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Steps to Flow Restoration: Lessons from the Northwest

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Steps to flow restoration: Lessons from the Northwest

Reed D. Benson

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May, 2009

Walla Walla R., Milton-Freewater, OR, late 1990s



Depleted flows: the legal dimension

Across the West, water use is governed by water laws based on prior appropriation:

- Water is public, but subject to rights of use
- Rights arise from diversion and use of water
- Rights last forever so long as they're used
- Oldest rights get priority if demand > supply
- No change in use without state approval

Instream flow laws don't do enough

Western states began adopting instream flow statutes in the last half of the 20th century

- state action needed to create flow protection
- flows protected via rule or appropriation
- either way, no effect on pre-existing uses

ISF rights/rules only protect flows remaining at time of adoption; typically little water left

What can be done to restore flows?

Prior appropriation allows a water right to be changed to a new use but keep its priority

Change allowed only if certain standards met:

- valid, existing right w/ history of actual use
- new use is considered “beneficial” under law
- change causes no harm to other users

Some states are now allowing water rights to be changed to instream use, restoring flows

Steps to flow restoration in the NW

The Pacific Northwest has seen notable progress on flow restoration in recent years

Progress has come from events on 3 fronts:

- new statutes: authorizing instream transfers
- new institutions: nonprofit water trusts
- new funding: public money for water deals

All three are needed for restoration at scale

Can lessons translate from NW to SW?



◀ chinook salmon

Rio Grande silvery minnow ▶



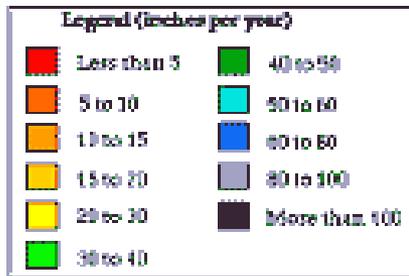
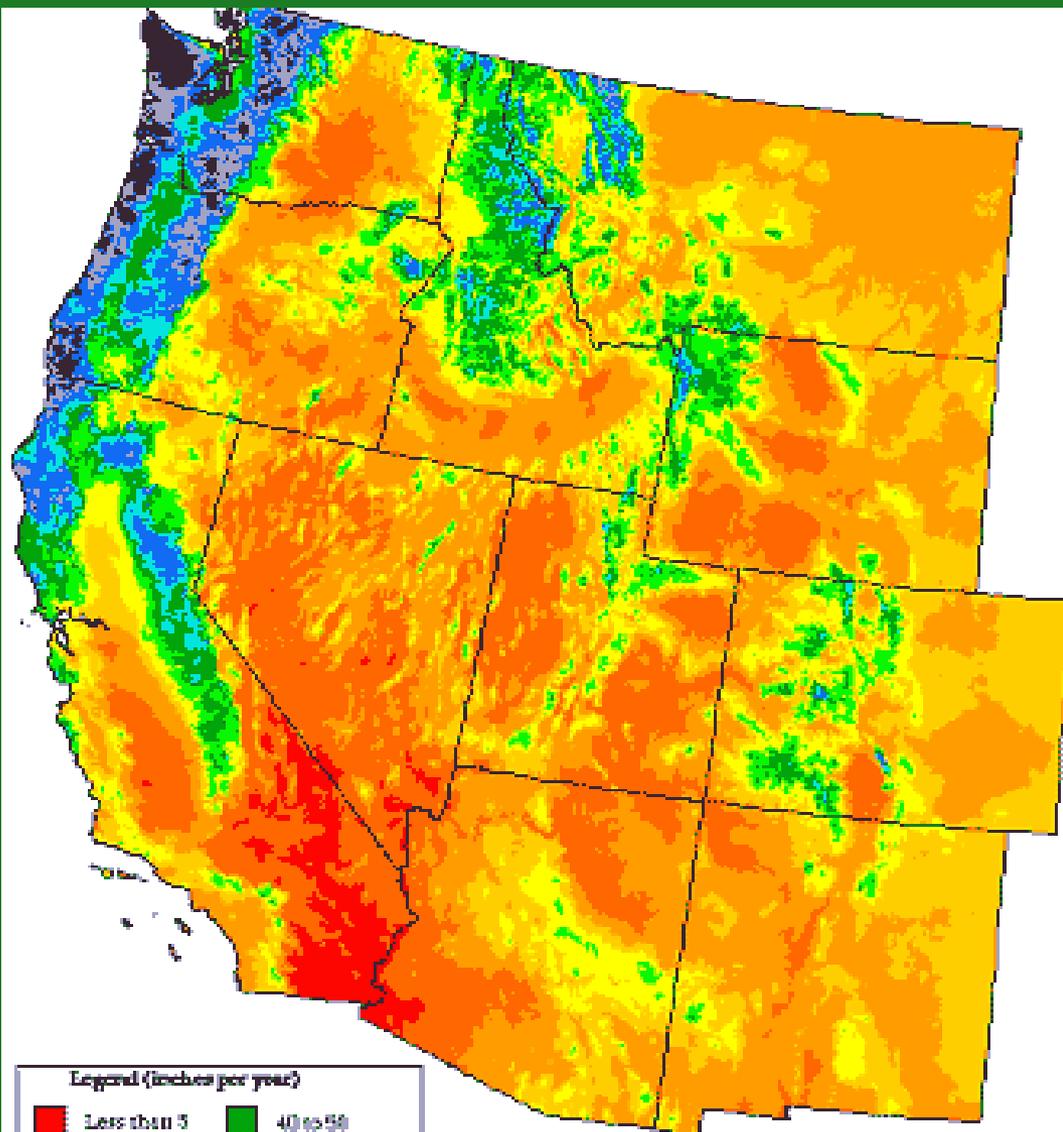
NW vs. SW: issues relevant to flows

Some key differences between NW and SW:

- long-established instream flow programs
- ESA-listed aquatic species across the region
- powerful voices for fish, esp. salmonids

Some key similarities between NW and SW:

- prior appropriation
- powerful user groups, esp. irrigation, cities
- semi-arid to arid conditions in most areas



Average Annual Precipitation

Western United States

Period: 1961-1990 Units: inches

East of the Cascades, much of the Pacific Northwest gets ≤ 15 " of annual precip on average—more similar to the Southwest than many people would expect

The Oregon example: legal changes

OR law had long provided for flow protection
but not for transfer of rights to instream use

1987 statute allowed rights to be changed to
instream use through sale, lease, or gift

- change still requires prior state approval

1994 rules provided streamlined process for
instream leases (2-year max, but renewable)

Law keeps evolving, e.g. split-season leasing

The Oregon example: institutions

1987 law didn't immediately lead to transfers

Oregon Water Trust formed in 1993 with the goal of using transactions to restore flows

- diverse board: ag, developer, enviros etc.
- started slowly, w/ 2 leases for 1.4 cfs in 1994
- by 2005, 84 projects for a total of 117 cfs
- ongoing innovation in structuring deals

The Oregon example: funding

OWT had shown that water right deals could restore flows, but its resources were limited

State officials balked at public funding for water right acquisitions due to ag opposition

- grant program for watershed restoration projects prohibited spending on water rights

Public funding eventually came from the federal Bonneville Power Administration

The NW restoration effort expands

Other NW states revised their laws to open up options for water right deals to restore flows

- MT in 1995 approved leasing w/ a 10-year sunset, but eventually made it permanent

The Oregon Water Trust also inspired other groups to pursue water deals to restore flows

- statewide water trusts, single-basin groups
- other nonprofits, notably Trout Unlimited
- state water agencies, esp. in ID, MT, WA

Public funding for restoration in NW

Columbia Basin Water Transactions Program

launched in 2002, using BPA hydro revenues

- funds water acquisitions in ID, MT, OR, WA
- grants go to “qualified local entities” (state agencies or nonprofits), which do the deals
- grants made by Nat’l Fish & Wildlife Found.

In 2006, CBWTP spent \$1.5M on 44 deals for a total of 256 cfs, benefiting 475 stream miles

What lessons does the NW offer?

Changing state laws to allow instream transfers is needed as a threshold matter

- making leases legal and practically workable

Laws won't do much good until institutions invest time and energy to make them work

- doing the deals and getting them approved

Public funding is needed for sufficient impact

- ideally not dependent on annual legislation