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Adequate Progress, or Rivers Left Behind? Developments in Colorado and Wyoming Instream Flow Laws Since 2000

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“ADEQUATE PROGRESS,” OR RIVERS LEFT BEHIND? DEVELOPMENTS IN COLORADO AND WYOMING INSTREAM FLOW LAWS SINCE 2000

BY
REED D. BENSON*

Colorado and Wyoming have much in common in regard to water supply and water use, and both states have followed the western states’ traditional approach in their instream flow laws. This traditional approach, however, has serious practical shortcomings in restoring and protecting instream flows. This Article asks whether Colorado and Wyoming have made “adequate progress” since 2000 in addressing these shortcomings in their instream flow laws. For one of these states, the answer is clear: Wyoming has made no progress on its instream flow laws in recent years. Colorado, by contrast, has clearly made progress in strengthening its laws—especially as to recreational in-channel water rights for local governments—but it is hard to call much of this progress “adequate” in practice. The Article concludes by suggesting two areas where both states could improve their programs for restoring flows in depleted streams.

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I. INTRODUCTION

According to the program for the Western Instream Flows Conference, this Article ought to provide a report card or class ranking on the Colorado and Wyoming instream flow programs,¹ and it does indeed evaluate these two states’ instream flow laws. But I have not given them grades or rankings, partly because I (like many law professors) have little enthusiasm for the task of grading, and partly because letter grades seem a little too “old school.” Instead, I have looked to President Bush’s “No Child Left Behind” law² for a

¹ This Article is based on a presentation I gave at the conference, as part of a panel entitled “Report Cards and Class Rankings: A Critical Look at State and Regional Water Programs.” Ruth Mathews, Charlton Bonham & Reed D. Benson, Report Cards and Class Rankings: A Critical Look at State and Regional Water Programs, Presentation to the Third Lewis & Clark Bicentennial Conference: Restoring the Rivers of Lewis & Clark (Apr. 20, 2006).

² No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in

modern, "compassionate conservative" approach to assessing performance. This 2002 statute requires schools to demonstrate "adequate yearly progress" in educating their students.³ In keeping with this "No Child Left Behind" principle, I will address the question of whether Colorado and Wyoming laws have made "adequate progress" since the year 2000 in providing for protection and restoration of instream flows.

Colorado and Wyoming have much in common,⁴ including many similarities relating to water supply, management, and use:

- both states are headwaters states in that they are each the source of several major rivers including the Colorado, Snake, Platte, Yellowstone, Green, and Rio Grande;
- both states are semi-arid to arid⁵ due to very limited annual precipitation except for snowfall in and around their mountains;
- both states' greatest use of water, by far, is for irrigation, which accounts for more than ninety percent of all of their water withdrawals;⁶
- both states' rivers provide great fishing, whitewater boating, and other forms of recreation;
- both states have enshrined the prior appropriation doctrine in their constitutions;⁷ and
- both states have played a key role in the development of western water law.⁸

scattered sections of 2, 7, 8, 10, 15, 20, 26, 29, 42, 47 U.S.C.).

³ 20 U.S.C. § 7325 (Supp. I 2002).

⁴ For example, both Colorado and Wyoming appear on the map as square states (although most Coloradans would insist that they are far more hip than those of us who live in Wyoming). In addition, both states are reliably colored red on Electoral College maps. Wyoming has voted for the Republican candidate in every presidential election since 1968. The same is true for Colorado except for 1992, when Bill Clinton carried the state with 40% of the vote. Dave Leip's Atlas of U.S. Presidential Elections, <http://www.uselectionatlas.org/RESULTS/index.html> (last visited Nov. 12, 2006).

⁵ See W. Reg'l Climate Ctr., Average Statewide Precipitation for Western U.S. States, <http://www.wrcc.dri.edu/htmlfiles/avgstate.ppt.html> (last visited Nov. 12, 2006) (noting that Wyoming and Colorado had average annual precipitation of just 12.92 and 15.93 inches respectively between 1971 and 2000).

⁶ See SUSAN S. HUTSON ET AL., ESTIMATED USE OF WATER IN THE U.S. STATES IN 2000: U.S. GEOLOGICAL SURVEY CIRCULAR 1268, at 7 (2004), available at <http://pubs.usgs.gov/circ/2004/circ1268/pdf/circular1268.pdf> (noting that Wyoming's total fresh water use and total fresh water use for irrigation in 2000 was 4,940 and 4,500 million gallons per day (mgd) respectively while Colorado's was 12,600 and 11,400 mgd respectively).

⁷ COLO. CONST. art. XVI, §§ 5–6 (stating respectively that unappropriated water is "the property of the public . . . dedicated to the use of the people of the state, subject to appropriation" and that "[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied"); WYO. CONST. art. VIII, § 3 ("Priority of [water] appropriation for beneficial uses shall give the better right. No [water] appropriation shall be denied except when such denial is demanded by the public interests.").

⁸ See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882) (holding essentially that prior appropriation had always been the law in Colorado despite early statutes that could easily have been interpreted as recognizing the old common law riparian rights doctrine); JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 294 (3d ed. 2000) (noting that the "Colorado

II. COLORADO AND WYOMING HAVE BOTH FOLLOWED THE TRADITIONAL WESTERN APPROACH TO INSTREAM FLOWS

Colorado enacted its original instream flow statute in 1973,⁹ while Wyoming did so in 1986.¹⁰ Although there is considerable variation among instream flow laws throughout the western states,¹¹ the Colorado and Wyoming statutes are typical of these laws in several important respects.

A. Basic Features of Colorado and Wyoming Instream Flow Statutes

1. Only State Agencies May Hold Instream Flow Rights¹²

The Colorado instream flow statute vests exclusive authority to appropriate water for minimum streamflows in the Colorado Water Conservation Board (CWCB) and provides that "no other person or entity" may obtain a water right "for instream flows in a stream channel between specific points, or for natural surface water levels or volumes for natural lakes, for any purpose whatsoever."¹³

The Wyoming instream flow statute provides that "[n]o person other than the state of Wyoming shall own any instream flow water right,"¹⁴ and authorizes the Wyoming Water Development Commission to apply "in the

Doctrine" of appropriation was adopted by the other states of the interior West); *id.* at 183 (noting that Wyoming pioneered the system of permits for new water rights, issued and regulated by a state agency, which would eventually be adopted by all the other western states except for Colorado); WYO. CONST. art. VIII, § 2 (providing for the Board of Control and state engineer to administer water rights system).

⁹ See Steven O. Sims, *Colorado's Instream Flow Program: Integrating Instream Flow Protection into a Prior Appropriation System*, in *INSTREAM FLOW PROTECTION IN THE WEST*, *supra* note 9, at 12-1, 12-1 to 12-3 (discussing the history and development of Colorado's instream flow statutes).

¹⁰ See Gordon W. Fassett, *Wyoming's Instream Flow Law*, in *INSTREAM FLOW PROTECTION IN THE WEST* 21-1, 21-1 to 21-2 (Lawrence J. MacDonnell & Teresa A. Rice eds., 1993) (discussing the history of Wyoming's instream flow statutes).

¹¹ See SASHA CHARNEY, COLO. WATER CONSERVATION BD., *DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* (July 2005), available at <http://cwcb.state.co.us/Streamandlake/Documents/ISFCompStudyFinalRpt.pdf> [hereinafter *DECADES DOWN THE ROAD*]. This recent report by the Colorado Water Conservation Board offers an excellent source of information about instream flow laws and programs in 18 western states (Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming). In particular, it contains a descriptive section, complete with several tables, summarizing various aspects of the 18 states' instream flow programs. *Id.* at 6-16. See generally Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177 (1998) (providing a somewhat older but still very useful review of instream flow laws in the West).

¹² *DECADES DOWN THE ROAD*, *supra* note 11, at 12-14 (detailing that of the 18 western states covered in the analysis, 12 authorize new instream flow appropriations and of these 12, seven allow only state agencies or the legislature to establish a new instream flow right).

¹³ COLO. REV. STAT. § 37-92-102(3) (2005).

¹⁴ WYO. STAT. ANN. § 41-3-1002(e) (2005).

name of the state of Wyoming for permits to appropriate water for instream flows in those segments of stream recommended by the game and fish commission.”¹⁵

*2. Instream Flow Rights Are for Limited Purposes, Primarily to Protect Fish*¹⁶

The Colorado instream flow statute allows CWCB “to appropriate . . . such waters of natural streams and lakes as the board determines may be required for minimum stream flows . . . to preserve the natural environment to a reasonable degree.”¹⁷ Neither statute nor rule further defines the phrase “preserve the environment to a reasonable degree,” but a recent CWCB report indicates that this phrase includes the protection of fish and other aquatic organisms, riparian areas, and the environment, but not the protection of wildlife, recreation, aesthetics, or water quality.¹⁸ In practice, CWCB typically bases its minimum flows on the amounts needed to preserve coldwater fish—generally trout—habitat.¹⁹

The Wyoming instream flow statute requires that any water appropriated for instream flows must be limited to provide only “the minimum flow necessary” in order to establish or maintain fisheries in the case of stored water,²⁰ or to maintain or improve existing fisheries in the case of unappropriated natural flows.²¹ In limiting instream flow rights solely for fishery purposes, Wyoming has the most restrictive statute of all the western states.²²

¹⁵ *Id.* § 41-3-1003(c).

¹⁶ DECADES DOWN THE ROAD, *supra* note 11, at 10. The CWCB report indicates that 15 western states (excluding Hawaii) have established legal protection for instream flows. Collectively these states have authorized flow protection for a fairly wide variety of purposes including environmental protection, aesthetics, riparian areas, and navigation. *Id.* The most common purpose, however, is fish habitat preservation, which is recognized by 14 of the 15 states. *Id.* Only three other purposes are recognized by a majority of these states: recreation (12), wildlife (11), and water quality (9). *Id.*

¹⁷ COLO. REV. STAT. § 37-92-102(3) (2005).

¹⁸ DECADES DOWN THE ROAD, *supra* note 11, at 10.

¹⁹ See DAN MERRIMAN & ANNE M. JANICKI, COLORADO'S INSTREAM FLOW PROGRAM—HOW IT WORKS AND WHY IT'S GOOD FOR COLORADO 3, <http://cwcb.state.co.us/Streamandlake/Documents/FinalRiparianAssocPaper.pdf> (last visited Nov. 11, 2006) (noting that in Colorado, most minimum streamflow rights “are based on the presence of a cold water fishery as an indicator of a healthy natural environment.”).

²⁰ WYO. STAT. ANN. § 41-3-1001(c) (2005).

²¹ *Id.* § 41-3-1001(d).

²² DECADES DOWN THE ROAD, *supra* note 11, at 10 (indicating that of 15 western states that authorize instream flow protections, Wyoming is the only one that limits instream flows to a single purpose).

3. Newly Created Instream Flows Are Water Rights with Junior Priorities²³

Any appropriation for minimum streamflow in Colorado "shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree."²⁴ Thus, instream flow rights in Colorado are effectively junior not only to established water rights, but even to established practices that have not been legally recognized.

Water may be appropriated for instream flows only "if such use does not impair or diminish the rights of any other appropriator in Wyoming."²⁵ The statute also specifies special procedures and standards for regulating a stream in favor of instream flow rights: the Game and Fish Commission must report to the Water Development Commission on the need for regulation, the Water Development Commission must then request regulation from the state engineer, and the state engineer may not regulate in favor of the instream flow right "[u]nless present or future injury to the fishery has been shown."²⁶

4. Water Rights May Be Transferred for Instream Use Through the State²⁷

Water rights holders in Colorado may sell, lease, or otherwise make water available for instream flow use only through CWCB.²⁸ CWCB may acquire water or water rights for instream flow use by grant, purchase, lease, exchange, "or other contractual agreement, from or with any person."²⁹ Existing water rights must go through a change in water right (transfer) proceeding before they may be used for instream flows, and the statute authorizes CWCB to apply for such changes.³⁰

The Wyoming statute authorizes the state to acquire water rights for instream flows "by transfer or gift," and requires that any water right so acquired and changed to instream use "shall be [held] in the name of the state of Wyoming."³¹ Such water rights must go through a change of use (transfer)

²³ Ruth Mathew's article in this issue addresses this point, noting that state instream flow programs tend to be ineffective in practice because they were created long after other water uses were already established, and because instream flow protections do not prevent streams from being depleted by these established (senior) uses. Ruth Mathews, *Instream Flow Protection and Restoration: Setting a New Compass Point*, 36 ENVTL. L. 1311, 1320-21 (2006).

²⁴ COLO. REV. STAT. § 37-92-102(3)(b) (2005).

²⁵ WYO. STAT. ANN. § 41-3-1001(b) (2005).

²⁶ *Id.* § 41-3-1008(a)(i).

²⁷ Of the 14 western states that allow existing water rights to be transferred to instream flow use, eight require that the right be held by a state agency after the transfer. *DECADES DOWN THE ROAD*, *supra* note 11, at 13-14. A ninth state, Arizona, allows any person to transfer an existing right to instream flow use, but only the state or one of its political subdivisions may do so without losing the water right's original priority date. *Id.* at 13.

²⁸ COLO. REV. STAT. § 37-92-102(3) (2005).

²⁹ *Id.*

³⁰ *Id.*

³¹ WYO. STAT. ANN. § 41-3-1007(a) (2005).

proceeding, and the statute provides that petitions for changes in use to instream flow will be filed by the Game and Fish Commission.³²

B. Criticism of the Typical Western Approach to Instream Flows

From the standpoint of ensuring that rivers have sufficient water to provide adequate protection for a full range of public values, the western states' traditional approach to instream flows—as typified by Colorado and Wyoming—has several major problems.³³

1. State Agencies Determine the Degree of Protection

State agencies decide whether instream flows will be established at all, and also decide the flow levels to be protected. Moreover, state agencies are responsible for ensuring that established instream flows are protected during times of shortage—that is, the agencies must place a “call” on the river to shut off water users whose rights are junior to the instream flow. When state water agencies place a higher priority on protecting the interests of traditional water users than on protecting public values, instream flow protection is likely to suffer.

Experience in Wyoming shows some of the ways in which state agencies—even agencies with highly dedicated, expert staff³⁴—can fall short of providing adequate protection for instream flows. One way is by failing to establish instream flow rights where they are most needed. As of 2005, Wyoming agencies³⁵ had filed for ninety-seven instream flow rights, more than in most other western states.³⁶ The vast majority of these rights, however, are

³² *Id.*

³³ In identifying these problems with state instream flow programs, I cannot claim to be either complete or original. Several commentators have already examined these problems, as well as various others. *See, e.g.,* DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 111–35, 297–306 (1997) (highlighting problems in the instream flow protection statutes of western states such as the use of the term “minimum flows” instead of “optimal flows”); Covell, *supra* note 11, at 191–96 (describing the limitations of instream flow rights, depending on the purpose of the right, how it is administered, and whether it is established by appropriation or reservation); Steven J. Shupe & Lawrence J. MacDonnell, *Recognizing the Value of In-Place Water Uses in the West: An Introduction to the Laws, Strategies and Issues*, in *INSTREAM FLOW PROTECTION IN THE WEST* 1-1, 1-15 to 1-19 (Lawrence J. MacDonnell & Teresa A. Rice eds., 1993) (suggesting that western states should look at uses beyond fish use in crafting instream flow protection statutes).

³⁴ Tom Annear has been the lead staff person on instream flow issues for the Wyoming Game & Fish Department since 1981. *INSTREAM FLOW COUNCIL, INSTREAM FLOWS FOR RIVERINE RESOURCE STEWARDSHIP* 407 (2002). In addition to working tirelessly on instream flow issues in Wyoming, he has been a major force in the Instream Flow Council (IFC), serving as chair of the IFC steering committee from 1995 to 1998 and as its first president from 1998 to 2000. *Id.* IFC is a nonprofit organization, composed of state and provincial fish and wildlife agencies, whose mission is to improve the effectiveness of instream flow programs. *Id.* at xv.

³⁵ The Wyoming Water Development Commission applies for instream flow rights on stream segments recommended by the Wyoming Game & Fish Commission. WYO. STAT. ANN. § 41-3-1003(c) (2005).

³⁶ *DECADES DOWN THE ROAD, supra* note 11, at 18. As of 2005, only Colorado, Oregon,

for streams flowing entirely across federal lands,³⁷ which are probably the ones least in need of protection as a legal and practical matter.³⁸ And even where instream rights exist, the agencies may not actually protect the flows from being depleted below established levels by junior water users.³⁹ According to a recent report by CWCB, Wyoming is one of "at least five states [that] do not regularly protect and enforce instream flow water rights."⁴⁰

2. The Purposes of Instream Flow Rights Are Too Narrow

Instream flows provide a wide range of public benefits, supporting river recreation (from whitewater boating to swimming and wading), fish and wildlife habitat, water quality, riparian areas, and scenic beauty.⁴¹ These benefits are highly valued in today's West, but they are essentially ignored (or addressed only incidentally) by instream flow programs that protect flows solely for fish habitat or other narrow purposes.

No state has a more restrictive instream flow law than Wyoming, but Colorado also narrowly constrains the purposes for which minimum streamflows may be established. For example, even though adequate instream flows can have significant benefits for water quality,⁴² Colorado law does not

Montana, and Washington had more instream flow rights than Wyoming. *Id.* Arizona (with 93 instream rights) and Idaho (85 instream rights) had about the same number. *Id.*

³⁷ E-mail from Tom Annear, Water Mgmt. Coordinator, Wyo. Game & Fish Dep't, to Reed D. Benson, Assoc. Professor of Law, Univ. of Wyo. Coll. of Law (Apr. 3, 2006, 15:00 MDT) (on file with author); E-mail from Tom Annear, Water Management Coordinator, Wyo. Game & Fish Dep't, to Reed D. Benson, Assoc. Professor of Law, Univ. of Wyo. Coll. of Law (Apr. 4, 2006, 15:45 MDT) (on file with author).

³⁸ As a practical matter, National Forest waters are often high-altitude headwater streams and the flows are not likely to be significantly affected by upstream diversions for irrigation or other purposes. *See generally* United States v. New Mexico, 438 U.S. 696, 724 (1978) (Powell, J., dissenting) (noting that instream flow rights for national forest lands would not conflict with the water supply purposes of the national forest system, because these non-consumptive rights would not reduce the supply available to downstream appropriators). As a legal matter, the U.S. Forest Service has authority under the National Forest Management Act to impose protective conditions, including minimum "bypass flows," on permits for dams or diversions located on National Forest lands. *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1084-85 (9th Cir. 2003); *Trout Unlimited v. U.S. Dep't of Agric.*, 320 F. Supp. 2d 1090, 1105-06 (D. Colo. 2004), *stay denied*, No. Cir.A. 96-WY-2686-WD, 2005 WL 2141465 (D. Colo. Sept. 2, 2005), *appeal dismissed*, 441 F.3d 1214 (10th Cir. 2006).

³⁹ Enforcement in Wyoming is undoubtedly hampered by a statute which imposes a complicated process and tough standards for regulating water use in favor of an instream flow right. WYO. STAT. ANN. § 41-3-1008 (2005). A dearth of agency resources devoted to instream flow protection is probably another factor. The Wyoming instream flow program has only the equivalent of two full-time employees. *DECADES DOWN THE ROAD*, *supra* note 11, at 18.

⁴⁰ *DECADES DOWN THE ROAD*, *supra* note 11, at 26. The other states are Alaska, Arizona, Idaho, and South Dakota. *Id.*

⁴¹ A leading book on the subject identifies and explains all these benefits of instream flows, plus hydropower, navigation, and river channel maintenance. GILLILAN & BROWN, *supra* note 33, at 45-79.

⁴² The lower a stream's flow, the more easily its water quality can be impaired by heat or other pollutants. *See* Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 232-34 (2005) (explaining ways that altered flows can affect water quality, and can also lead to violations of water quality

authorize any regulation of water quantity for purposes of protecting water quality.⁴³ By authorizing appropriation of minimum streamflows "to preserve the natural environment to a reasonable degree,"⁴⁴ the Colorado statutory language would seem broad enough to allow the establishment of flows for water quality and other environmental purposes, but CWCB sees no such authority in the law.⁴⁵

3. Instream Flow Rights Only Protect What Is Left, Which Is Often Very Little

Because state instream flow programs work primarily by protecting flows that have not already been appropriated, and because flow protections were established only in the latter part of the twentieth century, many streams were fully appropriated long before there was any flow protection. Thus, a stream may have an instream flow right but still be dried up, quite legally, by the exercise of senior water rights.⁴⁶

Colorado illustrates, perhaps as well as any state, that establishing instream flow rights does not prevent dewatering of streams. Remarkably, Colorado had nearly two thousand minimum streamflows as of 2005, significantly more instream flow rights than any other western state.⁴⁷ But the problem of depleted rivers remains substantial in the state, as documented in a 2002 report by Trout Unlimited.⁴⁸

4. Rigid Limits on Water Rights Discourage Transfers for Instream Use

Where state laws impose rigid requirements on instream flow rights—such as the prohibition in the Wyoming statute, as interpreted by the state engineer, against temporary transfers of water rights to instream use⁴⁹—they discourage efforts to restore instream flows through conversion of existing

standards established under the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (2000)).

⁴³ The Colorado Water Quality Protection Act provides that it shall not be interpreted "to supersede, abrogate, or impair rights to divert water and apply water to beneficial uses" under state law. COLO. REV. STAT. § 25-8-104(1) (2005); *see also* City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 91 (Colo. 1996) (observing that "the system of water quality regulation in Colorado reflects a continued conflict with and subordination to the prior appropriation system"); Colo. Wild, Inc. v. U.S. Forest Serv., 122 F. Supp. 2d 1190, 1192–93 (D. Colo. 2000) (interpreting the statute to give water rights priority over water quality protection).

⁴⁴ COLO. REV. STAT. § 37-92-102(3) (2005).

⁴⁵ *See* DECADES DOWN THE ROAD, *supra* note 11, at 10 tbl.5 (showing water quality as an authorized purpose for instream flows in nine western states, but not Colorado).

⁴⁶ This situation is common in the West, even on major rivers such as the Snake in Idaho, the Gila and Salt in Arizona, the Arkansas in Colorado, and the San Joaquin in California. GILLILAN & BROWN, *supra* note 33, at 40.

⁴⁷ DECADES DOWN THE ROAD, *supra* note 11, at 18. Only Oregon, with 1550 instream flow rights, was anywhere near Colorado's 1926 rights. *Id.* The number three state in this category, Montana, had 434 instream flow rights as of 2005. *Id.*

⁴⁸ TROUT UNLIMITED, A DRY LEGACY: THE CHALLENGE FOR COLORADO'S RIVERS (2002), available at <http://cotrout.org/Dry%20Legacy%201.pdf>. This report provides 10 case studies of stream dewatering problems in Colorado, rather than a scientific or statistical study. *Id.*

⁴⁹ *See infra* notes 131–35 and accompanying text.

water rights. This chilling effect may, in fact, be the primary reason why these requirements were established and why they remain on the books.⁵⁰

If the purpose of such restrictions is to inhibit water right changes to instream use, they are working very well. For example, Wyoming law has allowed such changes for twenty years, but in all that time there has not been even one. The statute, of course, requires that all instream water rights (even transferred ones) be "held in the name of the state of Wyoming," and conventional wisdom is that this tool has not been used because nobody has wanted to deed his or her water rights to the Game and Fish Department. Some water users may be willing to sell to the agency if paid good money for their rights, but Wyoming has never allocated state funds for water right acquisitions, and it appears unlikely to do so any time soon.⁵¹

In short, these are some of the problems that have prevented instream flow programs in the western states from actually preserving and restoring flows as effectively as they could—returning to the schools metaphor, these problems are major reasons why "Johnny can't read." The next Part of this Article evaluates whether Colorado and Wyoming have taken steps since 2000 to address these problems in their laws.

III. HAVE COLORADO AND WYOMING MADE PROGRESS IN THEIR INSTREAM FLOW LAWS?

In recent years the Colorado and Wyoming legislatures, and to a lesser extent the agencies and courts of these states, have been faced with decisions relating to instream flow laws. To what extent have these decisions resulted in progress toward addressing some of the basic problems of the states' standard approach to protecting flows?

A. Allowing Other Entities (Beyond State Agencies) to Protect Flows?

1. Colorado

Colorado statutes still require that CWCB hold all minimum streamflow rights. The Colorado legislature has retained this limitation even for existing water rights that are converted to instream use, and even

⁵⁰ Consider the following statement by attorney Chris Meyer:

The most pervasive and frustrating limitation on instream rights in most western states is the prohibition against ownership of instream rights by persons other than a designated state entity. This prohibition is a curious twist on the prior appropriation doctrine. It reflects a basic discomfort with the concept of instream rights and an underlying distrust of those entities which may seek to acquire them, particularly environmental groups and the federal government.

Christopher H. Meyer, *Instream Flows: Integrating New Uses and New Players into the Prior Appropriation System*, in *INSTREAM FLOW PROTECTION IN THE WEST*, *supra* note 9, at 2-1, 2-13.

⁵¹ See *infra* notes 110-14 and accompanying text (discussing prohibition, enacted in 2005, on use of the new wildlife trust fund to acquire water rights for instream flows).

as it has provided new legal tools for such conversions including water right loans and water banks.⁵²

In 2001, however, the Colorado legislature enacted a statute⁵³ allowing cities and other local government entities⁵⁴ to pursue a quasi-instream flow right for recreational purposes. The statute provides for a water right called a “[r]ecreational in-channel diversion,” or RICD.⁵⁵ Such water rights are like instream flow rights in that they allow a local government to appropriate an amount of streamflow for use within the river channel. But unlike a true minimum streamflow, a RICD requires that this flow be “diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures.”⁵⁶ And unlike minimum streamflows, RICDs are held by local governments rather than by CWCB.⁵⁷ The statute requires CWCB to hold a hearing on any RICD application and make certain factual findings,⁵⁸ but those findings may be rebutted by any party in water court proceedings on the application.⁵⁹ CWCB may participate in the water court proceedings,⁶⁰ but the water court makes the final decision on the application.⁶¹

The statute codified RICDs as a legitimate form of water rights for local governments, but the Colorado courts had already recognized that cities could obtain recreational water rights for in-channel use. In a 1992 decision, the

⁵² See *infra* notes 115–24 and accompanying text (discussing these changes by the legislature in 2002 and 2003).

⁵³ Act of June 5, 2001, ch. 305, § 7, 2001 Colo. Sess. Laws 1187, 1188–89.

⁵⁴ The statute provides that “only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district” may obtain a RICD water right. COLO. REV. STAT. § 37-92-103(7).

⁵⁵ *Id.* § 37-92-103(10.3) (2005).

⁵⁶ *Id.*

⁵⁷ *Id.* (noting that local governments file applications for RICDs).

⁵⁸ *Id.* § 37-92-102(6). These findings address several issues, including whether the RICD would affect Colorado’s ability to develop all the water it is entitled to under interstate compacts, and whether the RICD “would promote maximum utilization of waters of the state.” *Id.* § 37-92-102(6)(b)(V).

⁵⁹ *Id.* § 37-92-305(13).

⁶⁰ See *id.* § 37-92-102(6)(c) (noting that the board may defend findings through participation in the proceedings). Indeed, CWCB has been an active objector in RICD water court proceedings. For example, many local water users objected to both the (pre-statute) Golden application and the Steamboat Springs application; the cities were able to settle before trial with all of the local water users, but not with CWCB. See *Concerning the Application for Water Rights of the City of Golden*, No. 98CW448, slip op. at 1-2 (Colo. Water Div. 1 June 13, 2001); *Concerning the Application of the City of Steamboat Springs*, No. 03CW86, slip op. at 1-3 (Colo. Water Div. 6 Mar. 13, 2006). CWCB settled with Steamboat Springs only after the water court had ruled in the city’s favor. Dana Strongin, *City Endorses Water Settlement*, STEAMBOAT PILOT & TODAY, Feb. 3, 2006, at 2, available at http://www2.steamboatpilot.com/news/2006/feb/02/city_endorses_water/.

⁶¹ See COLO. REV. STAT. § 37-92-305 (2005) (listing the standards the water judge must follow in making a ruling). In a case where CWCB had recommended that the water court award a lesser flow than requested by the RICD applicant, the Colorado Supreme Court held that the statute required CWCB “to function as a narrowly constrained fact-finding and advisory body when it reviews RICD applications, rather than in an unrestricted adjudicatory role.” *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005).

Colorado Supreme Court upheld the City of Fort Collins's water right for recreational uses on the Cache La Poudre River.⁶² Fort Collins was interested in maintaining a minimum flow in the Cache La Poudre River through town, but as a municipality it could not obtain a minimum streamflow right. Instead, the city sought a garden-variety appropriation to maintain flows within the river channel. The city's uses of the water, including fish, wildlife, and recreation, were already recognized as beneficial under Colorado statutes.⁶³ In order to make a valid appropriation, the city also had to demonstrate that the waters of the river would be diverted,⁶⁴ but this statutory requirement could be satisfied by "controlling water in its natural course or location" by means of some sort of "structure or device."⁶⁵ The city proposed to control the waters through the use of a couple of structures within the river channel that served, among other things, as fish ladders and low-flow boat chutes.⁶⁶ A major argument against this claim was that Fort Collins was simply seeking a minimum streamflow right through illegitimate means.⁶⁷ The Colorado Supreme Court rejected this argument and upheld the water court's decree, holding that although the city's proposed use "may effect a result which is similar to a minimum flow," it was nonetheless a valid appropriation under Colorado statutes.⁶⁸

After other Colorado cities, relying on the Fort Collins precedent, sought their own decrees for recreational water rights, the Colorado legislature predictably stepped in.⁶⁹ As introduced in the 2001 legislative session, Senate Bill 216 would have given CWCB the power to determine the appropriate amount of water for a claimed RICD.⁷⁰ Moreover, an early version of Senate Bill 216 would have repealed most of its own provisions regarding RICDs after two years.⁷¹ As enacted, however, Senate Bill 216 authorized cities and other

⁶² *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

⁶³ *Id.* at 930 (citing COLO. REV. STAT. § 37-92-103(4) (1990), which defines "beneficial use" to include "the impoundment of water for recreational purposes, including fishery or wildlife").

⁶⁴ *City of Thornton*, 830 P.2d at 929 (citing COLO. REV. STAT. § 37-92-305(9)(b) (1990), which requires an applicant for a conditional water right to establish "that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled").

⁶⁵ *City of Thornton*, 830 P.2d at 929-30 (citing COLO. REV. STAT. § 37-92-103(7) (1990), which defines diversion as "removing water from its natural course or location, or controlling water in its natural course or location, by means of a ditch, canal, flume, reservoir . . . or other structure or device").

⁶⁶ *City of Thornton*, 830 P.2d at 920. Perhaps oxymoronicly, Fort Collins called one of these structures the "Nature Dam." *Id.*

⁶⁷ *See id.* at 929 (City of Thornton arguing that the Nature Dam is not a true diversion, and that Fort Collins is simply making a thinly disguised and illegal minimum streamflow claim).

⁶⁸ *Id.* at 931. The court held that because Fort Collins was using structures or devices to divert or control the water, "[t]his is not an appropriation of a minimum stream flow, an appropriation given exclusively to the CWCB." *Id.*

⁶⁹ *See Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservatory Dist.*, 109 P.3d 585, 591 (Colo. 2005) (emphasizing that the Colorado General Assembly enacted a RICD statute after the cities of Golden and Breckenridge filed for recreational water right decrees, but before water courts finally decided those cases).

⁷⁰ *See id.* at 594 (noting that CWCB sought to assert that same power under the RICD statute as enacted).

⁷¹ S.B. 01-216, 63rd Leg., 1st Reg. Sess. (Colo. 2001) (as amended by Senate Public Policy

local governments to pursue RICD water rights without any time limits,⁷² and gave CWCB only a limited fact-finding role in the process of adjudicating RICD claims.⁷³ Thus, while preserving a “not unimportant” role for CWCB in reviewing RICD applications,⁷⁴ the Colorado legislature confirmed the legitimacy of quasi-instream flow rights for recreational purposes obtained and held by cities for their own uses.⁷⁵ At least eight Colorado cities and localities have filed for water rights under the RICD statute, joining Fort Collins and five others who obtained decrees for pre-statute recreational water rights.⁷⁶

2. Wyoming

In recent years, the Wyoming legislature has rejected bills that would have allowed any “person or entity [to] acquire by purchase, gift, lease or other form of conveyance” the right to use of water under an existing right and convert that right to temporary instream flow use for up to two years, subject to the approval of the state engineer. These proposals, including Senate File 106 in 2005⁷⁷ and Senate File 72 in 2003,⁷⁸ have failed.

B. Allowing Instream Flow Water Rights for Purposes Beyond Fish?

1. Colorado

Minimum streamflows are still recognized only for the purpose of “preserv[ing] the environment to a reasonable degree.”⁷⁹ But by recognizing water rights for maintaining in-channel river flows for recreational purposes—initially through the Fort Collins decision,⁸⁰ and later through the RICD statute⁸¹—Colorado has effectively expanded the purposes for which instream flows may be legally protected.

and Planning Committee).

⁷² See Act of June 5, 2001, ch. 305, § 7, 2001 Colo. Sess. Laws 1187, 1189.

⁷³ *Upper Gunnison River Water Conservancy Dist.*, 109 P.3d at 592–95.

⁷⁴ *Id.* at 595.

⁷⁵ The 2006 Colorado legislature enacted a new statute that imposed some new standards on RICD applications, but preserved cities’ ability to obtain and hold these water rights. See *infra* notes 91–96 and accompanying text.

⁷⁶ Colo. Water Conservation Bd., Recreational In-Channel Diversion Program, <http://cwcb.state.co.us/WaterSupply/RICD.htm> (last visited Nov. 12, 2006). According to CWCB, by early June, 2006, three communities—Gunnison, Longmont, and Steamboat Springs—had obtained RICD decrees, and Avon, Chaffee County, Durango, Pueblo, and Silverthorne had filed under the RICD statute. Six cities—Aspen, Breckenridge, Fort Collins, Golden, Littleton, and Vail—had secured pre-RICD recreational water rights based on the precedent established in the Fort Collins case. *Id.*

⁷⁷ S. File 106, 58th Leg., Gen. Sess. (Wyo. 2005), available at <http://legisweb.state.wy.us/2005/digest/SF0106.htm>.

⁷⁸ S. File 72, 57th Leg., Gen. Sess. (Wyo. 2003), available at <http://legisweb.state.wy.us/2003/Digest/sf0072.HTM>.

⁷⁹ COLO. REV. STAT. § 37-92-102(3) (2005).

⁸⁰ See *supra* notes 62–68 and accompanying text.

⁸¹ See *supra* notes 53–61 and accompanying text.

Somewhat paradoxically, Colorado law has for many years recognized recreation as a beneficial use of a water right, but not for a minimum streamflow. In the Fort Collins case, the court applied a statute that defined beneficial use to include "impoundment of water for recreational purposes, including fishery or wildlife," and separately, to include "appropriation by the state of Colorado in the manner prescribed by law of such minimum flows . . . as are required to preserve the natural environment to a reasonable degree."⁸² The latter provision prevented Fort Collins from obtaining a true instream flow right, but the former opened the door for the city to obtain a water right to preserve flows in the river for recreational purposes. The dispute in the Colorado Supreme Court centered on whether the city would make a legitimate diversion, not on whether recreation was a legitimate beneficial use.⁸³

The RICD statute established "recreational in-channel diversion purposes" as a specific type of beneficial use for which certain local governments could obtain a water right.⁸⁴ It further defined a RICD as "the minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use . . . for a reasonable recreation experience in and on the water."⁸⁵ The 2001 statute did not define this last term.⁸⁶ In practice, most cities seeking recreational water rights have sought to ensure adequate flows for whitewater boating and floating,⁸⁷ and more specifically for engineered whitewater parks designed and built to provide features for kayak play-boating at a variety of water levels.⁸⁸ For example, the city of Golden sought a pre-statute recreational right for its kayak course on Clear Creek—one of the most fought-over streams in Colorado—and obtained a decree for up to 1,000 cubic feet per second (cfs).⁸⁹ More recently, Steamboat Springs obtained an even larger RICD water right for its downtown whitewater course on the Yampa River.⁹⁰

⁸² *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 930 (Colo. 1992) (citing COLO. REV. STAT. § 37-92-103(4) (1990)).

⁸³ *City of Thornton*, 830 P.2d at 929–31.

⁸⁴ COLO. REV. STAT. § 37-92-103(4) (2005).

⁸⁵ COLO. REV. STAT. § 37-92-103(10.3).

⁸⁶ The RICD bill as introduced had an even less specific standard, allowing RICDs "for recreation in and on the water." S.B. 01-216, 63rd Leg., Reg. Sess. (Colo. 2001) (as amended by Senate Public Policy and Planning Committee).

⁸⁷ Many people enjoy whitewater without a boat, using a boogie board, inner tube, or other device.

⁸⁸ A Boulder company, Recreation Engineering and Planning, is a leading developer of these whitewater parks. The company's website lists about three dozen completed projects involving whitewater parks, including many in Colorado and a few in Wyoming. See List of Completed Projects, http://www.wwparks.com/compl_proj.htm (last visited Nov. 12, 2006).

⁸⁹ Concerning the Application for Water Rights of the City of Golden, No. 98CW448, slip op. at 4–5 (Colo. Water Div. 1, June 13, 2001) Following the enactment of the RICD statute, an equally divided Colorado Supreme Court affirmed Golden's water court decree. *State Eng'r v. City of Golden*, 69 P.3d 1027, 1028 (Colo. 2003).

⁹⁰ Steamboat Springs appropriated up to 1400 cfs on the Yampa. Concerning the Application of the City of Steamboat Springs, No. 03-CW-86, slip op. at 4 (Colo. Water Div. 6, Dec. Mar. 13, 2006).

In response to ongoing controversy over these recreational water rights,⁹¹ the 2006 Colorado legislature established additional requirements and standards on RICDs.⁹² Under the new law, RICDs may be obtained only for the purpose of “nonmotorized boating.”⁹³ Perhaps more significantly, the 2006 statute imposed certain limits on local governments’ ability to obtain a RICD,⁹⁴ to defend a RICD against new appropriations,⁹⁵ and especially to call for water to satisfy a RICD.⁹⁶

2. Wyoming

Proposals to expand (beyond fisheries) the purposes for which instream flows may be created have failed in the Wyoming legislature. For example, in the 2003 legislative session, Senate File 72 would have expanded beneficial uses for instream flow purposes to include water quality, aesthetics, and groundwater recharge.⁹⁷ The bill failed. In 2005, Senate File 107 met the same fate; it would have expanded beneficial uses for instream

⁹¹ Those who support restrictions on RICD applications have raised a variety of concerns. State Senator Jack Taylor, who sponsored a bill in 2005 that would have imposed limits on RICDs, said that the bill was intended to protect Colorado water law. Christine Metz, *Senate Passes RICD Bill*, STEAMBOAT PILOT & TODAY, Mar. 1, 2005, at A1, available at http://www2.steamboatpilot.com/news/2005/feb/28/senate_passes_ricd/. He also said that RICDs could limit water storage projects and new appropriations in Colorado. *Id.* Additionally Taylor said that the issue with RICDs was not recreation, but greed and control. *Id.* “Whether Vail or Steamboat, they want to get control They are going outside the city limits and trying to control what is happening out in the county for their benefit.” *Id.* (quoting state senator Jack Taylor).

⁹² Act of May 11, 2006, ch. 197, 2006 Colo. Sess. Laws. 906, 906–10

⁹³ This limitation is set forth in a new definition of “reasonable recreation experience,” which further provides, “[o]ther recreational activities may occur but may not serve as evidence of a reasonable recreation experience.” COLO. REV. STAT. § 37-92-103(10.1) (2006).

⁹⁴ *Id.* § 37-92-103(10.3). RICDs may be obtained only from April 1 to Labor Day “unless the applicant can demonstrate that there will be demand for the reasonable recreation experience on additional days.” *Id.* The new statute also limits the time periods for which RICDs may be established. *Id.*; *Id.* § 37-92-305(13)(f).

⁹⁵ *Id.* § 37-92-103(10.3). The statute establishes a presumption that a RICD will not be injured by a new water right that would reduce the amount of water available to the RICD by no more than one-tenth of one percent of its lowest decreed flow, so long as the cumulative effect of all such new rights does not exceed two percent of the RICD’s lowest decreed flow. *Id.* This same standard also applies to water right changes. *Id.*

⁹⁶ A relatively large RICD—one whose total volume exceeds half the average annual flow of the relevant stream segment—may call for water only if the call would result in the RICD receiving at least 85% of its decreed flow rate. *Id.* § 37-92-305(13)(f). Thus, if the RICD had a decreed flow rate of 1,000 cfs for the month of June, a June call would be valid only if it would result in the RICD getting at least 850 cfs. This restriction is perhaps the most significant provision of the new law. In addition, the statute provides that RICD decrees shall include a finding “as to the flow rate below which there is no longer any beneficial use of the water” for recreation. *Id.* § 37-92-305(13)(d). Presumably, no one could place a call for any RICD water right if the resulting flow would fall below this specified level.

⁹⁷ S. File 72, 57th Leg., Gen. Sess. (Wyo. 2003), available at <http://legisweb.state.wy.us/2003/introduced/sf0072.pdf>.

flow purposes to include water quality, aquatic and riparian habitat improvement, and groundwater recharge.⁹⁸

C. Seeking Flow Restoration Through State Action?

1. Colorado

The Colorado legislature enacted a statute in 2002 expanding the authority of CWCB to acquire water rights for instream flows.⁹⁹ The statute allows CWCB to accept water rights by donation (as well as through purchases, leases or other arrangements, as allowed under the preexisting statute¹⁰⁰), and to accept such water rights even if they would exceed the amounts needed to meet minimum streamflows.¹⁰¹ Moreover, the statute authorizes CWCB to use any funds available to it (other than a specified construction fund) to acquire water rights and convert them to instream flows.¹⁰² Thus, the 2002 statute not only lifted some of the constraints on CWCB's authority to obtain existing water rights for instream use, it specifically authorized the use of appropriated state funds to promote flow restoration through water right transfers.¹⁰³

Since voters approved the Great Outdoors Colorado program (GOCO) in 1992, the Colorado constitution has authorized the spending of state lottery dollars to "[p]rovide water for recreational purposes through the acquisition of water rights or through agreements with holders of water rights, all in accord with applicable state water law."¹⁰⁴ The constitution directs the net proceeds of state lottery games into a GOCO trust fund,¹⁰⁵ to be spent on various programs for the benefit of Colorado wildlife, recreation, parks, and open space.¹⁰⁶ In fiscal year 2003–2004, the GOCO Trust Fund expended fifty-four million dollars for these programs.¹⁰⁷ Although the GOCO provisions of the

⁹⁸ S. File 107, 58th Leg., Gen. Sess. (Wyo. 2005), available at <http://legisweb.state.wy.us/2005/Introduced/SF0107.pdf>.

⁹⁹ Act of May 21, 2002, ch. 149, 2002 Colo. Sess. Laws 445, 445–46 (codified at COLO. REV. STAT. § 37-92-102(3) (2005)).

¹⁰⁰ COLO. REV. STAT. § 37-92-102(3) (2002).

¹⁰¹ COLO. REV. STAT. § 37-92-102(3) (2005). The statute allows CWCB to acquire water rights "in such amount as the board determines is appropriate for stream flows . . . to preserve or improve the natural environment to a reasonable degree." *Id.* Before this amendment, CWCB was authorized to acquire water rights only as "may be required for minimum stream flows . . . to preserve the natural environment to a reasonable degree." *Id.* The change therefore frees CWCB to acquire water rights, by donation or otherwise, for water in excess of the amount needed to satisfy minimum streamflows established by the board.

¹⁰² *Id.*

¹⁰³ The statute does, however, prohibit CWCB from accepting water rights that were acquired by condemnation. *Id.*

¹⁰⁴ COLO. CONST. art. XXVII, § 1(1)(b)(IV).

¹⁰⁵ *Id.* § 2 (establishing the trust fund); *id.* § 3 (allocating the net proceeds of all state-supervised lottery games to the trust fund, except for certain specified obligations).

¹⁰⁶ *Id.* § 5.

¹⁰⁷ GREAT OUTDOORS COLORADO, ANNUAL REPORT 2003–2004 6 (2005) (on file with author). The state board of the GOCO trust fund is responsible for deciding how to spend the available dollars. COLO. CONST. art. XXVII, § 6(2)(a).

constitution expressly disclaim any effect on Colorado water law,¹⁰⁸ they also establish water right acquisitions for recreation as an appropriate use of state lottery funds, on par with parks, open space, and wildlife projects.¹⁰⁹

2. Wyoming

In 2005, the legislature established the Wyoming Wildlife and Natural Resource Trust account, often referred to as the Wildlife Trust Fund.¹¹⁰ Money from the trust fund generally goes to fish and wildlife habitat projects, including those that improve, maintain, or benefit aquatic habitat.¹¹¹ No funds may be used, however, "to purchase water rights to be held by the state of Wyoming[,]" which of course would include instream flow rights.¹¹² In the same vein, the trust fund is authorized to make grants to nonprofit groups or governmental entities, but no grant money may be used to acquire "any interest in water rights to be held by the state of Wyoming."¹¹³ Moreover, the trust fund may not even receive water rights by gift or donation "unless the right is attached to real property accepted under the terms of this act."¹¹⁴

D. Providing Legal Flexibility for Water Right Transfers to Instream Use?

1. Colorado

In the disastrous drought of 2002, the city of Aspen sought to keep water in the Roaring Fork River to preserve its excellent trout fisheries, and worked out a deal with an irrigation entity and another municipality for a temporary change in water rights that would have kept the river flowing.¹¹⁵ The Colorado state engineer, however, determined that this temporary change could not be approved under existing law.¹¹⁶ In response, the Colorado legislature enacted a bill in 2003 authorizing water users to "loan" their water rights to CWCB for

¹⁰⁸ Article XXVII, section 7 preserves not only the water law provisions of the Colorado Constitution, but also all "statutory provisions related to the appropriation of water in Colorado." COLO. CONST. art. XXVII, § 7.

¹⁰⁹ *Id.* § 1 (purposes of GOCO program); *id.* § 5 (expenditures from trust fund).

¹¹⁰ Wyoming Wildlife and Natural Resource Funding Act, 2005 Wyo. Sess. Laws 225 (codified at WYO. STAT. ANN. §§ 9-15-101 to 9-15-107 (2005)).

¹¹¹ WYO. STAT. ANN. § 9-15-103(d) (2005).

¹¹² *Id.* § 9-15-103(g).

¹¹³ *Id.* § 9-15-105.

¹¹⁴ *Id.* § 9-15-103(k).

¹¹⁵ Melinda Kassen, *Statutory Expansion of State Agencies' Authority to Administer and Develop Water Resources in Response to Colorado's Drought*, 7 U. DENV. WATER L. REV. 47, 59-60 (2003). Aspen proposed to pay Salvation Ditch Company to transfer its water rights for the remainder of the 2002 irrigation season to Glenwood Springs, which would use the water to irrigate its municipal ball fields. *Id.* The water would have remained in the Roaring Fork River for a distance of 50 miles, to the benefit of Aspen and its recreation-based economy. *Id.* at 60.

¹¹⁶ *Id.* Aspen's attempted change of Salvation Ditch Company's water rights to Glenwood Springs was proposed under an 1899 Colorado statute authorizing a water right holder to loan her rights temporarily to another user. *Id.* at 59. The state engineer denied the proposed temporary transfer on the Roaring Fork because he found that it did not satisfy the criteria of the 1899 statute. *Id.* at 60.

instream flow purposes for up to 120 days.¹¹⁷ This 2003 statute limited these loans to basins or counties where a drought emergency had been declared, but two years later the legislature lifted this restriction.¹¹⁸

The 2003 legislature also authorized the creation of water banks within each of Colorado's major river basins for the purpose of facilitating water leases and other types of changes in use of water rights.¹¹⁹ This enactment greatly expanded the authority for water banks under Colorado statute, which previously had provided only for testing "the concept of a water bank" through a pilot bank in the Arkansas River Basin.¹²⁰ The water bank statute contemplates the use of water rights for instream flow purposes, requiring that any "transfer, lease, loan, exchange, or sale" of water for instream flow uses must be to CWCB.¹²¹ The 2003 statute authorizes the state engineer (rather than the water courts) to approve temporary water right changes through the water banks,¹²² subject to a no "material injury" standard¹²³ and other "necessary or desirable limitations" determined by the state engineer.¹²⁴

Even before these recent reforms, however, Colorado statutes provided a fair degree of flexibility regarding the arrangements for transferring water rights to instream flow use. Prior to the 2002 amendment discussed above,¹²⁵ CWCB was authorized to acquire, by grant, purchase, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water as the board determines may be required for minimum streamflows.¹²⁶ A unique arrangement between the city of Boulder and CWCB illustrates the flexibility

¹¹⁷ Act of June 5, 2003, ch. 362, 2003 Colo. Sess. Laws 2396, available at http://www.state.co.us/gov_dir/leg_dir/olls/sl2003a/sl_362.pdf.

¹¹⁸ See Act of Mar. 25, 2005, ch. 18, 2005 Colo. Sess. Laws 82, available at http://www.state.co.us/gov_dir/leg_dir/olls/sl2005a/sl_18.pdf (removing the drought emergency requirement for water rights owners to loan water to CWCB); COLO. REV. STAT. § 37-83-105(2)(a) (2005) (establishing conditions when a water rights owner may loan water to CWCB).

¹¹⁹ Act of June 5, 2003, ch. 361, 2003 Colo. Sess. Laws 2391, available at http://www.state.co.us/gov_dir/leg_dir/olls/sl2003a/sl_361.pdf.

¹²⁰ *Id.* § 1 (amending COLO. REV. STAT. § 37-80.5-102 by striking references to a pilot water bank in the Arkansas basin and authorizing the creation of water banks within each of the state's seven water divisions).

¹²¹ COLO. REV. STAT. § 37-80.5-104.5(1)(a)(II) (2003). The statutory language regarding instream flows is actually stated as a prohibition rather than an authorization: "The rules [for water banks, to be promulgated by the state engineer] shall not permit the transfer, lease, loan, exchange, or sale of water from the banks to instream flow uses as provided in section 37-92-102(3) unless such transfer, lease, loan, exchange, or sale is to the Colorado water conservation board." *Id.*

¹²² See *id.* § 37-80.5-104.5(1)(a)(III) (giving the state engineer authority to administer "leases, loans, and exchanges" under the Colorado Water Right Determination and Administration Act and the Colorado Ground Water Management Act, "notwithstanding the fact that they may not have been adjudicated").

¹²³ *Id.* § 37-80.5-104.5(1)(b).

¹²⁴ *Id.* § 37-80.5-104.5(1)(a)(V).

¹²⁵ See *supra* notes 99-103 and accompanying text.

¹²⁶ CWCB acquired its first water right under the authority of COLO. REV. STAT. § 37-92-102(3) in 1976, and as of 2006 it had done about 22 acquisitions in total. Telephone Interview with Anne Janicki, Senior Water Res. Specialist, Colo. Water Conservation Bd. (June 29, 2006) (on file with author).

of Colorado law for creative water right deals to restore streamflows. Boulder wanted to use some of its own water rights to restore the flows of Boulder Creek through the city. Boulder had built a wonderful walking and biking path along the creek in the 1980s, but in the summer months the creek was basically dry—dewatered by an irrigation diversion located, ironically, in a downtown city park.¹²⁷ Using the flexibility in Colorado law regarding conversion of water rights to instream use, Boulder negotiated a unique agreement with CWCB. The city dedicated some of its water rights for use in meeting the state's minimum streamflow,¹²⁸ while reserving the right to take the water for its own municipal use if needed in a dry year.¹²⁹ This arrangement has effectively restored flows in Boulder Creek to fifteen cfs in the summer months, when they had historically dropped to about one cfs due to irrigation use.¹³⁰

2. Wyoming

When the town of Pinedale tried to lease some of its own stored water rights for instream flow use in Pine Creek,¹³¹ the Wyoming state engineer denied the request because he interpreted state law as requiring state *ownership* of instream flows, and thus prohibiting leasing of water rights for this purpose.¹³² The Wyoming instream flow law provides only that no one "other than the state of Wyoming shall own any instream flow water right,"¹³³ but the state engineer inferred that this section also prohibited the State from holding any instream flow right that it did not "own."¹³⁴ The state engineer

¹²⁷ The diversion dam is located in a park located just east of Broadway and three blocks south of the Pearl Street Mall in Boulder.

¹²⁸ CWCB's instream water right on Boulder Creek, in the amount of 15 cfs, has a 1974 priority. The city conveyed senior water rights in excess of 18 cfs—primarily a portion of the Farmers Ditch water right, with an 1862 priority—to CWCB for purposes of meeting this minimum streamflow. Agreement between the City of Boulder and the Colorado Water Conservation Board 1-2 (July 20, 1990) (on file with author). These water rights were legally changed to instream use in 1993. Concerning the Application for Water Rights of the Colorado Water Conservation Board on Behalf of the State of Colorado and Water Rights of the City of Boulder, No. 90-CW-193, slip op. at 13-22, 28 (Colo. Water Div. 1 Dec. 20, 1993).

¹²⁹ In conveying its water rights to CWCB, the city reserved the right to use these rights "for its municipal purposes in the event of extraordinary drouth [sic] conditions or of emergency conditions involving the loss of water to its municipal system as a result of catastrophic events." Agreement between the City of Boulder and the Colorado Water Conservation Board ¶ 2(a) (July 20, 1990) (on file with author).

¹³⁰ Memorandum from the Colo. Water Conservation Bd. on Program Highlights (Dec. 2002) (on file with author).

¹³¹ Pinedale sought to convert 27% of its stored water in Fremont Lake (up to 4,800 acre-feet) for instream use in Pine Creek, which flows through the town. Pinedale entered into a renewable two year lease with the Wyoming Game & Fish Department allowing the agency to use the stored water for this purpose. Rose Skinner, *Wyoming Needs More Flexibility in Its Water Laws*, WYO. WATER FLOW (Wyo. Water Ass'n, Cheyenne, Wyo.), May 2004, at 2.

¹³² WYO. STATE ENG'R, PINE CREEK - INSTREAM FLOW SEGMENT No. 1, SECONDARY SUPPLY RECORD OF DECISION 6-8 (Dec. 10, 2003) (on file with author).

¹³³ WYO. STAT. ANN. § 41-3-1002(e) (2005).

¹³⁴ State engineer Pat Tyrrell has characterized WYO. STAT. ANN. § 41-3-1002(e) as leaving him no choice but to deny the application: "My decision, characterized as 'to avoid a precedent,' may

rejected this application even though he found no credible evidence that the proposed change would injure other water users.¹³⁵

In recent years, several bills have been introduced in the Wyoming legislature that would have authorized water rights to be used temporarily for instream flows. For example, Senate File 106 in 2005 would have allowed any person to obtain a water right for instream flow use for up to two years;¹³⁶ Senate File 65 in 2006 would have allowed water rights to be acquired for instream flow use for up to two years, but only by the state of Wyoming.¹³⁷ None of these bills have passed.

IV. "ADEQUATE PROGRESS" ON INSTREAM FLOWS

A. Considering Colorado and Wyoming Developments Since 2000

Have Colorado and Wyoming made "adequate progress" in addressing some of the fundamental problems of their instream flow laws since 2000? For each state this standard actually raises two questions. First, has the state made progress in reforming its instream flow laws? Second, has that progress been adequate?

In regard to Wyoming, the answer to the first question ends the inquiry: the Cowboy State has made no progress on its instream flow laws since 2000. The rejection of Pinedale's efforts to use its own stored water rights for temporary instream use,¹³⁸ the failure of legislative efforts to allow for this and other types of temporary changes to instream use, the legislature's refusal to expand the West's narrowest instream flow law to include uses beyond fisheries, and the prohibition on using the wildlife trust fund to acquire water rights (even by donation), all effectively convey the same message: for Wyoming decision-makers, protection and restoration of instream flows is at best a low priority.¹³⁹

As for Colorado, the answer to the first question is equally clear: the state has indeed made progress in reforming its laws relating to instream flows. Since 2000, the Colorado legislature has expanded CWCB's powers with respect to water right acquisitions, authorized water banking (with potential instream flow benefits) in each of the state's major river basins, and ended restrictions on "loaning" water rights for temporary instream use.¹⁴⁰ Most importantly, the 2001 RICD law provided statutory authority for cities and

in part have been exactly that. The precedent would have been one of having the word 'own' mean whatever public opinion or the State Engineer want it to be at any given time." Patrick T. Tyrrell, *Wyoming's Water Laws and the Pinedale Applications*, WYO. WATER FLOW (Wyo. Water Ass'n, Cheyenne, Wyo.), May 2004, at 3.

¹³⁵ WYO. STATE ENG'R, *supra* note 132, at 7.

¹³⁶ Temporary instream flow rights, S. File No. SF0106, 58th Leg., 2005 General Sess. § 1(e) (Wyo. 2005), available at <http://legisweb.state.wy.us/2005/Introduced/SF0106.pdf>.

¹³⁷ Temporary instream flows, S. File No. SF0065, 58th Leg., 2006 Budget Sess. § 1(b) (Wyo. 2006), available at <http://legisweb.state.wy.us/2006/Introduced/SF0065.pdf>.

¹³⁸ For further discussion see *supra* notes 131–35 and accompanying text.

¹³⁹ For further discussion see *supra* notes 110–14 and accompanying text.

¹⁴⁰ For further discussion see *supra* note 52 and accompanying text.

other local governments to obtain quasi-instream flow water rights for river recreation, allowing a new player to protect flows for a new purpose.¹⁴¹ One could argue that the 2001 statute only confirmed cities' authority to do what they could already do under the 1992 *Fort Collins* decision, but the legitimacy of such pre-statute claims was still heavily disputed in the Colorado courts, as shown by the Colorado Supreme Court's 3-3 split on appeal from Golden's water court decree.¹⁴² And while it is true that the 2006 legislature imposed new requirements and restrictions on RICD claims,¹⁴³ the new statute represents a step back on recreational water rights rather than a major retreat.¹⁴⁴

It is somewhat surprising that of these two states Colorado has been the one to revise its laws in ways that may be favorable to instream flows for public uses. Wyoming water law specifically requires consideration of the public interest, at least for new appropriations;¹⁴⁵ indeed, protection of the public interest is written right into the water law provisions of the Wyoming constitution.¹⁴⁶ Colorado law, by contrast, does not allow for consideration of public interest factors in regard to water rights,¹⁴⁷ perhaps reflecting the idea that the public interest is best served by ensuring that water may be appropriated for beneficial use.¹⁴⁸ This utilitarian philosophy seemingly

¹⁴¹ For further discussion see *supra* notes 53–61 and accompanying text.

¹⁴² *State Eng'r v. City of Golden*, 69 P.3d 1027, 1028 (Colo. 2003). The number and variety of amici curiae on appeal from the *Golden* decree also reflects the controversy associated with pre-code recreational claims. *Id.* at 1027 (listing dozens of attorneys representing diverse amici, including the city and county of Denver, the Colorado Farm Bureau, Vail Resorts, and Trout Unlimited).

¹⁴³ Act of May 11, 2006, ch. 197, 2006 Colo. Sess. Laws, 906, 906–10, available at http://www.state.co.us/gov_dir/leg_dir/olls/sl2006a/sl_197.pdf; see *supra* notes 91–96 and accompanying text.

¹⁴⁴ Some of the new statutory restrictions may prove to be significant in practice, particularly the limits on the ability of relatively large RICDs to place a call on junior water users. Act of May 11, 2006, ch. 197 § 1, 2006 Colo. Sess. Laws, 906, 909. The bill also restricted RICDs to a single recreational purpose, nonmotorized boating. *Id.* at 907. On the other hand, the 2006 statute did not restrict the types of entities that could obtain RICDs. *Id.* § 2, at 907. It did not increase CWCB's powers regarding RICD claims. *Id.* § 1, at 906, 908. And it did not impose firm limits on the size or season of RICD water rights. *Id.* § 1, at 907–09.

¹⁴⁵ The Wyoming state engineer has a duty to reject applications for new surface water permits "where the proposed use . . . threatens to prove detrimental to the public interest." WYO. STAT. ANN. § 41-4-503 (2005); see also *id.* § 41-3-931 (public interest to be considered in regard to permit application for groundwater well). See generally *id.* § 41-3-104(a) (Board of Control "shall consider all facts it believes pertinent" to a proposed change in the type of use or place of use of a water right).

¹⁴⁶ WYO. CONST. art. 8, § 3.

¹⁴⁷ In a case involving a determination of conditional water rights, the Colorado Supreme Court refused to allow the Colorado water courts to consider environmental factors without express statutory authorization: "Although environmental factors might provide a reasonable and sound basis for altering existing law, we have previously held: 'if a change in long established judicial precedent is desirable, it is a legislative and not a judicial function to make any needed change.'" *Bd. of County Comm'rs of the County of Arapahoe v. United States*, 891 P.2d 952, 972 (Colo. 1995) (quoting *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979)).

¹⁴⁸ See generally, Gregory J. Hobbs Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 875 (1989) ("The [d]octrine of [p]rior [a]ppropriation is an [e]xpression of the [p]ublic [i]nterest"); *id.* 881–82 (suggesting that the State of Colorado's

contributed to the biggest advance in Colorado instream flow law since 1973, the recreational in-channel water right. The Colorado Supreme Court recognized the Fort Collins in-channel claim not for policy reasons, but because it applied existing statutes and found that the city diverted or otherwise controlled water for a recognized beneficial use.¹⁴⁹ The city got a quasi-instream flow water right for recreation based on Colorado's commitment, not to the public interest, but to good old-fashioned appropriation.¹⁵⁰ That may seem an ironic twist on the beneficial use principle to some people, but probably not to RICD applicants, who expect to see major economic benefits from their whitewater courses.¹⁵¹

While Colorado has made substantial progress in strengthening its instream flow laws, it is hard to conclude that the progress has been "adequate," especially in regard to flow restoration. Without a doubt, the new statutes have provided new authority and flexibility to use existing water rights for instream use, thus expanding the "toolbox" for restoring flows. Thus far, however, most of these new tools have had no success in achieving flow restoration.¹⁵² Water right loans for instream use have been authorized since 2003, but there has never been such a loan.¹⁵³ Water banks have been authorized for all of Colorado's major river basins,¹⁵⁴ but these banks do not

public duty in regard to water resources is primarily a matter of assisting prior appropriators in making beneficial use of their water rights).

¹⁴⁹ *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 929–31 (Colo. 1992).

¹⁵⁰ In the words of the Colorado Supreme Court,

[A]ccording to the plain language of the foregoing statutes, we hold that water may be appropriated by a structure or device which either removes water away from its natural course or location and towards another course or location or which controls water within its natural watercourse, assuming such action puts the water to beneficial use. The type of beneficial use to which the controlled water is put may mean that the water must remain in its natural course Although controlling water within its natural course or location by some structure or device may effect a result which is similar to a minimum flow, that does not mean that the appropriation effected by the structure is invalid under the Act.

Id. at 930–31.

¹⁵¹ Studies project that the whitewater parks in Golden and Vail will each contribute more than one million dollars per year to those cities' economies. See Risa Shimoda, *The Way of the Whitewater Park*, PADDLER, May–June 2005, at 81, 82–83.

¹⁵² One of the new legal tools apparently has been used: the authority of CWCB to acquire water rights to improve (not just preserve) the environment to a reasonable degree. See COLO. REV. STAT. § 37-92-102(3) (2005). According to CWCB officials, this authority paved the way for an agreement to donate a 15 cfs water right to restore flows in North Mineral Creek near Silverton. DAN MERRIMAN & ANNE M. JANICKI, COLORADO'S INSTREAM FLOW PROGRAM—HOW IT WORKS AND WHY IT'S GOOD FOR COLORADO 5–6, <http://cwcb.state.co.us/Streamandlake/Documents/FinalRiparianAssocPaper.pdf> (last visited Nov. 12, 2006).

¹⁵³ Telephone Interview with Anne Janicki, Senior Water Res. Specialist, Colo. Water Conservation Bd. (June 29, 2006) (on file with author) [hereinafter Interview with Anne Janicki]. Although the loan statute has not been used for instream flow restoration, CWCB has done several temporary leases for this purpose under its general acquisitions authority. *Id.*

¹⁵⁴ The statute did not directly authorize the banks. Rather, the statute states that: "upon request by a water conservancy district or water conservation district, the state engineer shall promulgate program rules necessary or convenient for the operation of a water bank within the division in which such district is located." COLO. REV. STAT. § 37-80.5-104.5(1)(a) (2005). The

yet exist¹⁵⁵ except for the pilot bank in the Arkansas Basin, which had never processed a single transaction as of the middle of 2006.¹⁵⁶ CWCB has been authorized since 2002 to use funds from almost any source to acquire water rights and convert them to instream use, but has never spent any money for this purpose.¹⁵⁷

B. Suggested Reforms in Colorado and Wyoming Instream Flow Laws

One might argue that if the statutes provide tools that have not been used, the failure is in the implementation rather than the law. It may be that the circumstances are not yet ripe for the laws to achieve their full potential in facilitating flow restoration.¹⁵⁸ On the other hand, further statutory revisions might make the existing legal tools more attractive and effective.

In both Colorado and Wyoming, one factor requiring serious consideration is the role of the state agency in the conversion of existing water rights to instream use. In Wyoming, the statute allowing water rights to be changed to instream use has sat idle for twenty years,¹⁵⁹ probably because no one has wanted to donate a water right to the Game and Fish Department.¹⁶⁰ In Colorado, all permanent and temporary changes of existing

statute evidently requires such rules to be adopted before establishment of a water bank. *Cf.* COLO. REV. STAT. § 37-80.5-103(1) (2005) ("water bank operated pursuant to rules promulgated under this article").

¹⁵⁵ Outside the Arkansas Basin, no local entity has asked the state engineer's office to develop rules for a water bank, so the agency has never developed the rules necessary for establishment of water banks. Telephone Interview with Jody Grantham, Colo. State Eng'r's Office (July 11, 2006) (on file with author).

¹⁵⁶ *Id.* A 2001 statute authorized the creation of the "Arkansas River Water Bank Pilot Program," pursuant to rules promulgated by the state engineer. Water and Irrigation, ch. 284, 2001 Colo. Sess. Laws 1061.

¹⁵⁷ Interview with Anne Janicki, *supra* note 153.

¹⁵⁸ Experience in Oregon demonstrates that even reasonably good laws sometimes need a little time, and a little help, to work properly. Oregon enacted the "instream water rights law" in 1987 allowing water rights to be converted to instream use. *See* Janet C. Neuman & Cheyenne Chapman, *Wading into the Water Market: The First Five Years of the Oregon Water Trust*, 14 J. ENVTL. L. & LITIG. 135, 137 (1999). It was not until 1993, however, before any water right holder applied to transfer an existing water right to instream use. *Id.* at 147 n.37. After the nonprofit Oregon Water Trust was established in 1993 to pursue flow restoration through water right acquisitions, the state agency adopted "procedures" for implementing the 1987 statutes, and the Water Trust was then able to broker several pathbreaking water right deals for the benefit of instream flows. *Id.* at 146-53.

¹⁵⁹ The Wyoming Board of Control recently approved the first conversion of an existing water right to instream use under this statute. WYO. STAT. ANN. § 41-3-1007(a) (2005). This conversion, however, involved one of the Game and Fish Department's own water rights. The agency shut down a fish hatchery and converted its water right to instream flow use. Telephone Interview with Tom Annear, Water Mgmt. Coordinator, Wyo. Game & Fish Dept. (May 15, 2006) (on file with author).

¹⁶⁰ *See* Joan Barron, *No Go for Instream Flow Bill*, CASPER STAR-TRIBUNE, Sept. 4, 2003, at A1, available at <http://www.casperstartribune.net/articles/2003/09/04/news/910813dff54c759249ce9e851d2429c2.txt> (explaining that state senator Cale Case, a proponent of instream flow reforms, stated that the existing law has rarely been used because ranchers view leaving their rights instream as tantamount to giving water away to the state).

water rights to instream use must go through CWCB, which requires an extensive public involvement process regarding the proposal,¹⁶¹ after which CWCB may or may not agree to pursue the conversion.¹⁶² Such requirements probably serve to discourage many water users from changing their water rights to instream use, but it is not clear what other purpose is served by mandating that water rights *transferred* to instream use (as opposed to new instream appropriations) be held by a state agency.¹⁶³

The relative popularity of RICD claims¹⁶⁴—which, unlike instream flows, do not require affirmative approval of CWCB—also suggests that some flow protection efforts work best without much involvement by state agencies. Except for CWCB's exclusive power over instream flows, Colorado state agencies have a very limited role in determining water rights,¹⁶⁵ and, consistent with this principle, the RICD statute left the water courts in charge of deciding recreational water right claims.¹⁶⁶ CWCB certainly pushed for a stronger decision making role regarding RICDs, both in the Colorado legislature¹⁶⁷ and in the courts following the enactment of the statute.¹⁶⁸ But the Colorado Supreme Court held that the 2001 statute gave CWCB a “narrowly constrained” role in the RICD process,¹⁶⁹ and the 2006 legislature essentially left that role unchanged.¹⁷⁰ The statutes thus leave RICD decisions

¹⁶¹ See 2 COLO. CODE REGS. § 408-2 6i, 11 (2006). The process for short-term (120 day) loans of water for instream flow use is quicker and easier. *Id.* at § 408-2 6g.

¹⁶² CWCB's rules state that it “shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment.” *Id.* § 408-2 6e. The rules also say that “[s]uch evaluation may include, but need not be limited to,” consideration of several specified factors, including “potential material injury to existing decreed water rights,” the “natural environment that may be preserved or improved,” and “the effect of the proposed acquisition on the maximum utilization of the waters of the state.” *Id.*

¹⁶³ See Neuman & Chapman, *supra* note 158, at 167–72, for a discussion of some of the issues presented by proposals to allow private parties—rather than a state agency—to hold water rights that have been transferred to instream use.

¹⁶⁴ Eight cities have water rights or have pending applications under the RICD statute, following six who obtained pre-statute recreational water rights. Colo. Water Conservation Bd., Recreational In-Channel Diversion Program, <http://cwcb.state.co.us/WaterSupply/RICD.htm> (last visited Nov. 12, 2006).

¹⁶⁵ Colorado is well known as the only western state that retained a primary role for the courts, rather than state agencies, in making decisions on water right appropriations and transfers. In the words of one commentator, “increasing state agency authority over water rights administration and development runs counter to Colorado's traditional hands-off approach in managing water resources. Since the late nineteenth century, Colorado has maintained a court-based system for water rights determination.” Kassen, *supra* note 115, at 50.

¹⁶⁶ See COLO. REV. STAT. § 37-92-305(13) (2006).

¹⁶⁷ See Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 595 (Colo. 2005) (noting the RICD statute as enacted “does not give the CWCB the extensive oversight and adjudicatory authority it sought, nor does it give the CWCB any authority to dictate a flow rate or recreation experience for RICD water rights”).

¹⁶⁸ See *id.* at 593 (“General Assembly granted it expansive authority, in particular, the authority to objectively determine what stream flow is minimally necessary in order to provide a reasonable recreation experience”).

¹⁶⁹ See *id.* (holding “the General Assembly intended for the CWCB to function as a narrowly constrained fact-finding and advisory body when it reviews RICD applications, rather than in an unrestricted adjudicatory role”).

¹⁷⁰ The 2006 statute reduced CWCB's fact-finding obligations regarding RICD applications,

primarily to the applicants and the water courts, just as with all other Colorado water rights except for minimum streamflows.

This last principle—treating water right transfers for instream flow in the same manner as transfers for other uses—is important. The question is not whether water right changes to instream use should get special treatment. Such transfers should be subject to the same legal standards as any other, and should follow the same process, wherein other water right holders can raise objections about injury and other legally relevant issues. Such requirements, well established by statute both in Colorado¹⁷¹ and Wyoming,¹⁷² are appropriate; they allow water users to protect their interests from any potential harm that may result from a transfer. But why impose more rigorous standards, more extensive processes, or more restrictive ownership limits on just one type of transfer—a change to instream use? To the extent that state laws impose such additional requirements, they reflect nothing more and nothing less than discrimination against instream water uses.

In at least one other area—funding to acquire water rights for flow restoration—Colorado made statutory progress that cannot be deemed “adequate” in practice. To its credit, the Colorado legislature opened the door to spending state funds for water right acquisitions.¹⁷³ The Wyoming legislature, by contrast, kept the door closed, bolted, and barred by establishing the wildlife trust fund in 2005.¹⁷⁴ In practice, however, the difference between the two states is less dramatic than it may appear. Despite having statutory authority to do so, CWCB has never used state money to acquire water rights for instream use.¹⁷⁵ The GOCO board has spent lottery proceeds for water right acquisitions, but primarily for the purpose of flatwater (reservoir) recreation rather than instream flow restoration.¹⁷⁶

It has long been said that water in the West flows uphill to money. Some commentators have questioned whether that maxim is always true,¹⁷⁷ but there is no doubt that very little water flows uphill *without* money. Acquiring

but otherwise retained and clarified its existing role. See Act of May 11, 2006, ch. 197, 2006 Colo. Sess. Laws 906–10.

¹⁷¹ See COLO. REV. STAT. § 37-92-102(3) (2005) (stating that at the “request of any person . . . the board shall determine in a timely manner . . . what terms and conditions it will accept in a contract or agreement for such [a water right]” and authorizing CWCB to initiate water rights applications, “including applications for changes of water rights”).

¹⁷² WYO. STAT. ANN. § 41-3-1007(a) (2005) (providing that a “change in use of the [water] right [for instream flow] shall be in accordance with W.S. 41-3-104,” the general water right transfer statute).

¹⁷³ Act of May 21, 2002, ch. 149, 2002 Colo. Sess. Laws 148, 148–49 (amending COLO. REV. STAT. § 37-92-102(3)).

¹⁷⁴ See *supra* notes 110–14 and accompanying text.

¹⁷⁵ Interview with Anne Janicki, *supra* note 153.

¹⁷⁶ As of July 2006, Colorado State Parks had secured GOCO funding for one permanent water right acquisition and five leases, primarily to ensure adequate levels for reservoir recreation. Telephone Interview with Paul Flack, Hydrologist, Colo. State Parks (July 6, 2006) (on file with author).

¹⁷⁷ See, e.g., Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 916 (1998) (comparing the power of existing water users to the influence of money in determining water use and management practices).

water rights for instream use is an uphill battle,¹⁷⁸ and without significant funding to compensate water right owners, it will continue to be a losing battle. With values for some water rights on the Colorado Front Range in the range of \$11,000 per acre-foot,¹⁷⁹ the folly of relying on donations and low-budget nonprofit entities for acquisitions should be evident.

Colorado and Wyoming should consider funding models from the Pacific Northwest, where public money has been dedicated to water right acquisitions in recent years. In Washington, the legislature earmarked funds for use by the state Department of Ecology to acquire water rights for flow restoration.¹⁸⁰ At the regional level, the Columbia Basin Water Transactions Program—funded by the Bonneville Power Administration and run by the National Fish and Wildlife Foundation¹⁸¹—provides money for water right acquisitions by qualified local entities, including both nonprofit groups and state agencies.¹⁸² In 2005, this program contributed over \$1.2 million in funding for forty-two water right transactions, and local partners kicked in nearly \$1 million in cost share.¹⁸³

In sum, Colorado deserves credit for the progress made in addressing some of the shortcomings of its instream flow laws since 2000, especially in contrast to the complete lack of such progress in the square state to the north. Wyoming could take a huge remedial step forward simply by bringing its instream flow statutes in line with Colorado's, especially by recognizing recreational in-channel rights and providing more flexible options for converting water rights to instream use.

¹⁷⁸ The Oregon Water Trust is probably the leading pioneer in acquiring and converting irrigation water rights for instream use, and its experience shows the difficulty in negotiating deals and getting them approved. "The Water Trust's initial optimism about how much it could accomplish, and how quickly, has been tempered by the reality of just how difficult it is to buy water for instream flows." Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 439–40 (2004).

¹⁷⁹ Municipal water suppliers on the northern Front Range for years have been paying around \$11,000 per acre-foot for water from the Colorado-Big Thompson (CBT) Project. *Annual Transaction Review*, WATER STRATEGIST, Feb. 2006, at 21. I use this figure to illustrate the economic value of water in Colorado, but not to suggest that other water rights would command such a price because the market for CBT water is very unusual in some respects. *Id.* at 13–14.

¹⁸⁰ In Washington, state funds for water right acquisitions have come from both legislative appropriations for that purpose and from the state Salmon Recovery Funding Board. In the 2001–2003 biennium, \$3.5 million was earmarked through the appropriations process for acquisitions by the Department of Ecology. WASH. STATE DEP'T OF ECOLOGY & WASH. DEP'T OF FISH & WILDLIFE, WASHINGTON WATER ACQUISITION PROGRAM: FINDING WATER TO RESTORE STREAMS 20 (Mar. 2003), available at <http://www.ecy.wa.gov/pubs/0311005.pdf>.

¹⁸¹ See Columbia Basin Water Transaction Program, The Program, <http://www.cbwtp.org/jsp/cbwtp/program.jsp> (last visited Nov. 12, 2006).

¹⁸² As of June 2006, 10 local entities in four states had been approved for participation in the program. Columbia Basin Water Transaction Program, Program Partners, <http://www.cbwtp.org/jsp/cbwtp/partners/partners.jsp> (last visited Nov. 12, 2006).

¹⁸³ COLUMBIA BASIN WATER TRANSACTIONS PROGRAM, FINDING BALANCE IN THE BASIN: FY 05 ANNUAL REPORT SUMMARY 3 (2005), available at http://www.cbwtp.org/jsp/cbwtp/library/documents/CBWTP_2005Annual.pdf.

Looking to the future, what would constitute “adequate progress” in these states’ instream flow laws? As discussed above, flow restoration efforts could benefit greatly from further reforms in two key areas: eliminating needless legal and bureaucratic obstacles to water right changes for instream use and dedicating public funding for water right acquisitions to restore flows. Such changes would not resolve all the problems with these states’ instream flow programs, nor ensure that all streams have sufficient water for fish, wildlife, water quality, recreation, etc. But they would almost certainly have practical benefits for many rivers and those who use them, and would show that flow restoration in Colorado and Wyoming is a priority, not just a theoretical possibility.

V. CONCLUSION

For all their similarities in regard to water,¹⁸⁴ Wyoming and Colorado could hardly be more different in two crucial categories: total population and population growth. Nearly 4.7 million people now live in Colorado while just over 0.5 million reside in Wyoming.¹⁸⁵ Moreover, Colorado grew by over 30% in the 1990s, making it the third fastest growing state in the nation over that decade.¹⁸⁶ Wyoming’s 8.9% increase was well below the national growth rate.¹⁸⁷ The most startling comparison is that Colorado added over one million souls in the 1990s, Wyoming about forty thousand.¹⁸⁸

Given this explosive growth, Colorado’s recent reforms are all the more remarkable and significant. This ongoing influx of humans will put serious pressure on Colorado’s limited water resources: the state projects a sixty-five percent increase in population from 2000 to 2030, resulting in a fifty-three percent increase in municipal and industrial water demand.¹⁸⁹ Under these circumstances, some might argue that instream flows are a luxury Colorado cannot afford—but that would be a short-sighted and counterproductive view for a state that attracts people largely because of its stellar outdoor amenities and recreation.¹⁹⁰ If anything, the population boom makes it all the more

¹⁸⁴ See *supra* notes 4–8 and accompanying text.

¹⁸⁵ U.S. CENSUS BUREAU, 2005 POPULATION ESTIMATES, *available at* <http://www.census.gov/popest/states/tables/NST-EST2005-01.xls>.

¹⁸⁶ U.S. CENSUS BUREAU, POPULATION CHANGE AND DISTRIBUTION 1990 TO 2000, at 2 (Apr. 2001), *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ COLO. WATER CONSERVATION BD., STATEWIDE WATER SUPPLY INITIATIVE WATER DEMANDS FACT SHEET 1–2 (2004), *available at* http://cwcb.state.co.us/SWSI/pdfDocs/Demand_FactSheet_7-19-04.pdf. Even a doubling of municipal and industrial water use would represent a fairly small increase in total Colorado water use, because irrigation accounts for about 90% of all water use in the state. But existing water withdrawals for irrigation and other uses have already stressed many rivers and streams, and additional demands for growing cities and industries will only add to that stress—particularly if Colorado hopes to slow the decline in irrigated farmland.

¹⁹⁰ Commercial river rafting alone is a \$135 million industry in Colorado, making it the number one summer tourism industry in the state. Colo. River Outfitters Ass’n, Colorado River Rafting by the Numbers, <http://www.croa.org/media-1.htm> (last visited Nov. 12, 2006).

imperative to strengthen and update Colorado's instream flow laws, lest more of its rivers be sacrificed for the sake of lawns, laundry, and lattes.

Population growth has not been a major issue in Wyoming, but its rivers may be stressed by a different type of boom: energy development. New power plants¹⁹¹ could pose significant demand for additional water supplies. Wyoming's existing power plants already use more than twice as much water as all Wyoming cities put together.¹⁹² Drilling and mining activity raise additional concerns. As Governor Dave Freudenthal told the legislature in 2004, "[T]he same national energy economy that fills our coffers could inadvertently turn our state into a water and wildlife wasteland. This is no time to reduce our efforts to protect our environment, our water and our wildlife."¹⁹³ Although the 2005 legislature took a positive step in establishing a trust fund to protect Wyoming's natural resources, it essentially prohibited any use of the fund for addressing instream flows, thereby undercutting the stated purpose of preserving aquatic habitat.

With all their environmental, economic, and recreational benefits, flowing rivers are very important to the citizens of both states. Increasingly, Colorado laws relating to instream flows reflect that importance. Wyoming's laws do not: the state is still stuck with a narrow, rigid, and bureaucratic system that continues to limit the options of water users and frustrate efforts to restore and protect instream flows. Change has come slowly, but I am cautiously hopeful that Wyoming's laws will begin to evolve in the direction that Colorado's have. One thing seems clear: Wyoming must begin, and Colorado must continue, to make significant progress in reforming their instream flow laws. Otherwise, as each state faces its own development pressures, more and more rivers will be left behind.

¹⁹¹ At least two major new coal-fired power plants have been proposed in Wyoming. W. Res. Advocates, Wyoming Coal Plant Proposals, <http://www.westernresourceadvocates.org/energy/coal/wyoming.php> (last visited Nov. 12, 2006). Wyoming is also pushing to be the home of a futuristic new zero-emissions coal-fired plant. Press Release, Office of Governor Dave Freudenthal, Wyoming Makes Case for Futuregen Site (May 3, 2006), available at http://webserv.state.wy.us/governor/press_releases/2006/may%2006/futuregen.asp.

¹⁹² In 2000, water use in Wyoming was estimated at 243 million gallons per day for thermoelectric power use and 107 million gallons per day for public water supply. HUTSON ET AL., *supra* note 6, at 7.

¹⁹³ Governor David D. Freudenthal, Message Before the Budget Session of the Wyoming legislature (Feb. 9, 2004), available at <http://wyoming.gov/governor/2004stateOfState.asp>.