189; *see NEV. REV. STAT.* § 533.030(1).

127. *NEV. REV. STAT.* § 533.030 (2016); *State v. Morros*, 766 P.2d 263, 267 (Nev. 1988).

Nevada include habitat for aquatic invertebrates, fishes, birds and other wildlife, maintenance of water quality, and recreation.<sup>128</sup>

In 2007, the state legislature expressly authorized temporary transfers of agricultural water rights “for wildlife purposes or to improve the quality or flow of water.”<sup>129</sup> Such temporary conversions are limited to three years in duration, but they can be renewed an indefinite number of times.<sup>130</sup>

Within that framework, the most common mechanism for protecting instream flows has been through large-scale projects that involve state and local government entities purchasing land and water to protect streams. One project allowed two federal agencies to work with the Nevada Division of State Lands to acquire water rights from willing sellers to protect 25,000 acres of wetlands.<sup>131</sup> The federal government appropriated sixteen million dollars to facilitate these purchases.<sup>132</sup>

#### N. NEW MEXICO

Described as the West’s last holdout state on instream flow rights, New Mexico’s battle over recognizing those rights has been drawn-out and contentious.<sup>133</sup> Even now, the right to appropriate water for instream flow purposes is not specifically authorized in any statutes. Currently, instream flow rights rest in the state engineer’s current definition of a beneficial use, which includes fish and wildlife, and recreational uses.<sup>134</sup> The definition likely stems from a 1998 agency document that was penned by then Attorney General Tom Udall, which stated that New Mexico law does permit instream flow rights for “recreational, fish or wildlife, or ecological purposes.”<sup>135</sup>

In 2005, the legislature passed the Strategic Water Reserve Act, under which water may be reserved by the Interstate Stream Commission “to assist the state in complying with interstate stream compacts and court decrees” or to “assist the state and water users in water management efforts for the benefit of threatened or endangered species or in a program intended to avoid additional listings of species.”<sup>136</sup> The Commission has focused efforts on providing water to augment streams in the Pecos River Basin as a means of protecting threatened species’ critical habitat.<sup>137</sup> As of 2013, the state no longer had funding to purchase water rights to augment those streams. According to the Commission Director at the time, “the greatest impediment to this effort has been loss of interest from potential lessors.”<sup>138</sup>

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128. NEV. DIV. OF WATER PLANNING, NEV. STATE WATER PLAN 3-B1 (1999).

129. NEV. REV. STAT. § 533.0243 (2016).

130. *Id.*

131. Amos & Swensen, *supra* note 13.

132. *Id.*

133. Denise D. Fort, *Instream Flows in New Mexico*, 7 RIVERS 155, 155 (2002).

134. N.M. CODE R. § 19.26.2.7(D) (2016).

135. N.M. Att’y Gen. Op. No. 98-01 (Mar. 27, 1998).

136. N.M. STAT. ANN. § 72-14-3.3 (2017).

137. MICHELLE HENRIE, NEW MEXICO LAW AFFECTING THE PECOS RIVER 8 (Feb. 18, 2015), <http://www.pecosriverresolution.com/~pecosriver/pdf/2015-02-18-Appendix-to-New-Mexico-Laws-Affecting-Pecos-River.pdf>.

138. *Id.*

## II. CONCLUSION

In testimony to the adaptability of western states' prior appropriation systems to changing water needs, instream flow water rights to protect fisheries, aquatic habitat, and similar environmental values have become accepted as beneficial uses of water in most western states. Instream rights for recreation, water quality protection, and other uses have likewise gained acceptance in some states. However, this acceptance is tempered by the fact that the number of stream miles protected by instream flow water rights is small compared to the total number of stream miles in the West. Moreover, instream water rights continue to be subject to restrictions not imposed on other water rights, such as periodic review and subordination to uses perceived as more important. In short, although instream flow water uses are recognized as beneficial uses of water, these uses are carefully limited, and generally have not been allowed to seriously threaten other water uses. The continued viability of instream flow programs, and likelihood of broader utilization, is threatened by lack of funding and increasing demands for water for industrial and municipal uses resulting from new methods of resource development, population increase, and the very real but unknown impact of climate change.