Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean

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ABSTRACT

This article provides a guide to transactional mechanisms available in Rocky Mountain, Great Basin, and Pacific states for private participation in preserving and enhancing instream flows. The strengths and weaknesses of each state’s law are explored, and, when viewed together, they provide basic legal and policy principles that should be included in state instream flow regimes.

I. INTRODUCTION

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.

Justice Oliver Wendell Holmes

In the 72 years since Justice Holmes wrote these lines, the people of the United States have come to agree that rivers are treasures. But we now treasure rivers for reasons beyond their provision of benefits to those who control them. Indeed, much of what we love about rivers, and the natural systems they support, cannot be enjoyed when those who have power over them choose to exercise it.

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** This article was written mainly during the summer and fall of 2002. Most of the assertions are based on the law and facts existing at that time. Since instream flow law is changing rapidly throughout the West, readers should understand that the legal and factual landscape may have changed significantly since the time of writing.

States throughout the West have allowed, and even encouraged, full appropriation of rivers and streams. For most of the modern era, state law considered water left in stream to be wasted. Therefore, the agencies charged with administering water rights have allowed appropriation from streams that in most years would not carry enough water to satisfy the right created. Large storage reservoirs, supplemental groundwater wells, and lax enforcement of priority allowed junior right holders to appropriate all the water they wished, even in years when such appropriation represented a tax on the system. The population and development of western states was booming at a time when appropriation was still easy and priority dates did not seem to matter.

By the 1990s, it became clear, even to some pro-agriculture pundits, that many western rivers were over-appropriated—and the results of over appropriation were not acceptable to an increasingly urban and environmentally minded electorate. Salmon populations were crashing, riparian habitat was being lost, and, in places, legendary rivers like the Rio Grande had become little more than concrete-lined conduits. People began to demand that the law protect the rivers they fished, rafted, and admired.

Western legislatures and courts have struggled to find ways to protect and restore riparian habitat that is threatened or has been destroyed by over appropriation. A key consideration in all their attempts has been how to create or secure instream flows.

Nine of the eleven continental states from the Rocky Mountains to the Pacific Ocean rely on statutory schemes to administer their various instream flow "programs." Nevada's instream flow law is founded almost exclusively upon a 1988 Nevada Supreme Court holding that water used instream for fish and wildlife is a beneficial use and that

2. "Over appropriation" is theoretically impossible in a true prior appropriation system—if there is insufficient water to honor junior rights, junior right holders do not receive water. Indeed, this is how the prior appropriation system was designed; thus, within the classic prior appropriation framework, a stream can be fully appropriated but not over-appropriated. For the purposes of this article, "over appropriation" occurs when the amount of water legally used by right holders in a given watershed exceeds the amount that can be used while maintaining the ecological viability of the riparian system from which the water is taken.

3. For summaries of the problem, see WESTERN WATER POLICY REVIEW COMMISSION, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 2-12-2-14 (1998); DAVID M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE 1-8 (1997).

4. Though the action of federal law and interstate compacts can have profound effects on flows in a given stretch of river, whether an intrastate or non-endangered-species carrying stream will or can have a legally protectable instream flow is largely a function of state law.

5. These states are Arizona, California, Colorado, Idaho, Montana, Oregon, Utah, Washington, and Wyoming.
diversion is not necessary for the existence of a valid water right.\footnote{6} Finally, New Mexico has neither statutory nor common law that directly addresses the maintenance of instream flows.\footnote{7}

The language and mechanism of instream flow law varies wildly from state to state. However, a review of the existing schemes and their use allows the identification of six basic considerations that should be addressed by any legal regime designed to maintain or enhance instream flows. First, the state legislature should make an express finding that functioning riparian ecosystems and a healthy agricultural base are indispensable parts of the state's economy. Second, either the legislature or the courts should make a clear statement that "beneficial use" includes water reasonably used for ecological preservation or enhancement and that physical diversion from a stream is not necessary for the establishment of a valid water right. Third, conservation should be encouraged by allowing the continued ownership of excess water (created by implementing novel water conservation measures) that can be transferred to instream use. Fourth, private individuals and organizations should be able to hold instream water rights. Fifth, the quantity of any instream right should be conservatively presumed over the stretch of stream to which that right applies, subject to expansion if the transferor performs a hydrological survey that shows the right extends over a longer stretch. Finally, cooperative, watershed-based management plans should be encouraged by promoting the participation of all stakeholders in negotiations and by allowing the flexibility needed to reach creative solutions.

II. THE STATUTE STATES

A. Arizona

In Arizona, "any person" may appropriate water for instream purposes.\footnote{8} However, only "the state or its political subdivisions" can


\footnote{7} The most significant statement on instream flows in New Mexico comes in the form of a 1998 attorney general's opinion. See 98-01 N.M. Op. Att'y Gen. (Mar. 27, 1998).

transfer existing consumptive rights to instream uses." This transfer law hinders private involvement in instream flow protection in fully appropriated systems. Additionally, under Arizona law, most groundwater use in the state is subject only to the limitations of the reasonable use doctrine, while instream flow rights are subject to the prior appropriation doctrine. This leaves instream rights vulnerable to the effects of consumptive groundwater use on surface flows within the basins where instream rights exist.

1. Bifurcation of Arizona Water Law

Arizona law governing surface water and ground water is bifurcated. Surface water is allocated by prior appropriation, while landowners may use the ground water under their land subject only to the reasonable use doctrine.10 "The doctrine of reasonable use permits an overlying landowner to capture as much ground water as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply."11

Only a very small category of ground water is subject to use limitation under the prior appropriation doctrine—subflow. Subflow is ground water within "a zone where water pumped from a well so appreciably diminishes the surface flow of a stream that it should be governed by the same law that governs the stream."12

This subflow standard seems to link surface and ground water sufficiently to protect surface rights (and thus any instream rights) from pumping that affects surface flow, regardless of where that pumping occurs. However, the Arizona Supreme Court has narrowly defined subflow to be ground water "within or immediately adjacent to the stream bed."13 Even where a well causes depletion of surface water equal to 50 percent of the water actually pumped during a given irrigation season, if the well is not "within or immediately adjacent to the stream bed," it is not subject to the prior appropriation doctrine.14

The Arizona Supreme Court acknowledges that

9. See ARIZ. REV. STAT. § 45-172.
11. Id. at 743 n.3.
12. Id. at 743.
14. See id. at 1239, 1243.
[t]o pump well water from "lands under or immediately adjacent to a stream" is not...the only pumping that may significantly diminish surface flow. The hydrological connection of groundwater and surface water is sometimes such that groundwater pumped more distantly within an aquifer may have comparable effect.\(^\text{15}\)

Yet, under current law, water users within a given watershed can literally suck streams dry without concern for priority as long as their wells are not next to or on top of the stream itself and are in compliance with the groundwater code.\(^\text{16}\)

2. Relative Value of Water Uses in Arizona

In those watersheds where groundwater pumping and surface diversion have not claimed all of the water flowing in a stream, the remaining water is subject to appropriation under section 45-152 of the Arizona Revised Statutes. Unlike many states, however, "[a]s between two or more pending conflicting applications for the use of water from a given water supply, when the capacity of the supply is not sufficient for all applications,"\(^\text{17}\) the Department of Water Resources must give preference to uses in the following order: (1) domestic and municipal; (2) irrigation and stock watering; (3) power and mining; (4) recreation and wildlife, including fish, and (5) nonrecoverable water storage.\(^\text{18}\) Thus, even in areas where agriculture is of marginal economic value and riparian habitat is productive, an application to use water for irrigation

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16. The use of ground water in Arizona is highly regulated within "active management areas" (AMAs). There are currently five AMAs in Arizona, within which lives 80 percent of Arizona's population. Arizona Department of Water Resources, *Overview of the Arizona Groundwater Management Code*, at http://www.water.az.gov/adwr/Content/Publications/files/gwmgtovw.pdf (last visited Dec. 16, 2003). AMA's can be created by the director if the Department of Water Resources determines that "1) active management practices are necessary to preserve the existing supply of groundwater for future needs, 2) land subsidence or fissuring is endangering property or potential groundwater storage capacity, or 3) use of groundwater is resulting in actual or threatened water quality degradation." *ARIZ. REV. STAT.* § 45-412 (A). Unless fish and wildlife survival is determined to be a future need, little in the groundwater code enables the State to protect riparian habitat from degradation by the consumptive use of ground water. See generally *ARIZ. REV. STAT.* §§ 45-401-45-704. Additionally, even where the state creates an AMA in basins where habitat is threatened by groundwater depletion, many of the rights causing the problem would probably be grandfathered and allowed to continue depleting the aquifer. See generally *ARIZ. REV. STAT.* §§ 45-461-45-482 (grandfathered groundwater rights in active management areas). Overall, mandatory compliance with the groundwater code does not significantly protect riparian areas from degradation by the consumptive use of ground water.
18. *Id.* § 45-157(B).
purposes will be approved over a contemporaneously filed application for instream use.

3. Strategies for Instream Flow Protection in Arizona

a. Appropriation

The same procedure that applies to more typical surface water appropriations also applies to the appropriation of water for recreation and wildlife purposes. However, pursuant to statute, the Department of Water Resources (DWR/Department) has issued a form and guidelines specifically for instream-flow applications.

The DWR will issue a written notice of completeness or deficiencies within 51 days of an instream flow application. If the application is deficient, the DWR sends the applicant a "Notice of Deficiency," and, if the missing information is not provided to the DWR within 60 days, the Department may presume the application withdrawn and close the file.

Complete applications are approved unless the DWR finds that the proposed use (1) would conflict with vested rights, (2) is a menace to public safety, or (3) is against the interests and welfare of the public. This determination is made within 530 days of the application's completion, and, if the application is approved, the DWR issues a permit.

Unlike some instream flow programs in other states, Arizona's legal mechanism to appropriate water for instream purposes has actually been used. In order to secure a certificated right, an individual or organization must (1) file and successfully prosecute a complete application and (2) gather data showing four years of beneficial use.

19. See id. § 45-152 ("any person...intending to acquire the right to the beneficial use of water, shall make an application to the director of water resources..."); id. § 45-181 (beneficial use includes recreation and wildlife, including fish).
20. Id. § 41-1079 ("An agency that issues licenses shall provide...[a] list of all of the steps the applicant is required to take in order to obtain the license...").
21. ARIZ. DEP'T OF WATER RESOURCES, supra note 8.
22. Id.
23. Id.
25. ARIZ. DEP'T OF WATER RESOURCES, supra note 8.
26. Telephone Interview with Diana Imig, supra note 8. The Nature Conservancy currently has four certificated rights on Aravaipa Creek, two permits on O'Donnell Creek, one permit each on/in Bass Canyon, Hot Springs Canyon, the Hassayampa River, and Ramsey Canyon, and an application pending on Buehman Canyon. E-mail from Diana Imig, Arizona Protection Program Coordinator, The Nature Conservancy, to Jesse Boyd (Feb. 10, 2003) (on file with author).
27. Telephone Interview with Diana Imig, supra note 8.
b. Transfer

Private entities cannot purchase or lease water rights for instream purposes. However, the state or its political subdivisions can effect such a transfer if it complies with certain limitations and conditions, including

1. Transfer must comply with any conditions placed on it by the DWR.
2. Transfer cannot interfere with existing rights.
3. Transfer cannot increase the size of the right.
4. Only perfected rights can be transferred.
5. Transfers from land within any irrigation district, agricultural improvement district, or water users’ association require the written approval of the district or association affected.
6. Publication of notice in the county or counties affected is required and interested parties have an opportunity to submit written objections to the transfer.
7. The DWR may hold an administrative hearing if it deems one necessary.

Though private involvement in instream flow enhancement by way of transfer is limited, the transfer statute provides a means for tourism-dependent communities to enhance the stretches of riparian habitat on which they depend.

c. Contract

Any person “who voluntarily fails, without sufficient cause, to beneficially use all or any part of the right to withdraw for any period of five successive years shall relinquish such right or portion thereof.” Under this language, a right holder theoretically needs only to use all of their water right one out of every five years in order to maintain a perfected water right. Though somewhat risky, it is possible that an individual or organization wishing to enhance streamflow could contract with existing rightholders to schedule the full use of their rights one year out of five while reducing or eliminating their use during the remainder of the term.

29. See id.
30. Id. § 45-188 (A).
31. Telephone Interview with Andy Lorenzi, Environmental Director, Town of Marana, Arizona (Feb. 10, 2003).
However, this strategy would be futile on over-appropriated systems unless sufficient water were freed up by the contracts to satisfy the rights not under a similar contract (e.g., if a farmer fallows his land for a year, junior rightholders that would not have received water that year would be able to appropriate the water that was made available by the contract and thus defeat the purpose of the contract—especially where the junior rightholders are upstream from the contracting farmer). However, on a basin or subbasin scale, with education, planning, and community involvement, the strategy could work if a sufficient number of rightholders participate.

d. Land Acquisition

The reasonable use doctrine applied to Arizona ground water makes the transfer or appropriation of surface rights for instream purposes futile in many stream systems. In areas where groundwater (and/or surface) withdrawals have severely affected surface flows, the acquisition and fallowing of irrigated land has shown promise in maintaining and enhancing instream flows.

In recent years, The Nature Conservancy has purchased approximately 40 percent of the agricultural land within a lower San Pedro sub-basin.\textsuperscript{32} Whether the land has been using ground or surface water, it is fallowed after purchase and is then resold with a conservation easement attached to the title that limits all future owners' development of the property and limits water use to that required for domestic needs.\textsuperscript{33} The lower San Pedro River is subject to an Indian water rights settlement that will theoretically cease agricultural expansion in the area. Additionally, the San Pedro is within an active management area that further limits new withdrawals.\textsuperscript{34} These aspects of the basin make it attractive for application of a purchase-fallow strategy to enhance instream flows.

Though land acquisition and fallowing show promise in certain areas of the state, the strategy has its drawbacks. First, in much of the state, there is little to stop a farmer from selling his land to a conservation entity and then proceeding to buy, irrigate (with ground water), and farm virgin land within the same basin.\textsuperscript{35} Second, this strategy can seriously affect farming communities, which can lead to political opposition and undesirable, long-term cultural effects.

\begin{itemize}
\item \textsuperscript{32} Telephone Interview with Dave Harris, Lower San Pedro Program Manager, The Nature Conservancy (Aug. 9, 2002).
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} Active Management Area legislation allows the state to control the amount of groundwater use within certain boundaries. See \textsc{Ariz. Rev. Stat.} § 45-451.
\item \textsuperscript{35} This very thing happened after the Bureau of Land Management bought out a farmer and fallowed his land. Telephone Interview with Dave Harris, \textit{supra} note 32.
\end{itemize}
e. The Arizona Water Protection Fund

In 1994, the legislature established the Arizona Water Protection Fund (AWPF/Fund). The enabling legislation states,

A. It is the declared policy of the legislature to provide for a coordinated effort for the restoration and conservation of the water resources of this state. This policy is designed to allow the people of this state to prosper while protecting and restoring this state’s rivers and streams and associated riparian habitats, including fish and wildlife resources that are dependent on these important habitats. In support of this policy, financial resources shall be made available by this state to the appropriate public and private entities to assist in water resource management activities that protect this state’s rivers and streams and associated riparian habitats...B....This funding shall occur primarily through the grant of monies from the Arizona water protection fund by the commission to entities that cooperate and work in conjunction with local residents and affected jurisdictions.

This bold declaration is one of the best of its kind in the western United States. Any person, state, or federal agency or political subdivision of this state can apply for a grant from the AWPF, increasing the diversity and creativity of proposals, which in turn makes those projects that are funded more likely to be successful. However, the AWPF’s ambitious goals must be accomplished “consistent with existing water law and water rights,” and existing Arizona water law puts “recreation and wildlife” low on its list of values. This could hinder riparian restoration and enhancement projects in areas of significant over appropriation.

The shortcomings of Arizona law aside, AWPF activity has been impressive. From 1995 through 2000, the AWPF funded 142 projects with grants totaling more than $26 million. The AWPF funded projects focused largely on research, feasibility studies, and actual restoration.

36. ARIZ. REV. STAT. §§ 45-2101-45-2114.
37. Id. § 45-2101(A), (B).
38. Id. § 45-2113(E).
39. Id. § 45-2101(B).
40. See, e.g., supra section II.A.2.
The Fund receives most of its money from appropriations by the state legislature; however, some additional money is gleaned from donations and surcharges on interstate transfers of water from the Central Arizona Project. Unfortunately, the AWPF received no appropriations in 2002 or 2003 so the number of funded projects has dropped off considerably.

Other statutes allow, encourage, and demand cooperation between various governmental and quasi-governmental entities that deal with water resources and habitat preservation, especially in active management areas. These statutes, along with a fully funded AWPF, could provide a very fertile legal environment for the development of cooperative watershed-based management schemes.

4. Arizona's Strengths and Weaknesses

The biggest obstacle to meaningful instream flow maintenance and enhancement in Arizona is the bifurcation of surface and groundwater law. Until groundwater use is better regulated to protect surface flows, the water users of the state will likely continue to "suck" the state dry.

Arizona has also codified a hierarchy of uses that could prove to be a major obstacle to future instream transfers or appropriations. If municipal, domestic, irrigation, stock watering, power, and mining uses are "valued" above "recreation and wildlife, including fish," any number of interests could sabotage ecological restoration and enhancement projects dependent on instream flows. How people value water uses varies from county to county and even from community to community. This leads to the inequitable, if not illogical, result that a small number of

43. ARIZONA WATER PROTECTION FUND: COMMON QUESTIONS, supra note 41.
44. See, e.g., ARIZ. REV. STAT. § 45-105 (2003) (the Director of the Department of Water Resources may coordinate [and] contract with various public entities, including the Game and Fish Commission on water development and water quality issues); id. § 11-933 (Counties and municipalities can enter into cooperative agreements "with the United States, a state, the governing body of another county or municipality, or a private legal entity, within or without the state, for the establishment, development, maintenance or administration of a public park."); Maricopa County v. Maricopa County Mun. Water Conservation Dist. No. 1, 830 P.2d 846, 852 (Ariz. Ct. App. 1991) (section 11-933 applies to water conservation districts); ARIZ. REV. STAT. § 30-104 (2003) (The Arizona Power Authority must cooperate with the State Land Department and the Director of Water Resources "in the planning of the hydroelectric power generation aspects of the development and use of the state's water resources.").
45. See, e.g., ARIZ. REV. STAT. § 48-4851 (2003) ("The [AMA water] district shall cooperate...with the director of water resources" and various other governmental entities.). See also supra note 16 and accompanying text.
farmers or miners could thwart the restoration/enhancement efforts of a tourism-dependent community.

Strangely, any person can appropriate water for instream flows in Arizona, but only government entities can transfer existing consumptive rights instream. Allowing private entities to hold transferred instream rights could encourage participation in restoration programs. Users who are suspicious of government reacquisition of water rights could be encouraged to join and cash-rich non-governmental organizations would be more likely to participate if they could continue to hold the rights they purchase.

Arizona law has not provided guidance on how to determine what quantity of water can be transferred or appropriated for instream use. Neither has it created a presumption about the stretch of stream to which an instream right applies. Without legal guidance on both of these issues, the transaction costs associated with the acquisition—and enforcement—of instream flow rights may remain prohibitive.

Arizona law does, however, provide several tools to maintain and even enhance surface flows in some areas. Appropriation, transfer, contract fallowing, land acquisition, and most promisingly, AWPF projects can be used strategically to protect what remains of Arizona’s naturally-flowing surface water.

B. California

California has the most complex water resource regime of any western state. A draft water transfer guide (Guide) published by the State Water Resources Control Board (SWRCB) offers some advice: “keep in mind that the issues presented...are not as complicated as they may seem at times.”\(^4\) This is largely true; however, it is worth noting that the Guide has never been finalized and comes with the following disclaimers:

[the Guide] does not establish any rules or guidelines for water transfers...this document will not be considered binding or presumptively correct. Nor will this document be given any regulatory effect as applied to the SWRCB, its staff, or other parties proposing, opposing, reviewing or otherwise involved in water transfers.\(^5\)


\(^{48}\) Id.
Fortunately, much of the complexity that leads to this unwillingness to stand behind the Guide's legal conclusions only applies to inter-basin transfers. Since most transfers to instream use are intra-basin, they can be relatively simple.

1. Water Rights in California

The complexity of California water law stems from the state's acknowledgment of riparian, appropriative, and prescriptive rights. These rights are based upon, and limited by, an amalgamation of statutory, constitutional, and common law.

In California, riparian rights are limited to the amount of water that can be put to reasonable beneficial use upon the land carrying the riparian right. The amount of water that can be secured under riparian water rights can vary from year to year because, unlike appropriative rights, scarcity must be borne equally by all riparian right holders on a stream system.

On fully appropriated streams, the variable nature of riparian rights can affect the availability of water for even the most senior appropriators. Riparian rights cannot be lost due to non-use and appropriative rights are subordinate to riparian rights, so the decision to use a previously unused riparian right can significantly affect the amount of water available for appropriation.


52. Id. § 161. Reasonable use (and thus the riparian right) depends on how that use affects other riparian owners, which in turn depends on the amount of water in the stream during a given season.


54. 62 Cal. JUR. 3D, Water § 68 (2003), Barstow v. Mojave Water Agency, 5 P.3d 853, 864 (Cal. 2000); but see David H. Getches, Water Law in a Nutshell 202 (3d ed. 1997) (citing Lux v. Haggin, 69 Cal. 255 (1886) (riparian right paramount as against appropriative right except where appropriation began after Mining Act of 1866 and before the riparian land was patented)).

55. Telephone Interview with Mark Stretars, Staff Member, Water Rights Division, California State Water Resources Control Board (June 25, 2002). But see In re Water of Hallett Creek Stream Sys., 749 P.2d 324, 337 (Cal. 1988), cert. denied, 488 U.S. 824 (1988) (before dormant riparian right can be used, owner must apply to the SWRCB so that it may "determine whether the riparian use should be permitted in light of the state's interest in promoting the most efficient and beneficial use of the state's waters.").
Appropriative priority and the duty under a riparian right can change as against other right holders by prescription. Junior appropriative rights and riparian rights can ripen into prescriptive rights against downstream right holders where there are five years of continuous use that is adverse to those downstream holders.\textsuperscript{56}

For example, assume A has a permit to appropriate five cubic feet per second (cfs) with a priority date of 1950, and B, downstream from A, has a permit to appropriate 10 cfs with a priority date of 1890. If A continues to draw 5 cfs during a five-year period when B only receives 8 cfs and B does not challenge A's use in court, B is thereafter barred from asserting her priority over A. Now assume that X is the owner of a dormant riparian right and that Y irrigates 20 acres of pasture with a riparian right. X begins farming watermelons at the beginning of a five-year dry spell that reduces the stream flow across Y's property to a trickle. If during those five years Y fails to assert a claim against X for injury to her right, she will forever be barred from doing so. In future dry years, X will not have to "share" any shortage with Y. Aside from these examples, riparian right holders can acquire a prescriptive right against appropriative right holders and vice versa.

Combine an appropriative system laid over riparian rights with prescription and you have a regime rife with litigation. When push comes to shove, the priority and quantity of a given right largely depend upon what documentation of historical use and reasonableness of future use the parties can produce.

2. Transactional Strategies to Enhance Instream Flows in California

Before most water transactions are approved, the SWRCB must find that the transaction will not unreasonably affect "fish, wildlife, or other instream beneficial uses."\textsuperscript{57} Section 1707 of the California Water Code allows the holder of an "appropriative, riparian, or other" water right to petition the SWRCB for a change in that right "for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water."\textsuperscript{58} Since environmental organizations can protest almost any water transaction on "unreasonable effect" or public trust grounds, the California law noted above affords two clear strategies

\textsuperscript{56} CAL. STATE WATER RESOURCES CONTROL BD., INFORMATION PERTAINING TO WATER RIGHTS IN CALIFORNIA 6 (1990) (on file with author), available at http://www.waterrights.ca.gov/forms/app-geninfo.pdf (last visited Jan 21, 2004). Prescriptive rights accrue by adverse possession. The use during the five years must be continuous, open and notorious, exclusive, under a claim of right, hostile, and adverse.

\textsuperscript{57} See, e.g., CAL. WATER CODE §§ 1435, 1725, 1727, 1735 (West 2003).

\textsuperscript{58} Id. § 1707(a)(1).
for transactional protection of instream flows.\textsuperscript{59} First, interested parties can protest transactions that are likely to harm instream values\textsuperscript{60} and second, water can be "transferred" instream under section 1707.

a. Protesting Transactions

California's courts and administrative agencies take the view that "the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands...."\textsuperscript{61} The law leaves plenty of room to protest the creation, transfer, and even continuation of water rights in a form that is detrimental to instream values. Therefore, instream flow advocates can put up stiff resistance against those who would harm riparian ecosystems through water rights transactions.

After an application for appropriation or a petition for change is filed and accepted, either the applicant or the SWRCB publishes notice.\textsuperscript{62} The SWRCB will set the protest filing deadline on a case-by-case basis and will include the deadline in the notice it publishes or mandates.\textsuperscript{63} Persons or organizations are then free to file protests based, among other things, on allegations that the proposed transaction would harm the environment or betray the public trust.

After a protest is filed, the SWRCB may perform an investigation to assess the economic and environmental (public trust) effects of the proposed transaction.\textsuperscript{64} Any party can request an investigation and, if no party makes a request, the Board may conduct an investigation pursuant to its own motion.\textsuperscript{65} If, during the preceding steps, the parties are unable

\textsuperscript{59} California water law is exceedingly complex. The strategies covered in this guide are by no means the only tools available to people and organizations wishing to protect instream flows in California. See, e.g., CAL. WATER CODE §§ 79070–79104 (West 2003) (Watershed Protection Program). Which tools should be used will vary from situation to situation, but even in cases where the strategies in this article make little sense, solutions to instream flow problems should be available with creative application of California water law.

\textsuperscript{60} See Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 716 (Cal. 1983) (citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)).

\textsuperscript{61} Id. at 724.

\textsuperscript{62} In the case of appropriations, within 20 days of the SWRCB's issuance of notice, the applicant publishes notice "in a newspaper having a general circulation and published within the county wherein the point of diversion lies." CAL. WATER CODE § 1312. In the case of changes in point of diversion, place of use, or purpose of use, the form that notice will take is up to the discretion of the SWRCB. Id. § 1703. See also CAL. CODE REGS. tit. 23, § 795 (2004). SWRCB publishes notices online that can be accessed at http://www.waterrights.ca.gov. (last visited Jan. 21, 2004).

\textsuperscript{63} CAL. CODE REGS. tit. 23, § 747 (2004).

\textsuperscript{64} Id. §§ 755–756.

\textsuperscript{65} Id. § 756.
to settle their differences, an administrative hearing is held, the Board makes findings, and those findings can be appealed to the courts.

Unlike many western states, California has effectively stemmed, and even reversed, the loss of instream flows by implementing statutes and regulations that require consideration of the public trust when making water rights decisions. These statutes and regulations show promise for increased protection of instream flows. However, within 20 years, the increased demand for the state’s limited water resources is estimated to outstrip supply by more than two million acre-feet annually. This demand may well lead to reticence on the part of judges, administrators, and legislators to further protect instream flows by regulation. Should regulatory protection of instream flows diminish, section 1707 of the California Water Code provides a transactional tool for the protection of instream flows that is available for use by individuals and private organizations in their efforts to maintain and enhance instream flows.

b. Instream Transfers under Section 1707 of the California Water Code

Section 1707 allows any water right holder to apply for a permanent, temporary, or urgency transfer of water instream “for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.” The SWRCB may approve the petition...subject to any terms and conditions which, in the board’s judgment, will best develop, conserve, and utilize, in the public interest, the water proposed to be used [instream] ... if the board...

66. See id. § 760.
68. The umbrella standard for water rights in California is reasonable beneficial use, see CAL. CONST. of 1879, art. X, § 2; Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 725 (Cal. 1983). This standard applies to public trust uses, Nat’l Audubon, 658 P.2d at 725. When severe shortages occur, challenges of the “reasonableness” of public-trust-mandated instream flow requirements will undoubtedly have a greater likelihood of success. In times of shortage, political pressure to increase the amount of water allocated to human use is inversely proportional to the amount of water so allocated. For an example of this, one need look no further than the Klamath Basin. Also, human economic hardship is part of the reasonableness calculation, and, as that hardship increases, so do the grounds for steering the public trust analysis in an anthropocentric direction.
69. The section is quite new and has been used rarely; however, on paper it appears to provide a means for the maintenance of instream flows in areas where the public trust doctrine does not provide adequate protection.
70. CAL. WATER CODE § 1707(a) (West 2003).
determines that the proposed change meets the following requirements: 1) Will not increase the amount of water the person is entitled to use. 2) Will not unreasonably affect any legal user of water....

Upon request of the petitioner, any water transferred under section 1707 is in addition to water already required to remain instream to satisfy federal, state, and local regulatory requirements.

The processes for permanent, long-term, temporary, and urgency transfers are largely the same. In each case, the parties must first reach an agreement on the terms of the transfer. The holder of the water right must then file the appropriate petition (for change, long-term transfer, temporary transfer, or urgency change) with the SWRCB. After the SWRCB accepts the petition, the Board conducts an environmental review of the petition. If unreasonable environmental impacts are unavoidable, the Board denies the application. Alternatively, if the Board finds no unreasonable environmental impacts or determines impacts can be mediated, the process continues and the applicant is responsible for publishing notice in any county where the transfer will occur.

Interested parties then have a variable amount of time to protest the proposed change, and, if any protests are filed, the SWRCB holds a hearing. After all information is gathered and the parties have been heard, the SWRCB either grants or denies the petition. If the SWRCB approves the petition, the agreement should become enforceable. In the case of a permanent transfer (e.g., sale or donation) agreement, the new owner must immediately file notice of the change in ownership with the SWRCB. This notice should include the signature of the previous

71. Id. § 1707(b).
72. Id. § 1707(c).
73. These agreements should identify the water right involved and will usually include language to the effect that the agreement is only binding if SWRCB approves the proposed transfer. If the agreement covers the permanent conveyance of a water right, the parties should indicate whether the seller would provide a warranty or a quitclaim deed. Warranty deeds protect the buyer while quitclaim deeds protect the seller. Generally, water rights are conveyed by a special warranty deed that does not warrant the validity of the water right but does warrant that the seller is not aware of any encumbrance and is not personally responsible for any encumbrance on the water right.
75. If it is a temporary transfer of less than 30 days and 3 cfs (or 200 acre-feet of storage), notice need only be posted in two conspicuous places near the location of change by the petitioner plus the mailing of notice to people who could be adversely affected by the transfer. Otherwise, notice decisions are made on a case-by-case basis by SWRCB after considering "the potential effects of the proposed change(s) on legal users of water and on fish, wildlife, and other instream beneficial uses...." CAL. CODE REGS. tit. 23, § 795 (2004).
76. The amount of time given to protest a given transfer varies from case to case and its determination is within the discretion of the SWRCB. See supra section II.B.2.a.
owner, the application or permit number, and the name and address of the new owner.78

Temporary transfers (i.e., those less than one year) are the most commonly used water transfer process.79 One reason for their popularity is that they are not subject to California Environmental Quality Act (CEQA) requirements,80 which can save significant amounts of money and time. Although section 1707 transfers are meant to enhance the environment, permanent, long-term, and urgency transfers would still be subject to CEQA requirements.81 A finding of adverse impact to the environment due to a transfer of water instream is unlikely; however, compliance with CEQA still takes time. Depending on the duration of the proposed transfer, temporary transfers may be the most efficient means of protecting instream flows in California.

3. Additional Considerations

a. Who can hold the instream rights?

Under section 1707, the owner of the right being transferred instream continues to own the right after the water is transferred. Theoretically, the water could be transferred back out of a stream as long as that transfer did not unreasonably injure existing water rights or instream beneficial uses.82 This mechanism for transferring water in and out of streams could allow an organization to manage water much like the Nature Conservancy manages land—i.e., selling lower-priority instream water rights to fund the purchase of other water rights that can be transferred instream on high-priority stretches.

b. Who is responsible for enforcement of the instream right?

The enforcement of water rights in California is largely left up to the right holders. Once an appropriation or transfer is approved, the SWRCB’s role is limited to notifying right holders when a new appropriation or transfer might affect their rights. If a right holder feels his or her right is being injured by the water use of another, it is up to the injured right holder to bring an enforcement action in court.83 Considering the overlapping appropriative, riparian, and prescriptive rights involved in almost every water basin, enforcement of an instream right might prove quite difficult.

78. Id.
79. Telephone Interview with Mark Stretars, supra note 55.
81. Telephone Interview with Mark Stretars, supra note 55.
82. Id.
83. Id.
c. What amount of water can be transferred instream?

A transfer instream is the same as any other transfer in California in that it cannot enlarge the right, unreasonably injure existing rights, or unreasonably injure instream beneficial uses. Transfer of water under section 1707 is limited to the amount of water consumptively used under the existing right. As with enforcement, proving the amount of consumptive use associated with the existing right is the responsibility of the party requesting the transfer. However, it appears that transfer applicants often merely give any foundation for a large estimate and then rely on the adversarial process to ultimately set the consumptive use.

Section 1011 of the California Water Code encourages conservation by allowing right holders to transfer or use all water saved by conservation measures. This provides substantial incentive for right holders to increase efficiency and also offers an opportunity for conservation organizations to enter agreements with right holders for transfer of conserved water instream under section 1707. However, proving conservation can be difficult and such proof is still the responsibility of the party requesting the transfer.

d. What stretch of river can be protected?

As part of a petition to transfer water instream, the petitioner must supply information sufficient to indicate how long the water will remain instream. Unlike Oregon, which has a default measure of the stretch protected, California requires significant proof of how the flow of the stream will be affected by the transfer at the time the petition is

84. This is certainly true for temporary and long-term transfers, see Telephone Interview with Mark Stretars, supra note 55, accord Cal. Water Code §§ 1725, 1735 (West 2003). However, permanent transfers under section 1700 may not be limited to consumptive use depending on the circumstances. See Natomas Cent. Mut. Water Co., Order WR 2000-01 (Cal. State Water Resources Control Bd. 2000), available at http://www.waterrights.ca.gov/hearings/WaterRightOrders/WRO2000-01.pdf (last visited Jan. 24, 2004) ("[O]ther transfer provisions in the Water Code are not limited to reductions in consumptive use, but it might be necessary to limit the amount of water transferred in order to ensure that the transfer will not injure any third party water right holder, or unreasonably affect fish, wildlife, or other instream beneficial uses."). In fully appropriated streams, consumptive use would probably be the limit because any amount beyond that would necessarily injure existing rights.

85. See CAL. WATER CODE § 1707 (West 2003).


87. See CAL. WATER CODE § 1011 (West 2003).

88. Telephone Interview with Mark Stretars, supra note 55.

89. See infra note 169 and accompanying text.
filed. This means that a party wishing to transfer water instream will likely have to conduct a hydrological study that examines the amount of water lost through evaporation and percolation. This requirement appears to make section 1707 transfers significantly more burdensome than typical transfers.

e. How does the overlapping water right system affect transfers?

Riparian rights are attached to the land. However, section 1707 allows riparian rights to be transferred instream. This creates a legal quandary that has not yet been tested in the courts. Specifically, section 1707 appears to allow an end run around the riparian requirement that the water right remain attached to the land. If a riparian right holder transfers their water for “fish and wildlife” purposes to a stretch of stream or an artificial or reclaimed wetland on another property (as section 1707 would allow), one of the elements of riparian rights, appurtenance, is violated. Whether such a violation would be acceptable to the court is open to question, which makes the purchase and transfer of riparian rights under section 1707 somewhat risky.

Another interesting question is whether an unexercised riparian right can be transferred by section 1707. As it stands now, the SWRCB will approve a section 1707 transfer of a riparian right only to the extent that the right has been used in the past. Also, quantification of riparian rights can vary from year to year; therefore, a transferred riparian right would also be subject to change. Significant change might require a fresh review of evaporation and percolation losses if an enforcement action is pursued.

Finally, appropriative rights vested prior to 1914 generally do not fall within the SWRCB’s jurisdiction, which offers a temptingly easy means of transfer. For example, a simple agreement with a pre-1914 right holder can transfer the water instream under sections 1707 and 1706. However, section 1707 requires SWRCB action and, therefore, theoretically brings pre-1914 rights within the Board’s jurisdiction. Consequently, it is unclear whether a pre-1914 right can be transferred instream without following the SWRCB process. But any time and effort saved on the front end by staying clear of the SWRCB process may cause enforcement problems after the water is transferred instream; therefore, compliance with the SWRCB process is safer, even if it is the longer path to take.

90. Telephone Interview with Mark Stretars, supra note 55.
91. Id.
f. Adjudicated versus Unadjudicated Streams

When a stream system is adjudicated under division two, part three, chapter three of the California Water Code, jurisdiction over water issues is held by the superior court of any county containing a portion of the adjudicated stream system. Adjudicated systems usually have a watermaster who keeps track of water transactions and assists the court in adjusting the decree that indicates the ownership and extent of rights within the system. Transactions within adjudicated streams are generally simpler because the rights involved have already been quantified and there is usually a watermaster to make streamlined decisions. Combine their simplicity with the fact that transactions within adjudicated streams are not subject to SWRCB jurisdiction or CEQA and you have a relatively cheap process for transferring water instream.

4. California's Strengths and Weaknesses

California law provides significant regulatory protection of instream flows and encourages cooperation between public and private entities in habitat restoration. These principles, along with section 1707's transactional mechanism for the transfer of consumptive rights instream, give California the foundation for a successful instream flow regime.

Unfortunately, the complexity of California water law makes transaction costs exceptionally high. These high transaction costs limit the small-scale transactions that show promise in other states. Until costs are reduced, section 1707 will be mainly applicable to large-scale transactions. Protection of small streams under stress from water withdrawals is best accomplished by implementing cooperative management schemes and, if that fails, forcing compliance with extensive regulations meant to protect instream beneficial uses.

The strategies outlined in this section are not meant to be comprehensive. California relies heavily on the assertion of private rights to manage water use, which has led to extensive litigation and the creation of a large body of common law. The SWRCB addresses water right issues on a case-by-case basis, which makes it difficult to outline a universal strategy for instream flow protection. Suffice it to say that, until California water law is simplified, assistance from a lawyer experienced in water transactions is indispensable when attempting to transfer water instream.

93. Telephone Interview with Mark Stretars, supra note 55.
94. See, e.g., Cal. Fish & Game Code § 2003.5 (West 2003).
C. Colorado

Colorado has more practicing water lawyers than all other western states combined. This is largely because Colorado has a functioning water court system and all water appropriations and transactions are heard in this court. Despite, or perhaps because of, Colorado's dependence on attorneys and court decrees to administer its water regime, many of the state's rivers have become seriously over-appropriated. Private right holders and judges charged with settling their disputes are rarely willing to give much deference to the ecosystems that rely on the same water over which the parties are fighting. Indeed, the Supreme Court of Colorado has held that, absent enabling legislation, environmental factors cannot be considered when courts decide water cases.

Most of the state's rivers and streams are, or soon will be, seriously affected by unchecked water development; however, a statutory mechanism does exist to check and even reverse this trend. Section 37-92-102 of the Colorado Revised Statutes provides that the Colorado Water Conservation Board (CWCB or Board) has the "exclusive authority" to appropriate or "acquire by grant, purchase, donation, bequest, devise, lease, exchange or other contractual agreement...such water, water rights, or interests in water in such amount as the [CWCB] determines is appropriate for stream flows...to preserve or improve the natural environment to a reasonable degree."

Until last year, the CWCB could only hold water rights "required for minimum stream flows...to preserve the natural environment to a reasonable degree." Under this language, from 1973, when the law was passed, until it was amended in 2001, the CWCB acquired more than 1350 instream rights covering 8400 miles of streams. However, the CWCB only filed for nine instream rights in 1999, 2000, and 2001 combined. In response to the CWCB's unwillingness (it is the agency charged with promoting traditional water development) or inability to secure instream rights sufficient to protect

96. See id.
97. See In re Bd. of County Comm'rs, 891 P.2d 952, 973 (Colo. 1995).
98. See generally TROUT UNLIMITED, supra note 95.
100. 2002 Colo. Legis. Serv. 149 (S.B. 02-156) (West) (emphasis added).
101. TROUT UNLIMITED, supra note 95, at 6.
102. See id.
Colorado streams from over appropriation, the legislature changed the language of the statute as noted above. Now the Board can appropriate or acquire water not only to preserve existing habitats but also to improve Colorado's riparian corridors.\textsuperscript{103}

The statute provides for some private participation in instream preservation and enhancement in that "any person" may donate or bequest a water right to the CWCB for instream purposes.\textsuperscript{104} However, the donor loses control of the water right, making the scheme unpopular.

Aside from donation and bequest, governmental and quasi-governmental entities can hold "recreational in-channel diversion” rights.\textsuperscript{106} These rights, though they can function like minimum stream flows, are diversionary in nature (they require some sort of manmade structure to control the stream), which means their ownership is not limited to the CWCB.\textsuperscript{106} Productive riparian habitat is crucial to the economy of many Colorado communities—usually because it supports one or more recreational activities (i.e., fishing, hunting, rafting, etc.). In-channel diversion rights give local communities a way to protect riparian habitats and the industries dependent upon them.

1. Colorado's Strengths and Weaknesses

Colorado is a strict “use-it-or-lose-it” state, and there is nothing in the law that allows a water user to transfer or "spread" water saved by conservation measures.\textsuperscript{107} In combination, these aspects of Colorado water law produce inefficient use of water resources.

Colorado has the most regimented water allocation system in the nation. All of its streams are adjudicated and it has separate courts to handle its water cases. The legal structure is in place to implement what could be the most progressive instream flow program in the United States; however, this potential will not be realized until significant new legislation is passed that not only encourages conservation but also

\textsuperscript{103} COLO. REV. STAT. § 37-92-102(3) (2002), as amended by 2002 Colo. Legis. Serv. 149 (S.B. 02-156) (West).

\textsuperscript{104} See id.

\textsuperscript{105} See id. §§ 37-92-102(5), -103(4), -103(10.3).


\textsuperscript{107} See TROUT UNLIMITED, supra note 95, at 4, 15; but see COLO. REV. STAT. § 37-92-103(2) ("Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder"); Thornton v. Bijou Irr. Co., 926 P.2d 1, 70 (Colo. 1996) ("[t]he crucial elements for finding abandonment are the intent to abandon and non-use of the water right."). Though intent to abandon "may be presumed due to a long period of disuse," Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 57 (Colo. 1999), in the case of vested water rights, some showing of intent to abandon is required for the right to be lost. Cf. COLO. REV. STAT. §§ 37-92-103(1), -103(2).
provides a framework that encourages greater private involvement in riparian habitat maintenance and enhancement.

**D. Idaho**

Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right. Only two exceptions to the diversion requirement exist. No diversion...is needed to establish a valid appropriative water right for stock watering. In addition, State entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens.\(^{108}\)

Idaho has three statutory schemes for protecting/enhancing instream flow. First, pursuant to sections 42-1501 through 1505 of the Idaho Code, the Idaho Water Resources Board (WRB) can apply to the director (Director) of the Department of Water Resources (DWR) to appropriate water to protect the water supply, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, or water quality.\(^{109}\) Second, specific legislation can be passed allowing appropriation of water for public purposes in specific bodies of water.\(^{110}\) Finally, specific legislation can allow the “rental” of Idaho Water Bank rights for instream uses.\(^{111}\)

1. **Minimum Stream Flows**

Sections 42-1501 through 1505 set out a process to secure minimum stream flows. Only the WRB can apply for a minimum stream flow, and, if accepted by the DWR, the right only applies to unappropriated water and only the minimal amount necessary to accomplish the goal stated in the application.\(^{112}\) Any application approved by the Director must be submitted to the legislature. Approval of the application does not become final unless the legislature affirmatively acts or fails to act upon it during the session in which it is submitted.\(^{113}\)

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110. See **IDAHO CODE** tit. 67, ch. 43 (2001).
111. See, e.g., **IDAHO CODE** § 42-1763B (null and void Jan. 1, 2002) (interim authority for rental of storage water to augment lower snake river flows during the migration of snake river salmon).
112. Telephone Interview with Jeff Fereday, Attorney, Givens Pursley, LLP, Boise, Idaho (July 26, 2002); accord **IDAHO CODE** §§ 42-1502(f), 42-1503.
113. **IDAHO CODE** § 42-1503.
For private individuals and organizations, section 42-1504 offers a means to participate in the process. This section allows "[a]ny person, association, municipality, county, state or federal agency" to "request that the [WRB] consider the appropriation of a minimum stream flow of the unappropriated waters of any stream." The request must be accepted or rejected by the WRB within six months, and there is no right to have those decisions reviewed.

The DWR only receives one to two applications for minimum stream flows every year, and those are almost universally the result of requests sent to the WRB from state agencies such as the Department of Fish and Game or Department of Environmental Quality. The lack of private involvement in the process leaves some room for increased activism. However, the entity submitting the request to the WRB must include all of the information required by a WRB-initiated application (which can be a daunting task), after which, the fate of the request is entirely in the hands of the WRB and any rejection cannot be appealed.

Given the amount of work required and the risk that the work might be summarily dismissed by the WRB, rejected by the DWR, or rejected by the legislature, it is little wonder that private entities have yet to extensively utilize section 42-1504.

2. Specific Legislation

In 1925 the Idaho Legislature directed the governor to "appropriate in trust for the people...all the unappropriated water of Big Payette Lake, or so much thereof as may be necessary to preserve said lake in its present condition." The appropriation did not require a fee or proof of completion of a diversion. This was Idaho's first recognized instream or in situ water right, and since 1925 stream flows and lake levels on six other bodies of water have been similarly protected. These specific legislative appropriations attached only to the unappropriated water in the affected stream system. Considering the fact that most of

114. IDAHO CODE § 42-1504.
115. Id.
116. Telephone Interview with Glen Saxton, Hearing Officer, Idaho Dep't of Water Resources (July 25, 2002). Mr. Saxton actually said that only state agencies could request that WRB file an application for instream flows; however, this is contrary to the clear language of section 42-1504. At any rate, it is clear that privately initiated requests for WRB appropriation of minimum flows are essentially non-existent. Id.; Telephone Interview with Jeff Fereday, supra note 112; Telephone Interview with Scott Yates, Director, Western Native Trout Program, Trout Unlimited, Idaho (July 24, 2002).
117. IDAHO CODE § 42-1504.
118. Id. § 67-4301.
119. Id. §§ 67-4304, 67-4307-4311.
120. See id §§ 67-4301, 67-4304, 67-4307-4311.
the stream systems are fully appropriated, the specific legislation option is of minimal practical ecological value and becomes less valuable with each new diversion application submitted or approved.

3. Specific Water Bank Legislation

The Idaho Water Supply Bank (Bank) was created by statute in 1979 and is operated by the WRB. Under the scheme, right holders can sell or lease their water rights to the Bank, which in turn can "rent" the water to third parties. Nothing in the water bank statutes precludes the use of rented water for instream purposes, and, in fact, two sections specifically provide for the rental of water for instream use. However, such specific legislation is necessary for Bank water to be used for instream purposes.

4. Another Possibility

Though the ruling in Idaho v. United States made it more difficult to prosecute, it is possible that an individual could donate a water right to the WRB for application to a minimum flow. This strategy would require a creative interpretation of the law, and it is not certain that such a donation would result in a protectable instream right. Given that many right holders would balk at donating water to a state agency and that the creation of an instream right would be uncertain, significant donation of rights to the WRB for instream purposes is unlikely without a firm statement from the judiciary that those instream rights would be valid.

5. Idaho's Strengths and Weaknesses

Other than for stock watering or in instances where a specific statute allows for instream flows, a physical diversion of water is still necessary to secure water rights in Idaho. Case law and current political sentiment will make it hard to establish any additional instream flows.

121. Telephone Interview with Jeff Fereday, supra note 112.
122. At this point, new applications to divert water are rarely approved and, if approved, are of little use because of their late priority date. Id.
123. IDAHO CODE § 42-1761.
124. Id. §§ 42-1763B, 42-1765A.
125. Telephone Interview with Glen Saxton, supra note 116, accord State v. United States, 996 P.2d 806, 811 (Idaho 2000). The Idaho Legislature has regularly had the chance to allow the rental of water from the Bank for instream uses but has always solidly defeated any such proposal. Telephone Interview with Glen Saxton, supra note 116.
126. 996 P.2d 806.
127. Telephone Interview with Jeff Fereday, supra note 112.
However, limited options leave significant room for improvement in the law either by legislative initiative or by well chosen litigation.

In order to implement a functioning instream flow regime in Idaho, either the legislature or the courts must recognize ecological restoration and enhancement as "beneficial use" that does not require a diversion. Also, in a state that places a high value on individual property rights, private ownership of instream rights is essential before large-scale participation by existing water right holders will be realized.

E. Montana

If California instream flow law is hopelessly complex, then Montana instream flow law is brutally simple: it errs on the side of allowing an appropriation, even when that appropriation might wipe out a stretch of riparian habitat. The result has been that nearly every basin in Montana is over-appropriated.

Montana statutes do offer one mechanism for private entities to hold instream flows. Under sections 85-2-408 and 439 of the Montana Code, water rights can be leased (instream leases). However, the legislature has been hesitant to permanently enshrine this option, which sunsets in 2005.

128. Montana did not have a formal water right permit process until 1973 when the Water Use Act was passed. By that time, several stream systems were already severely over-appropriated. However, instead of requiring the Department of Natural Resources and Conservation (the agency tasked with administering water rights) to consider instream beneficial uses of water when dealing with appropriations and changes, it made such considerations contingent upon the issue being raised by a valid objector. See MONT. CODE ANN. §§ 85-2-311, 402 (2003). Only an entity whose "property, water rights, or interests" would be adversely affected by the appropriation or change can be a "valid objector," id. § 85-2-308, and wildlife organizations do not have any protectable interest, see Baker Ditch Co. v. Dist. Court, 824 P.2d 260, 262 (Mont. 1992).

129. Telephone Interview with Laura Ziemer, Attorney, Montana Chapter, Trout Unlimited (July 16, 2002).

130. MONT. CODE ANN. §§ 85-2-408, 439. Section 408 is a general leasing statute, while section 439 deals only with the Upper Clark Fork River basin. The two statutes' requirements are essentially the same; however, leases under section 439 are limited to ten years, while a section 408 lease that involves water made available by a conservation project can be up to 30 years. In addition to section 408 leases, the Montana Department of Fish, Wildlife, and Parks can lease appropriative rights under MONT. CODE ANN. § 85-2-436. Also, any political subdivision of the state or the federal government can "reserve" water for "existing or future beneficial uses or to maintain a minimum flow, level, or quality of water." Id. § 85-2-316(1). However, the priority date of the reservation corresponds to the date the entity files notice of intent to reserve the water, id. § 85-2-316(9); this means that there is essentially nowhere in the state where a reservation would make much of a difference. Telephone Interview with Laura Ziemer, supra note 129.

131. Telephone Interview with Laura Ziemer, supra note 129.
Given the state of the statutory law, the prospects for private transactional protection of instream flows appears bleak, but the situation on the ground gives much reason for optimism. Along with leases, semi-formal agreements ("drought plans") between water users and environmental groups, which encourage the sharing of shortages and basin-wide conservation, have enhanced base flows even during some of the worst drought years on record.132

1. Instream Leases

Sections 85-2-408 and 85-2-439 allow an individual, association, partnership, or corporation to temporarily change an appropriation right to "maintain or enhance instream flow to benefit the fishery resource."133 The full diversion flow right is protected at the former point of diversion, while only the amount historically consumed is protected below the point of diversion.134

One of the benefits of Montana's leasing scheme is that it allows private control over the instream right after lease signing. In a state that places a high value on individual property rights, a scheme such as Oregon's135 (which places the right in the hands of the state) would severely limit participation in the program. As it stands, entities wishing to lease rights from wary right holders are able to assure them that the leasehold interest will be in the leasing party and that the right will revert to the owner when the lease expires.136

Preparing a lease is a significant undertaking. Not only must the parties navigate the Department of Natural Resources and Conservation (DNRC) water right change process but also the protection of flows below the former point of diversion. Additionally, a hydrologic analysis may be needed to determine whether the change adversely affects other water rights.

The change process first involves the applicant publishing notice of the proposed change in a newspaper of general circulation, in the county or counties affected, 30 days before the application is submitted

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132. Id.
133. MONT. CODE ANN. §§ 85-2-408, -439.
134. The language of MONT. CODE ANN. § 85-2-408 differs from that in section 85-2-439 regarding the amount of water protected under the statute. Section 408 has language protecting flow at a specific point, while section 439 speaks in terms of protected stretches and spells out that "the maximum quantity of water that may be changed...is the amount historically diverted. However, only the amount historically consumed may be used...below the existing point of diversion." In practice, the stretches protected by section 408 leases are determined by the section 439 calculus noted above. Telephone Interview with Laura Ziemer, supra note 129.
135. See infra section II.F.
to the DNRC. At the end of the 30-day period, the completed application may be submitted to the DNRC.

The applicant must prove by a preponderance of evidence that the proposed change will not adversely affect existing rights and is needed to maintain or enhance instream flows to benefit fishery resources. To this end, the applicant must provide information about the water right involved, the stretch to be protected, a map showing the location, a description of the proposed change, and the means that will be used to measure flow.

After the application is processed and deemed complete, the DNRC publishes notice and allows 30 days for stakeholders to protest the change. If no one protests the change and both of the above requirements have been sufficiently proven, the DNRC approves the application. However, if protests are filed, the DNRC may hold one or more hearings. After all of the information generated by the process is reviewed, the DNRC approves the application as submitted, approves the application with conditions, or denies the application.

2. Drought Plans

In 2000, Trout Unlimited, in collaboration with the Montana Department of Fish, Wildlife, and Parks (DFWP), the DNRC, local water users, and local anglers instituted the Blackfoot Emergency Drought Response Plan, which was included in a long-term plan still in effect. The purpose of the emergency plan “is to minimize adverse impacts on fisheries resources and to aid in the equitable distribution and shared sacrifice of water resources during [low flow years].” When the flow of

137. *Id.* § 85-2-408(5).
138. This requires the applicant to prove the amount historically diverted and the amount historically consumed.
139. *Id.* § 85-2-408(3).
141. See MONT. CODE ANN. § 85-2-402(7) (DNRC “shall provide notice and may hold one or more hearings upon any other proposed change if it determines that the proposed change might adversely affect the rights of other persons”). DNRC almost uniformly determines that a proposed change might adversely affect the rights of others.
142. *Id.*
143. *Id.*
144. *Id.*
145. Telephone Interview with Laura Ziemer, *supra* note 129.
the Blackfoot River drops to certain trigger levels, the plan calls for a combination of voluntary and mandatory conservation actions on the part of the participants. The plan has already registered some success—enhancing Blackfoot flow by an estimated 210 cfs during the summer of 2001.\(^{147}\) This, and future, success on the Blackfoot relies on two main components: (1) "Murphy" Rights and (2) voluntary community participation.

Murphy Rights are appropriative water rights held by the DFWP that protect minimum flows in 12 watersheds around the state, including the Blackfoot.\(^{148}\) The priorities of these rights date to late 1970 and early 1971.\(^{149}\) These relatively late priority dates limit their value to protect flows during drought years because most watersheds have senior rights sufficient to fully appropriate the streams. However, Murphy Rights are sticks that can be used to prod junior appropriators and encourage cooperative solutions to low stream flow.

The junior appropriators are given a stark choice: participate in the program or be subject to a call on the water by the DFWP when stream levels drop below Murphy Rights levels. The DFWP could thereby require junior appropriators to stop all diversions until stream levels recover sufficiently to satisfy the Murphy Rights. As an incentive to become involved, junior appropriators participating in the plan are not subject to an order to stop diverting water under such a Murphy Rights call.\(^{150}\) The participation of the junior appropriators places some political pressure on senior appropriators to join. Pre-1970 water rights control all of the water in certain streams during drought years;\(^{151}\) so senior appropriator participation can be the difference between dry gravel and flowing water.

Drought plans are being developed for both the Big Hole and Jefferson River basins. The DFWP does not hold Murphy Rights in either basin, but both basins have a corresponding organizing principle. In the Big Hole, that principle is the possible listing of the Fluvial arctic
grayling as an endangered species under the Endangered Species Act.\textsuperscript{152} The motivation to participate in the Jefferson basin is one of the more universal desires in communities around the West—to make dry-year water allocation more equitable.

In all cases, leadership by a prominent member of the community is invaluable. An endorsement from a respected rancher or farmer who is willing to risk ridicule from his contemporaries is at least as important as any coercive tool for recruiting participants and fostering trust.\textsuperscript{153} Murphy Rights and endangered species can bring water users to the table, but community bonds keep them there. Developing a functional drought management plan is, at its core, an exercise in good, old-fashioned community organizing.

3. Montana's Strengths and Weaknesses

Montana allows any person to lease water for instream purposes, which allows considerable flexibility in private and public attempts to maintain or enhance instream flows. However, the statutory mechanism that allows this leasing is due to sunset in 2005. Also, permanent transfers of water rights to instream purposes are not permitted. Since the leasing process is as onerous as the permanent transfer process, transaction costs may outweigh the benefits of securing temporary flows.

In a state where many historically perennial stretches of stream now run dry due to over appropriation, organizations have turned to cooperative watershed approaches to protect riparian habitat. Agreements such as the Blackfoot Watershed Emergency Drought Response Plan show that community organizing and education can be more effective than pure reliance on the law. However, current cooperative agreements operate somewhat outside the law, which makes them risky. Clear legislation that encourages cooperative agreements to protect riparian habitat would be indispensable for increased participation in future attempts to establish watershed management plans.

F. Oregon

Oregon has one of the most comprehensive (and comprehensible) systems for transferring water rights to instream use. The state has a clear regulatory scheme promulgated by the Oregon Water Resources Department (WRD or Department) and founded upon

\textsuperscript{152} Id.
\textsuperscript{153} Id.
a large body of statutory law. In Oregon, "[a]ny person may purchase or lease all or a portion of an existing water right or accept a gift of all or a portion of an existing water right for conversion to an in-stream water right." However, this does not mean that private entities can own instream water rights because such rights are held in trust for the public by the WRD. The plain language of section 537.348 of the Oregon Revised Statutes invites a legal argument about whether the statute allows private individuals to own instream water rights. However, absent a change in the statutes governing instream transfers, it is unlikely that the courts will overturn WRD's interpretation that the public is the owner of instream rights and the Department is its trustee. For now, private entities that purchase or lease rights for instream use largely act as brokers between sellers and lessors and the Water Resources Department, which becomes the trustee of the right at the conclusion of the transaction.

Notwithstanding the lack of private ownership, Oregon law offers several mechanisms to protect instream flows. Any person (or organization) can apply for (1) a permanent transfer, (2) a long-term lease or transfer of set duration (long-term lease), (3) a short-term lease, (4) allocation of conserved water to instream use, or (5) a supplemental groundwater right holder can transfer (change) that right into a primary right thereby reducing the direct effects on the stream during the irrigation season. Prior to any of these transactions, the WRD recommends a pre-application conference to ensure application materials are complete and to increase knowledge of the application process.

156. OR. ADMIN. R. § 690-077-0010(14), accord OR. REV. STAT. § 537.332(3).
157. Accord Jack Sterne, Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest, 27 ENVTL. L. 203, 213-14 (1997) (citing court deference to agency interpretation and concurring legislative history). There are also other signals within the statutes that the Oregon Legislature intended instream rights to be publicly owned. See, e.g., OR. REV. STAT. § 537.341 (stating that, upon compliance with procedure, the Water Resources Commission shall issue a certificate "in the name of the Water Resources Department as trustee for the people of the State of Oregon").
158. Telephone Interview with Andrew Perkey, Executive Director, Oregon Water Trust (June 3, 2002).
1. Permanent Transfer

Instream water right transfers in Oregon are processed largely the same way as typical water right transfers. First, an Application for Water Right Transfer must be filed with the WRD. Then, notice of the transfer proposal is published and interested parties have 30 days from date of last publication to protest the transfer. If a protest is filed or if the director of the WRD (Director) decides that a hearing is necessary to determine if the transfer would result in injury, the Department must hold a hearing on the matter unless the parties negotiate an instream water right that is acceptable to all. If, after a hearing or a review of the application, the Director decides that the amount, timing, and location of the proposed instream right are appropriate; that the right serves a public use; and that the transfer does not cause injury to any existing water right holder; the Director approves the transfer.

Statutory law requires the Director to make a finding that the instream right will represent a “public use.” But even if the instream right would increase flow to more than the minimum needed to protect the proposed use, it is highly unlikely that a proposed instream right will not constitute a “public use” in the eyes of the WRD. Therefore, whether the application is approved will almost entirely depend on whether the right as stated in the application constitutes an enlargement of the water right and whether there are any other rightholders that will be injured by the creation of the instream right. Careful calculation of the

160. See Or. Admin. R. § 690-77-0075 (instream right applications processed pursuant to Or. Admin. R. ch 690, div. 15 (transfers)).
162. For most transfers (including instream transfers), publication is required in the WRD’s weekly notice and in a newspaper of general circulation in the area where the instream flow will be located. See Or. Admin. R. § 690-380-4020 (2001). When an instream right application is filed, WRD is also required to notify “affected Indian tribes and cities, and...the planning department of each affected local government.” Id. § 690-077-0075(1).
164. Id. §§ 690-380-4030, 690-077-0075(2), (4)–(6).
165. “Public use” includes, but is not limited to, (a) recreation; (b) conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish, and wildlife habitat and any other ecological values; (c) pollution abatement; or (d) navigation. Id. § 690-077-0010(25).
166. See id. §§ 690-077-0075(2), (3), (5)–(6).
167. See Or. Rev. Stat. § 537.334 (defining public uses as beneficial uses that are required to create a right under Oregon law and prior appropriation law generally).
168. Telephone Interview with Doug Parrow, Field Services, Oregon Water Resources Dept’ (June 13, 2002), accord Or. Admin. R. §§ 690-077-0075(2)–(3) (requiring approval of an instream right application upon certain findings that do not include whether the proposed use is a public use).
stretch(es) and flow(s) to be protected is required to assure the application jumps these hurdles.169

The transfer process is demanding and, because it involves the permanent acquisition of a property interest, more precautions are needed for a transfer than for a lease. These precautions (such as a title search), combined with the increased mapping, notice, and other application requirements, make the transaction costs significantly more for transfers than for leases.

2. Long-Term Lease/Transfer of Set Duration

If an agreement is made with a right holder to transfer water instream for a specified period of more than five years, a transfer application must be filed with one additional piece of information—the lease/transfer duration. Aside from that, the process for a long-term lease is the same as a permanent transfer.7

As noted above, the transaction costs and the amount of time necessary to prosecute a transfer can be significant. Therefore, long-term leases for less than 20 years are of questionable value.172

169. A map must be prepared by a certified water rights examiner (CWRE) and must show the old locations of diversion and use, the stretch of stream to be protected, the use location of any portion of the water right not being transferred instream, and other pertinent information. See OR. ADMIN. R. § 690-077-0075 (2001) (requiring transfers to be processed according to OR. ADMIN. R. ch 690, div. 15), id. § 690-380-3100 (requiring maps to be prepared by a CWRE and giving map requirements). The stretch of stream that can be protected depends on several factors. All instream water rights begin at the former point of diversion (POD). See OR. ADMIN. R. §§ 690-077-0075(2). Normally, the instream right will protect a flow equal to the diversion flow from the POD to the mouth of the stream. OR. ADMIN. R. § 690-077-15(7); Telephone Interview with Andrew Perkey, supra note 158. However, depending on the amount and location of return flow associated with the original right, the instream right can cover more than one stretch. Where there was return flow at a definite point a substantial distance below the POD, the instream right can protect the entire diversion flow between the POD and the point where the return flow entered the stream. Below the return flow point, the instream right can protect a flow equivalent to the consumptive use whether or not there is another right holder between the return flow point and the mouth of the stream. See OR. ADMIN. R. § 690-077-0075(2). Where the instream right represents a “measurable portion” of the flow of the receiving stream, the flow can protect a stretch of the receiving stream as well. Id. § 690-077-15(7). Other considerations that can affect the size of flow that can be protected are whether there are areas of natural loss and whether other rightholders would be injured if the application as written were approved. Id. § 690-077-0075(2).

170. OR. ADMIN. R. § 690-077-0077 (short-term lease process only available to leases of less than five years).

171. Telephone Interview with Robert Rice, Instream Leasing Program, Oregon Water Resources Dep't (June 13, 2002).

172. Telephone Interview with Andrew Perkey, supra note 158 (would only consider a long-term lease for leases exceeding 20 years because it would be far less demanding to apply for a short-term lease with three or four renewals); see also infra section II.F.3 (discussing the reduced procedural requirements for short-term leases and the ease of
3. Short-Term Lease Process

Currently, short-term leases account for the majority of the instream flow transfers in Oregon. The short-term lease process has lower notice and mapping requirements than the full transfer process and does not require the inclusion of land use information. A short-term lease can last up to five years; however, it can be renewed indefinitely by filing a one-page Instream Lease Renewal with WRD before the expiration of the previous lease (i.e., every five years).

After the lease agreement is filed with the WRD, the Department must publish notice in its weekly public notice mailing list, mail notice to any water purveyor mentioned in the lease, and post the lease in the applicable watermaster office. However, unlike permanent and long-term transfers, notice is not required to be given to local political entities, nor is publication of notice in a newspaper required. Also, the approval of encumbrance holders (i.e., holders of liens, mortgages, easements, etc.) is not necessary to complete a short-term lease.

If allegations of enlargement or injury are received within 21 days of the weekly public notice, the parties to the lease (including WRD) must review the lease. If no such allegations are received, the Department can presume that no injury or enlargement will result from the proposed lease agreement. Once the lease is in force, claims of enlargement and injury can still be filed and, if they are found to be valid, the Department is required to discontinue distribution “in a way that would cause the injury or enlargement to continue.” This process allows for quick and easy execution of lease agreements (absent any protest) and tests the agreement’s functionality by allowing the lease to operate.

renewal). However, it should also be noted that the stringent full transfer process likely makes the rights that follow that process more defensible if they are ever challenged.

173. Telephone Interview with Andrew Perkey, supra note 158.
174. See OR. ADMIN. R. § 690-077-0077, compare id. § 690-077-0075.
176. Telephone Interview with Andrew Perkey, supra note 158; Telephone Interview with Robert Rice, supra note 171; see also OR. ADMIN. R. § 690-077-0077(14) (“Nothing in these rules shall be interpreted to prevent the renewal of a lease agreement…[which] shall be subject to the provisions of this rule.”).
177. OR. ADMIN. R. § 690-77-0077(6).
178. See generally id. § 690-077-0077.
179. Id.
180. Id. § 690-077-0077(7).
181. Id.
182. OR. ADMIN. R. § 690-077-0077(10).
Split-season leases are limited to one year. However, like normal leases, they can be renewed indefinitely. Split-season leases are subject to the same scrutiny as normal leases, but they can be filed as late as two weeks before the water is used for either the existing or instream purpose. The split-season leasing statute has a sunset clause, so if it is not reauthorized before January 2, 2008, it will not be a valid option after that date.

Short-term leases allow instream use with fewer logistical hurdles than permanent or long-term transfers. This probably accounts for the far greater number of leases than transfers to instream purposes. As popular and easy as the lease process is, there are drawbacks to relying on leases to maintain instream flows. First, leases are subject to less scrutiny than transfers and are therefore more likely to be executed containing fatal enlargement or injury flaws. Second, when push comes to shove in dry years, watermasters in some areas are simply terminating lease agreements as opposed to defending the instream right against angry irrigators. Finally, the right holder can choose to terminate or decline to renew the lease, which has the potential to wipe out much of the ecological gains made during the time the lease was in effect.

4. Allocation of Conserved Water Process

In 1987, Oregon passed a law that laid the foundation for a conserved water allocation program. Since its passage, the law has been amended several times to make it easier to implement. But even with the post-1987 amendments, the program remains largely unused.
Although it is not a popular option, there are situations where the program makes sense.

The amount of water the right holder will be able to control depends on the percentage of funding the conservation project receives from non-refundable state and federal sources. However, if the application is approved, in no instance will the right holder control less than 25 percent of the conserved water or more than 75 percent. For example, if the government pays for 60 percent of the conservation project, the WRD would receive 60 percent of the conserved water for allocation to instream flows and the right holder would be allowed to do what he or she pleased with the remaining 40 percent. If the government pays for 100 percent of the conservation project, the right holder still receives 25 percent of the conserved water. Conversely, if the right holder pays 100 percent of the project cost, he or she only receives 75 percent of the conserved water.

This allocation scheme indicates another reason why right holders to date have been reluctant to participate in the program. Either the right holder is going to pay 75 percent or more of the project cost and lose 25 percent of the saved water, or the government is going to pay a more substantial portion and the right holder will lose between 25 and 75 percent of the saved water. In the end, the land where the water is conserved will have a smaller water right, and the difference between the original and reduced water right will not be entirely controlled by the right holder. The incentive of allowing some "spreading" of water has proved insufficient to encourage widespread use of the program.

Although success of the conserved water project has been limited, this option has the potential to increase stream flow significantly. Where a right holder wishes to continue using water for an existing purpose but also wishes to enhance stream flow, this project affords the means to do so. However, the complexity of the process, and the lack of right-holder control over all water conserved, will probably limit its application to a few exceptional situations where the right holder's main goal in adopting water conservation measures is to enhance stream flow.

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192. See OR. ADMIN. R. § 690-018-0012.
193. Telephone Interview with Doug Parrow, supra note 168; see also OR. ADMIN. R. § 690-018-0012.
194. Telephone Interview with Doug Parrow, supra note 168.
195. WRD states that the guaranteed 25 percent it will receive for instream use is in exchange for right holder's newfound right to "spread" the water. OR. WATER RESOURCES DEP'T, supra note 190, at 1.
5. Supplemental to Primary Right Transfer Process

Supplemental rights are water rights that augment surface rights where flows are insufficient to meet the surface right. Generally, supplemental rights involve using ground water to supplement the surface right, although supplemental rights can also be drawn from other rivers and streams or from reservoirs. Ground water is often hydrologically connected to some surface source, but the effects of pumping ground water do not always have an immediate impact on the aquifer’s associated surface water source. A holder of both a surface and a supplemental groundwater right can apply to the WRD to “transfer” (change) a supplemental right into a primary right.196

This type of “transfer” is most beneficial when it involves the use of water during the summer months (e.g., irrigation). These are the months when demand for water is at its highest and stream flows are at their lowest.197 If a surface user changes his or her source from surface water to ground water, the effects on the stream may be reduced or eliminated. This is because the aquifer might be sufficiently recharged during the wet winter and spring months such that the effects of groundwater pumping on the stream never materialize.198

Due to the expense associated with the supplemental to primary right transfer process, it is a seldom used tool for enhancing instream flows. However, it is politically palatable to irrigation interests because there is no change in the use of the land, and, for the right holders themselves, it may be easier and less expensive to pump water from a well to their crops than to maintain a surface diversion.199

6. Oregon’s Strengths and Weaknesses

The procedural tool used to enhance instream flow depends on a myriad of factors. Oregon law provides several options and encourages creative and cooperative solutions. Currently, the WRD is amenable to increasing stream flow in practically every basin across the state.

198. The ideal situation would be pumping during the summer, which causes no effects on stream level (due to well depth or distance from the stream), combined with full recharge during the winter and spring when streams are full and withdrawal pressure on the system is not as acute.
199. Entities attempting this strategy should be sure that the transfer process leaves the priority date of the original surface right intact.
although individual watermasters may refuse to make tough decisions when necessary.\textsuperscript{200}

Although Oregon’s water law infrastructure is not perfect, it allows for significant protection of instream flows, especially when compared with other western states. Perhaps the most important facet of Oregon’s instream flow regime is its presumption about the stretch of stream to which an instream right applies. Of the states surveyed for this article, Oregon is the only state to have created such a presumption. The presumption significantly reduces transaction costs for transfer applicants, which makes small-scale transactions worthwhile. This, in turn, allows for wider participation in efforts to enhance and restore instream flows.

If Oregon could improve one aspect of its instream flow regime, it would be to allow private ownership of instream rights. As in other western states, right holders in Oregon are hesitant to give up control of water rights to the state. Exclusive authority of the state to hold instream flow rights is likely the biggest obstacle to greater participation in Oregon’s instream flow regime.

G. Utah

"Water is precious, and it [has been] the undoubted policy of the law to prevent its waste and promote its largest beneficial use."\textsuperscript{201} Because of this policy, which in practice maximizes out-of-stream use,\textsuperscript{202} Utah, like Montana, has seen stretches of river dry up due to human diversion. As one outdoor writer speaking of the Provo River recalled, "Sixteen inch [trout] scrambled for cover in three inches of water, while grazing pastures on the banks were literally flooded with inches of water."\textsuperscript{203}

Utah’s maiden venture into statutory instream flow protection can be found in section 73-3-3(11)(a) of the Utah Code, which states that,

\begin{quote}
[i]n accordance with the requirements of this section, the Division of Wildlife Resources or Division of Parks and Recreation may file applications for permanent or temporary changes for the purpose of providing water for instream flows, within a designated section of a natural
\end{quote}

\textsuperscript{200} Telephone Interview with Doug Parrow, \textit{supra} note 168; Telephone Interview with Andrew Perkey, \textit{supra} note 158.

\textsuperscript{201} Little Cottonwood Water Co. v. Kimball, 289 P. 116, 117 (Utah 1930).

\textsuperscript{202} Cf. \textsc{Utah Code Ann.} § 73-3-21 (2003) (giving agricultural use priority over all other uses except domestic uses "in times of scarcity").

stream channel or altered natural stream channel, necessary within the state of Utah for: (i) the propagation of fish; (ii) public recreation; or (iii) the reasonable preservation or enhancement of the natural stream environment.\textsuperscript{204}

Also, the state engineer cannot approve an appropriation or permanent change application without first determining that the proposed appropriation or change will not "unreasonably affect public recreation or the natural stream environment, or...prove detrimental to the public welfare..."\textsuperscript{205} "Any person interested may file a protest with the state engineer,"\textsuperscript{206} and "[t]he state engineer shall consider the protest and shall approve or reject the application."\textsuperscript{207}

1. Strategies for Instream Flow Protection in Utah

a. Division of Wildlife Resources (DWR) or Division of Parks and Recreation (DPR) Acquisition of Instream Rights

Section 73-3-3(11) of the Utah Code gives the DWR and DPR the power to acquire instream flow rights with money specifically appropriated by the legislature for that purpose or by donation,\textsuperscript{208} but these agencies have been slow to exercise this power.\textsuperscript{209} The main reason for this is that few, if any, rights have been donated, and the legislature has appropriated little money for this purpose.\textsuperscript{210} To date, the DWR holds only a handful of rights, the DPR holds none,\textsuperscript{211} and neither agency is aggressively pursuing increased funding for water right acquisition under this section.\textsuperscript{212}

Though seldom used, the donation provisions of section 73-3-3(11) offer an opportunity for significant private involvement with instream flow protection. Under the current statutory regime, a private individual or organization can acquire a diversionary right and then

\textsuperscript{204} Utah Code Ann. § 73-3-3(11)(a).
\textsuperscript{205} See id. § 73-3-8(1). Though this section can be read merely to require an investigation of these matters during the consideration of an application to appropriate water, the Utah Supreme Court has determined that this section also applies to permanent transfers and it is the state engineer's duty not only to investigate the matter but also to deny the application if the appropriation or permanent transfer will unreasonably affect public recreation or the natural stream environment or will prove detrimental to the public welfare. See Bonham v. Morgan, 788 P.2d 497, 502 (Utah 1989).
\textsuperscript{206} Utah Code Ann. § 73-3-7.
\textsuperscript{207} Id.
\textsuperscript{208} See id. § 73-3-3(11)(f).
\textsuperscript{209} Telephone Interview with Alan Matheson, Director of the Utah Office of the Western Water Project, Trout Unlimited (July 25, 2002).
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
donate it to one of the state agencies under section 73-3-3(11). This avoids the need for legislative approval, and the transfer to instream use only requires that the agency receiving the donation find that the water is necessary for the propagation of fish, public recreation, or the reasonable preservation or enhancement of the natural stream environment and a finding by the state engineer that the transfer complies with the ordinary transfer criteria.

Private donation in Utah faces the same obstacles as it does in other states where the ownership of instream flow rights is limited to governmental entities. Those advocating the transfers not only have to deal with water users’ general aversion to relinquishing control of their rights, they often have to deal with the even greater aversion to relinquishing control of their rights to the state. Absent increased legislative funding for instream right acquisition or a successful movement to encourage donation, section 73-3-3(11) will remain of little practical significance in protecting instream flows in Utah.

b. Protestation of Proposed Transfers and Appropriations

Any interested person may protest applications for transfer or appropriation, to be an “interested person” one need not hold a water right. “Any person aggrieved by an order of the state engineer may obtain judicial review...” And the state engineer has the duty to deny an application if its “approval would interfere with more beneficial use, public recreation, the natural stream environment, or the public welfare.”

Where proposed transfers or appropriations threaten instream flows, private entities could rely on the above-cited law to protest the relevant applications on recreation, environmental, and public welfare grounds. The state engineer has considerable discretion to determine

213. See UTAH CODE ANN. § 73-3-3(11)(f)(ii) (“accept a donated water right without legislative approval”).
214. Id. § 73-3-3(11)(a).
215. See id. (“In accordance with the requirements of this section...”).
216. See, e.g., supra section II.F.4 (lack of popular participation in conserved water program in Oregon due to automatic state control over the portion of the conserved water devoted to instream purposes).
217. UTAH CODE ANN. §§ 73-3-7 (“Any person interested may file a protest...”). However, all interested persons filing a protest under section 73-3-7 do not have a subsequent right to appeal, “[r]ather [section 73-3-7] simply allows those persons who have a genuine concern about proposed changes in water rights to voice those concerns before the State Engineer...” Badger v. Brooklyn Canal Co., 922 P.2d 745, 750 n.9 (Utah 1996).
218. See Bonham, 788 P.2d at 502.
219. UTAH CODE ANN. § 73-3-14.
220. See Bonham, 788 P.2d at 502.
whether applications run afoul of these considerations. However, protests give the state engineer the information he or she needs to make a proper decision when considering an application. With particularly lopsided facts, a court might well determine that the state engineer abused his or her discretion and abrogated his or her duty to assure that the "public" was not adversely affected by the transfer or appropriation.

2. Utah's Strengths and Weaknesses

Utah has made its first steps toward the implementation of a workable instream flow regime. The interplay between sections 73-3-3 and 73-3-8 of the Utah Code allows limited protection of streams, largely at the discretion of the legislature, the state engineer, the Division of Wildlife Resources, and the Division of Parks and Recreation. Private participation is largely limited to protesting transfers and appropriations on public interest grounds. Greater protection of riparian ecosystems in Utah will require significant changes to the Utah Code or greater use of existing discretionary tools by the entities with the power to employ them.

In order to establish a workable instream flow regime, Utah must broaden the ways in which instream rights can be secured. Limiting their acquisition to donations and purchases with specific legislative appropriations has effectively precluded large-scale participation in Utah's instream flow regime. A first step toward greater participation would be legislative authorization of private ownership of instream rights. But this would be only a first step. Utah still lacks a clear legislative statement recognizing the importance of instream flow rights to the preservation of riparian ecosystems in the state. The law also requires the DWR and DPR to perform extensive studies to determine the flow associated with any rights they acquire and the stretch of stream to which they apply. If this requirement applies to future private participants, transaction costs may make small transfers infeasible.

221. See Utah Code Ann. § 73-3-8 ("It shall be the duty of the state engineer to approve an application [unless]...the state engineer...has reason to believe that an application...will interfere with [more beneficial use/recreation/environment/public welfare].") (emphasis added).

222. See Badger, 922 P.2d at 750 n.9.

223. See Bonham, 788 P.2d at 501 (quoting United States v. Caldwell, 231 P.434, 439 (Utah 1924)).

224. Although the requirement in section 73-3-8 that the state engineer determine that a transfer or appropriation does not unreasonably affect public recreation, the stream environment, or prove detrimental to the public welfare is a better legislative statement on the importance of those values than have many other states.

225. See Utah Code Ann. § 73-3-3(11).
Utah law does not contemplate cooperative management of watersheds within its borders. However, non-right holder standing in protest actions gives private individuals and organizations some power to affect management plans. A statute that encourages cooperative watershed management and the involvement of all stakeholders could go a long way toward establishing a meaningful instream flow regime in Utah.

H. Washington

Washington's instream flow scheme or "trust water rights program" (TWRP) is quite similar to the scheme that has developed in Oregon. The state, through the Department of Ecology (DOE), "may acquire all or portions of existing water rights, by purchase, gift, or other appropriate means other than condemnation, from any person or entity or combination of persons or entities." These "trust water rights" can be acquired on a temporary or permanent basis, and the conveyor of the right can condition the conveyance upon the water being used for instream purposes. Additionally, any right donated to the state for instream purposes "shall be managed by the [DOE] for public purposes to ensure that it qualifies as a gift that is deductible for federal income tax purposes...."

These provisions make the program seem quite attractive; however, the trust water rights program has been rarely used. This lack of use may stem from insufficient funding and staffing of the trust water rights program. Section 90.42.080(6) of the Washington Revised Code provides that "[n]o funds may be expended for the purchase of water rights by the state pursuant to this section unless specifically appropriated for this purpose by the legislature," and over the past few

227. Id. §§ 90.38.020, 90.42.080. The trust water rights program in the Yakima Basin is governed by Chapter 90.38, while the rest of the state is governed by Chapter 90.42. WASH REV. CODE § 90.38.020 requires that the Department of Ecology acquire the rights under the program, while, under section 90.42.080, theoretically any state entity can acquire the rights.
228. Id. §§ 90.38.020(3), 90.42.080(3).
229. See id. §§ 90.38.020(1)(b), 90.42.080(1)(b).
230. Id. §§ 90.38.020(5), 90.42.080(7).
231. Telephone Interview with Yolanka Wulff, Executive Director, Washington Water Trust (July 24, 2002). Washington Water Trust was established in 1998 and currently acts mainly as a broker between people willing to sell or donate their water rights to the Department of Ecology's trust water rights program.
232. Telephone Interview with Angela K. Nicholson, Outreach and Communications Manager, Washington Water Trust (July 31, 2002).
233. WASH REV. CODE § 90.42.080(6).
years the legislature has appropriated several million dollars for the DOE to acquire trust water rights. Recent staff additions, increases in funding, and continued appropriations should enhance the operation of the TWRP.24

In 2001 and 2002, the Washington Legislature amended both the Yakima Basin and statewide trust water rights statutes.235 Most significantly, for leases that do not exceed five years, the notice and hearing requirements that previously attached to even the shortest trust water right transactions no longer apply.236 The purpose of this amendment was merely to make short-term instream leases as easy to approve as normal short-term leases under section 90.03.390.237

1. Long-Term Lease/Permanent Transfer Process

The statutes governing the transfer of a water right from one consumptive use to another do not apply to trust water rights.238 However, the process is largely the same. The application for change is made on a standard change application form.239 The applicant then publishes notice, which is followed by a comment period.240 After the comment period, DOE performs a site visit, calculates quantity, and performs a public interest and existing rights impairment analysis. DOE will then issue a report of examination that represents an approval or rejection of the application. The conclusions of the report of examination can be appealed to the pollution control hearings board under section 43.21B.230.241

2. Short-Term/Split-Season Leases

There is quite a disconnect between the way the short-term/split-season-lease process currently operates and the way the enabling statute’s structure appears to dictate. Originally, the process for short-term leases was the same as long-term or permanent leases.242 In 2001, the legislature amended section 90.42.040 to exclude leases that do

234. Id.
236. Telephone Interview with Angela K. Nicholson, supra note 232.
238. WASH. REV. CODE § 90.03.380(4) (2001).
239. Telephone Interview with Yolanka Wulff, supra note 231. During this interview, Ms. Wulff outlined all of the steps in the long-term/permanent transfer process noted here.
240. The statute does not actually require a comment period; see WASH. REV. CODE § 90.42.040(5), however, DOE always allows for one. Telephone Interview with Yolanka Wulff, supra note 231.
241. WASH. REV. CODE § 90.42.080(4).
242. Telephone Interview with Yolanka Wulff, supra note 231.
not exceed five years from notice requirements until the right is "exercised" and from the requirement that the DOE find no impairment of the public interest or existing rights. The statute appears to give the following process for leases of less than five years:

1. Application
2. Acceptance without a review of impairment of existing rights or the public interest
3. Notice when right first "exercised."

Section 90.42.040(8) requires the notice requirements of section 90.42.040(5) when the right is first exercised, but does not go on to require the impairment analysis of section 90.42.040(4). On first reading, the statute appears to make short-term leases uncontestable; subsection 8 exempts such leases from subsections 4 and 5 and then only requires the DOE to comply with subsection 5's notice requirements when the right is first exercised. At that point, the lease is still exempt from the impairment analysis required by subsection 4—meaning that even if persons respond to the notice, DOE does not need to address any impairment claims. Interpreted in this way, the statute would likely run into constitutional problems if an injured right holder were not afforded an opportunity to challenge the exercise of the trust water right before an impartial tribunal.

However, subsection 4 is couched in terms that grant the DOE broad discretion to exercise water rights. Because the term "exercised" is not defined and the fact that general structure of the statute leads to ambiguity, the DOE can easily interpret the statute so as to clear constitutional hurdles but retain the exemption for initial notice in short-term leases. The process will likely be something along these lines:

1. Application
2. Acceptance
3. Notice at first exercising of water right

243. 2001 Wash. Legis. Serv. Ch. 237 (West). "Exercised" is undefined in the statute and appears in two contradictory subsections of section 90.42.040. Subsection (4) allows the "exercise" of a trust water right only if the DOE finds no impairment to rights existing at the time the trust water right is "established" and no impairment to the public interest. Subsection (8) excludes short-term leases from the requirements of subsection (4) and only requires notice upon the trust water right being "exercised."

244. But see WASH. REV. CODE § 90.03.390 (making impairment analysis inapplicable to normal transfers).

245. "Exercise of a trust water right may be authorized..." WASH. REV. CODE § 90.42.040(4) (emphasis added).

246. Subsection (5) gives a large opening for DOE to play with the statute's interpretation and promulgate constitutional rules: "the department shall, at a minimum, require...notice..." Id. § 90.42.040(5) (emphasis added).
4. Comment period
5. Impairment analysis
6. Report of examination allowing the exercise of the right to continue as is, modifying the right, or terminating the lease.

3. Other Considerations

a. What is the priority date of a trust water right?

Long-term leases and permanent transfers are subject to the following requirement: "Exercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired." This appears to set the trust water right's priority at the time the trust is established. So, a farmer could donate an 1890 priority water right to the state for instream purposes but the exercise of that right against a 1999 priority water right would not be allowed if the trust water right was "established" in 2003. However, "established" is not defined and there is language in the statute to the effect that water rights converted to trust water rights do not lose their priority. Also, "impairment" theoretically would not occur if the trust water right were limited to consumptive use (which is probably the reason for this wording). However, the statute should be reworded such that trust priority dates will correspond with the priority dates of the original water rights.

b. Only the state can hold instream flow rights

Only the state can hold instream water rights in Washington. As in other states with similar limitations on private control of instream rights, the hesitancy of water right holders to give control of a water right to the state represents a considerable obstacle to large-scale program participation.

c. Determination of what stretch of stream can be protected

Determination of what stretch of stream can be protected depends on the conclusions contained in the DOE's report of examination. Analysis can vary from case to case, but generally the report of examination allows the entire diversion flow to be protected.

247. Id. § 90.42.040(4) (emphasis added).
248. Id. § 90.42.040(3).
249. Telephone Interview with Peter Dykstra, supra note 237.
250. See WASH. REV. CODE §§ 90.38.020, 90.42.080.
from the former point of diversion to the point of return flow, if any.\textsuperscript{251} Below the return flow point, only the former consumptive use is protected. The DOE determines the amount by which the flow must diminish over distance to avoid impairment of existing rights, inconsistency with the public interest, or enlargement of the original right.\textsuperscript{252} The state bears the burden of performing the hydrological analysis, which makes the transaction costs faced by private entities far less prohibitive.

d. Minimum Instream Flows

The DOE may "establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same."\textsuperscript{253} These minimum flows cannot affect existing use or storage rights.\textsuperscript{254} This minimum stream flow statute is a powerful tool for the maintenance of existing stream flows, but because application of the scheme cannot affect existing rights, it is of little or no use in enhancing stream flows in over-appropriated streams.

4. Washington’s Strengths and Weaknesses

The tone of Washington’s statutory law is quite instream flow and fish friendly. There are many examples of this sprinkled around the trust water rights statutes and the universal change statutes.\textsuperscript{255} But a friendly tone does not always produce practical results. Under old law, few rights had been transferred into the Trust Water Rights Program. In its first four years of existence, the Washington Water Trust (WWT) succeeded in more than tripling the number of transfers to the TWRP than had occurred in the seven years prior.\textsuperscript{256} However, even with the efforts of the WWT, fewer than 100 transfers have been made.\textsuperscript{257} The recent changes to the law should make short-term leases more attractive and will likely allow more water to be transferred back in stream. The statute is ambiguous and does not allow for private control of instream rights, so only time will tell if it functions as the valuable tool it appears to be.

\textsuperscript{251} Telephone Interview with Yolanka Wulff, \textit{supra} note 231.
\textsuperscript{252} \textit{See} \textsc{WASH. REV. CODE} § 90.42.080(8) (leased trust water rights limited to amount used under the original right in the last five years); Telephone Interview with Yolanka Wulff, \textit{supra} note 231.
\textsuperscript{253} \textsc{WASH. REV. CODE} § 90.22.010.
\textsuperscript{254} \textit{Id.} § 90.22.030.
\textsuperscript{255} \textit{See, e.g., id.} §§ 90.03.005, 90.22.010–90.22.060, 90.42.005, 90.42.080.
\textsuperscript{256} Telephone Interview with Angela K. Nicholson, \textit{supra} note 232.
\textsuperscript{257} \textit{Id.}
Although Washington does not allow private control of instream rights, the state does have the burden of performing the studies necessary to define instream rights and the stretch of stream protected. This significantly reduces the cost of participation on the part of private environmental organizations. If some private control of instream rights were added to the existing regime, private participation in Washington's instream flow program would likely increase significantly.

I. Wyoming

Currently, there is only one way of transferring water rights instream in Wyoming—through a statutory scheme that makes it more difficult to maintain or enhance instream flows than not having a system at all. This scheme allows water to be stored, appropriated, or transferred for instream use; however, instream flows are limited to the "minimum flow necessary" to maintain or improve fisheries. Also, the scheme contains language that makes instream rights difficult to secure and defend. Here are some of the reasons why:

1. The stream segment and the minimum amount of water necessary must be "defined specifically." The language of this section appears to preclude the transfer of existing storage rights beyond the minimum amount necessary for maintenance of fisheries and to preclude the transfer of existing direct-flow rights beyond the minimum amount necessary for maintenance or improvement of fisheries. See id. §§ 41-3-1001, -1002(a), -1007.

2. Certain stretches of streams and rivers are not protectable.

3. "No person other than the state of Wyoming shall own any instream flow water right." The amount of water appropriated for instream flow in each river basin in Wyoming shall not result in more water leaving the state than the amount of water that is allocated by interstate compact or United States Supreme Court decree for downstream uses outside of Wyoming.

4. The statute encourages the construction of dams by providing a separate mechanism for instream flow protection based around new storage projects to release water for instream flows.

5. Instream flow rights are limited by interstate compacts.
6. If a call is to be made on an instream right, the Wyoming Game and Fish Commission has the burden to prove (1) present or future injury to the fishery, (2) the call on the right will not be futile, (3) the call will not injure senior rights. 265

7. Instream rights can be condemned by a city or town for municipal purposes. 266

8. The only entity that can file applications for instream flows is the Wyoming Game and Fish Commission, with no statutory mechanism for private involvement. 267

9. It is unclear whether temporary transfers to instream use are allowable.

As of August 1, 2002, 17 instream flow rights had been approved by the state engineer under Wyoming’s instream flow scheme. 268 All of these rights represent “appropriations” by the Game and Fish Commission and have very late priority dates (post 1986), 269 which limits their effectiveness during drought years. No transfers of existing direct flow or storage rights to instream use have occurred under the statute. 270

1. Wyoming’s Strengths and Weaknesses

Given this legal landscape, private entities wishing to enhance instream flows in Wyoming would be well advised to work with farmers and ranchers on a local watershed basis. Handshake agreements and community efforts to encourage conservation during dry years promise greater results than an effort by the private sector to squeeze into Wyoming’s instream flow regime. The ability of the scheme to maintain or enhance instream flows depends almost entirely on the efforts of the Game and Fish Commission, which limits its potential to protect Wyoming’s rivers.

If no other changes are made to Wyoming law, the legislature should encourage cooperative watershed schemes to protect streamflow while preserving the agricultural economy. This would go a long way toward overcoming the pitfalls found throughout the existing regime.

265. See id. § 41-3-1008.
266. Id. § 41-3-1013.
267. See WYO. STAT. ANN. §§ 41-3-1003, -1007.
268. Telephone Interview with Pat Tyrrell, Wyoming State Engineer (Aug. 1, 2002).
269. Id.
270. Id.
III. NEVADA: THE COMMON LAW APPROACH

Nevada may be the most promising state for private transfer of water rights instream. This promise stems from the law’s simplicity: any person can apply to the Division of Water Resources (DWR) to transfer any water right instream and the right theoretically remains under the owner’s control. Simplicity, however, means that many of the basic issues associated with successful instream flow programs, such as the amount of water that can be transferred and the stretch of river that can be protected, have not been addressed.

Instream flow law in Nevada stems from the Nevada Supreme Court’s decision in State v. Morros. Morros arose after the state engineer approved a water appropriation by the Bureau of Land Management to maintain lake and stream levels for wildlife purposes. The court held that section 533.030(2) of the Nevada Revised Statutes, which includes “any recreational purpose” in the definition of beneficial use, encompasses “wildlife watering.” Wildlife watering, in turn, includes water for fish. As part of this holding, the court also concluded that Nevada water law does not require a diversion of water to secure a water right—beneficial use and consistency with the public interest are the only prerequisites for securing or transferring a water right.

The Morros decision combined with the Nevada water statutes provides only two means for protecting water with private transactions—temporary change or lease and permanent transfer. Temporary changes are limited to one year, and there is no statutory

271. Telephone Interview with Aaron Peskin, Director, Great Basin Land & Water Trust (July 22, 2002); Telephone Interview with Gordon DePaoli, Attorney, Woodburn & Wedge, Reno, Nev. (July 26, 2002). It should also be noted that, after a right is transferred instream, it may be hard to transfer back out because of Nevada’s public interest requirement for transfers.
272. Telephone Interview with Susan Joseph-Taylor, Hearing Officer, Nev. Div. of Water Resources (July 26, 2002).
274. Id. at 265.
275. Id. at 268.
276. See id. (quoting legislative history that states, “the bill...would include fishing and wild-life”).
277. The court used an interesting argument when it determined that no diversion was necessary to appropriate water. The court reasoned that “it is evident that the statutory scheme requiring appropriators to obtain permits from the state engineer superseded a primary purpose of any pre-statutory diversion requirement, providing notice of an appropriation to other water users on a watercourse. Id. at 266.
278. See NEV. REV. STAT. §§ 533.345, 533.360 (2001); accord Telephone Interview with Susan Joseph-Taylor, supra note 272.
279. NEV. REV. STAT. § 533.345(4).
framework or process for longer-term temporary transfers. Also, Nevada does not allow "spreading" or transfer of conserved water, which further limits instream flow protection options.

A. Temporary Transfers

The process for temporary transfers is (1) application, (2) investigation by state engineer, (3) determination of whether impairment of other rights or the public interests may occur due to the transfer (if the state engineer answers this question in the negative, then the application is approved), (4) notice, (5) comments and protests, (6) hearing (at the discretion of the state engineer), and (7) approval or denial. The process can be relatively quick if the state engineer determines that the initial prerequisites are satisfied and there is no need for notice and hearing. However, if the state engineer determines that notice and a comment period are required, the process can take several months, which makes this option of limited value for complex transfers.

B. Permanent Transfers

The permanent transfer process is largely the same as the temporary process, except that notice and a comment period are required in every case. Thus the process for permanent transfer in Nevada is (1) application, (2) notice, (3) comments and protests, (4) investigation, (5) hearing (discretionary), (6) approval or denial, (7) issuance of permit, (8) proof of beneficial use, and (9) issuance of certificate.

C. Current State of Nevada Instream Transfers: Who Is Doing It and What Questions Remain

There have been very few transfers of rights instream in Nevada to date. Most of the private transfers of rights instream have occurred as part of the Truckee River Settlement between the Pyramid Lake Paiute tribe, local municipal governments, the State of Nevada, and various

280. See generally NEV. REV. STAT. § 533.
281. See id. § 533.345.
282. See id. § 533.345(2)-(3); Telephone Interview with Susan Joseph-Taylor, supra note 272; Telephone Interview with Gordon DePaoli, supra note 271.
283. Telephone Interview with Susan Joseph-Taylor, supra note 272.
284. NEV. REV. STAT. § 533.360(1).
285. See id. § 533.400. How a holder of an instream right will be able to show beneficial use is unknown, because so few instream rights have been transferred.
federal agencies. In that case, the Great Basin Land and Water Trust has been contracted to broker permanent transfers of water rights from upstream users (usually agricultural rights and storage rights) to the local governments for municipal use and to the tribe for instream use. Several transfers have already taken place, though several have been protested.

The protests connected with the Truckee settlement involve issues such as how much water can be transferred instream and what stretch of river can be protected. However, these issues will not necessarily be decided as part of the cases already before the state engineer. The state engineer may not decide these issues because the Truckee settlement case involves many other issues, such as the transferability of federally reserved water rights that might decide the case before questions of application are addressed. However, a decision in a pending temporary transfer case may shed some light on how the state engineer will determine which stretch of river can be protected by the transfer of a storage right into an instream right.

D. Nevada's Strengths and Weaknesses

Private appropriation and transfer of instream water in Nevada is allowed by common law. The transferring entity can continue to hold and defend an instream right and could theoretically transfer such a right out of stream if it did not injure existing rights or the public interest (which may be harder to prove than when the instream right was created).

This power of private transfer into stream has rarely been used, and, therefore, many of the basic questions surrounding instream flow law have not been answered. Cases currently before the state engineer may shed some light on how Nevada will determine how much water

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287. Telephone Interview with Aaron Peskin, supra note 271.
288. Id.
289. Telephone Interview with Susan Joseph-Taylor, supra note 272.
290. The case involves Nevada Water Resources Department case files 67666T and 68157T. Telephone Interview with Gordon DePaoli, supra note 271.
291. The Bureau of Land Management has appropriated water for instream and in-lake purposes and was the driving force behind the development of the instream common law in Nevada. Their success has produced a strong body of law that makes it relatively easy to appropriate and transfer water instream See generally State v. Morros, 766 P.2d 263 (Nev. 1988); United States v. State Engineer, 27 P.3d 51 (Nev. 2001). Nothing in these decisions indicates that, given compliance with proper administrative processes, private individuals or organizations cannot also appropriate or transfer water instream.
can be transferred instream and what stretch of river will be protected. With more use, the power should become more defined.\(^{292}\)

**IV. NEW MEXICO: THE BLANK SLATE STATE**

New Mexico is the last of the Rocky Mountain, Great Basin, and Pacific states that has neither an instream statutory scheme nor a holding by its highest court directly addressing the validity of instream rights. Despite this lack of state law, New Mexico has seen some of the most extensive and controversial efforts to secure instream flows in the West. The Interstate Stream Commission has leased and purchased significant agricultural rights in order to send the water down the Pecos River to fulfill New Mexico's obligation to Texas under the Pecos River Compact.\(^{293}\) Also, several New Mexico reservoirs essentially have been, and may be, drained in an attempt to save the Rio Grande silvery minnow from extinction by releasing stored water to maintain flows downstream.\(^{294}\)

Largely as a result of the operation of federal law and multi-state compacts, water is being used in New Mexico for the enhancement of instream flows.\(^{295}\) This makes it clear that streamflows can be enhanced, in certain situations, without specific state instream-flow law. But extra-state strategies aside, the lack of specific law in New Mexico provides an opportunity to explore how existing, non-specific laws can be creatively interpreted and applied to achieve enhanced stream flow.

**A. Existing Interpretations**

On March 27, 1998, the New Mexico Attorney General (AG) published an opinion that "nothing in the New Mexico Constitution, statutes, or case law...would preclude the State Engineer from approving an application to change the purpose of use of an existing

\(^{292}\) It is important to remember that Nevada common law on this subject is based upon statutory construction and therefore could be superceded by statute.


\(^{295}\) That such significant activity is occurring in a state with no instream law of its own also shows how important federal and multi-state tools can be to entities attempting to maintain and enhance instream flows. Those extra-state tools are beyond the scope of this article, but they should be explored while developing any instream flow program.
water right to an instream purpose...."296 This is despite the New Mexico Supreme Court holding in State ex rel. Reynolds v. Miranda297 that man-made diversions are necessary to claim appropriative water rights.298 The AG’s opinion rests on a narrow reading of Miranda that would apply it only to pre-1907 agricultural rights.299 The opinion justifies this reading by pointing out that, at common law, diversion served as notice to other right holders of an intent to appropriate. Notice is now accomplished as part of a statutory scheme, which, the opinion argues, should obviate the common law diversion requirement.300 The opinion relies on an expansive analysis of relevant law from New Mexico and other western states to support its dismissal of Miranda and its conclusion that instream rights are legal in New Mexico. However, because certain New Mexico statutes reference “constructed works,” the opinion expressly applies only to transfers that would be conditioned upon the installation of “accurate and continuous” gauging devices on the permitted stretch of stream.301

In a case cited in the AG’s opinion, the New Mexico Supreme Court stated it was “unable to find authority, or justification in reason, to support the claim that the ‘beneficial use’ to which public waters, as defined in this and other jurisdictions, may be put, does not include uses for recreation and fishing.”302 As we have seen, statutory language including recreation as a beneficial use has been interpreted in other jurisdictions to allow non-diversionary instream rights.303 The unanswered question is whether New Mexico courts would follow an almost 60-year-old interpretation of a statute that was, and still is, silent about whether recreation or fish and wildlife uses are “beneficial uses” of water.

The AG limited the 1998 opinion to transfers conditioned upon gauging. However, the reasoning in the opinion theoretically can be applied more broadly. Should the judiciary follow the AG’s opinion (and should the legislature not pass specific instream-flow statutes), the most promising New Mexico laws that may allow protection of instream

298. See id.
300. Id.
301. Id. at 3, 6.
rights are those that control changes in the use and lease of water rights.  

B. Changes in Use (Transfers)

The surface waters of New Mexico are fully appropriated, and, unless significant rights are forfeited or abandoned, it would be impossible to make a new appropriation for instream flow purposes in the state. This leaves changing water right purpose or place of use as the only means of establishing permanent instream rights under existing state law.

"An appropriator of water may, with the approval of the state engineer, use the same for other than the purpose for which it was appropriated or may change the place of diversion, storage or use..." In order to affect a change in purpose or place of use, the right holder must file an application with the state engineer and publish notice. Interested parties then have an opportunity to file protests with the state engineer, and properly submitted protests force the state engineer to hold a hearing. Whether or not there are protests and hearings, if the state engineer finds that the change will not be (1) detrimental to existing water rights, (2) contrary to conservation of water in the state, and (3) detrimental to the public welfare of the state, the application should be approved.

Several bills that may affect instream-flow law in New Mexico were introduced during the 2003 legislative session. Most notable are certain water banking bills and Senate Bill 128, which, as enacted, amends the forfeiture statute to toll the forfeiture period "if the owner puts water-saving techniques into practice, including drip irrigation and low-energy precision application technologies." None of the bills directly addresses application to instream flows. However, though transfer of conserved water is also not expressly provided for in S.B. 128, it stands to reason that, if a right is not forfeited, water made available by conservation projects could be transferred to different uses (perhaps including instream flow). Cf. Sun Vineyards, Inc. v. Luna County Wine Dev. Corp., 760 P.2d 1290, 1293 (N.M. 1988) (recognizing the legality of spreading water conserved by crop change to land not encompassed by the original right).


Such significant forfeiture and/or abandonment is unlikely. Abandonment hinges on intent, and few right holders ever intend to relinquish their water rights. Although four years of continuous disuse after 1965 can lead to forfeiture in New Mexico, N.M. STAT. ANN. § 72-5-28 (2002), disused water rights will only be forfeited if the right holder does not resume use at the level allowed by the permit or license within a year of the state engineer giving notice and declaration of nonuse. Id.

See id. §§ 72-5-3, -4.

See id. § 72-5-5.

See id. §§ 72-5-23, -24 (requiring adherence to application, notice, and protest sections); accord 98-01 Op. N.M. Att’y Gen., but see In re Application of Sleeper, 760 P.2d 787, 791-93 (N.M. Ct. App. 1988) (holding that pre-1985 transfer applications are not subject
The state engineer has permitted instream flows under the statutes outlined above.\textsuperscript{311} However, the courts have not reviewed the validity of instream-flow permits in the state. All water right decisions of the state engineer are subject to de novo review in the district court.\textsuperscript{312} Thus, the courts may decline to follow state engineer decisions on instream flows and might ignore the reasoning of the 1998 AG's opinion. However, "[l]ong-standing administrative constructions of statutes by the agency charged with administering them are to be given persuasive weight, and should not be lightly overturned."\textsuperscript{313} So, if the state engineer's allowance of instream transfers goes unchallenged for some time, such transfers may be difficult to defeat in the courts.

C. Leasing

In New Mexico, "[a]n owner may lease to any person all or any part of the water use due him under his water right...."\textsuperscript{314} Upon termination of a lease, the water right reverts to the original use and location of use.\textsuperscript{315} Leasing of a water right does not toll forfeiture; however, leased rights cannot be forfeited unless non-use persists for one year after the state engineer provides notice of non-use to both the owner and the lessee.\textsuperscript{316}

Leases and renewals are limited to ten years,\textsuperscript{317} but municipalities, counties, state universities, and public and member-owned utilities can lease water for 40 years.\textsuperscript{318} These 40-year leases appear to be limited to non-acequia rights because the statute specifically limits leases of acequia rights to ten years.\textsuperscript{319}

A would-be lessee must file an application with the state engineer's office.\textsuperscript{320} The state engineer has not promulgated an application specific to leasing; rather, applicants must file an appropriate
transfer form that includes the details of the lease.\textsuperscript{321} The hearing and notice requirements for leases are the same as those for permanent transfers,\textsuperscript{322} as are the review standards.\textsuperscript{323} If, after the application has been fully processed, the state engineer finds that the lease will not impair existing rights and will not be contrary to the conservation of water within the state or detrimental to the public welfare of the state, the application must be approved.\textsuperscript{324}

To the knowledge of the Chief of the Water Rights Division, the New Mexico leasing statutes have not been applied to instream flow leases to date.\textsuperscript{325} But if fish and wildlife uses are "beneficial" in the state, nothing in the statutes appears to preclude using leased water for instream flows. In fact, because leases are temporary, there may be less resistance to their use for instream purposes than there is to permanent transfers. On the other hand, because the process is the same for leases as for permanent transfers, transaction costs may weigh heavily against using leases to secure or enhance instream flows.

D. New Mexico’s Strengths and Weaknesses

New Mexico law has not directly addressed how an instream flow regime might function in the state. However, many of the building blocks are in place.

The legislature has repeatedly recognized the importance of healthy ecosystems to the state’s well-being by passing various laws and memorials designed to protect the environment.\textsuperscript{326} New Mexico law is also replete with statements regarding the importance of agriculture to

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\textsuperscript{321} Telephone Interview with Paul Saavedra, Chief of the Water Rights Div., Office of the N.M. State Engineer (Nov. 3, 2003). Transfer applications are \textit{available at} \url{http://www.seo.state.nm.us/doing-business/forms-inst/wr-forms-inst.html} (last visited Jan. 6, 2004). The form most likely to be used by persons wishing to lease for instream purposes would be an Application for Permit to Change Point of Diversion and Place and/or Purpose of Use of Surface Waters, \textit{available at} \url{http://www.seo.state.nm.us/doing-business/forms-inst/wr-18.pdf} (last visited Jan. 6, 2004).


\textsuperscript{323} Compare id. § 72-5-6 with id. § 72-6-6.

\textsuperscript{324} Id. § 72-5-6.

\textsuperscript{325} Telephone Interview with Paul Saavedra, \textit{supra} note 321.

\textsuperscript{326} 98-01 Op. N.M. Att’y Gen. 2-3 (Mar. 27, 1998) (citing N.M. \textit{Stat. Ann.} § 17-2-39 (threatened and endangered wildlife should be managed to maintain populations), § 17-4-1 (“The state game commission...is hereby authorized...to acquire...and improve lands for...waterways...and for all purposes incidental to the propagation, preservation, protection and management of the game, birds, fish and wildlife of the state of New Mexico.”), §§ 17-6-1-17-6-11 (Habitat Protection Act), §§ 74-6-1-74-6-17 (Water Quality Act), Sen. Joint Memorial 18 (passed in Mar., 1997) (confirming the legislature’s desire to preserve river ecosystems)).
\end{flushright}
the state’s economy and culture. However, to lay the foundation for a functional instream flow regime, the legislature should combine these ideas in a clear statement.

Fifty-nine years ago the New Mexico Supreme Court stated that recreation and fishing were beneficial uses of water. Since then, the only clear government statement about the legality of instream flow rights in New Mexico has been an AG’s opinion that advances a theory based on a jumble of legislative and judicial statements. If New Mexico is to have a functional instream flow regime, either the legislature or the courts must make a clear statement that instream water rights can be protected under state law.

The New Mexico legislature took a major step toward encouraging conservation with Senate Bill 128. In order to make this a powerful tool for instream flow protection and enhancement, a reliable means of transfer is needed.

Aside from an expansive reading of Miranda, nothing in New Mexico law would preclude private ownership of instream water rights. In fact, the state engineer has permitted a privately owned instream-flow right. Whether the courts will uphold private ownership of instream flows has yet to be seen. An affirmative legislative or judicial statement on the issue will be essential in the development of a functional regime.

Like most other western states, New Mexico has created no presumptions as to how much water can be transferred instream or what stretch of stream will see the benefit of an instream flow right. This leaves the burden on the would-be transferor to produce hydrological studies and associated data. The applicant would also have the burden of defending study conclusions in contested cases. These factors would likely make the transaction costs associated with instream transfers prohibitive for most private-sector entities.

New Mexico is in the beginning stages of developing various regional water plans. Without instream flow rights recognized by state law, the negotiators of those plans lack a powerful tool for reaching cooperative solutions. As part of any future regime in the state, the legislature and judiciary should promote cooperative solutions to watershed management dilemmas that include market-based means of securing instream flows.

327. See, e.g., N.M. STAT. ANN. § 6-19-3 (Economic Advancement District Act purpose to promote agricultural products), § 73-2-4 (no person can construct a building on irrigated land or ditch “as the irrigation of the fields should be preferable to all others.”), § 73-2-6 (course of pre-1851 acequias cannot be altered).
328. Red River Valley Co., 182 P.2d at 428.
330. Interview with Charles Dumars, supra note 311.
New Mexico's instream flow law is sparse. However, this provides those creating an instream flow system with a chance to do things right—the first time.

V. TOWARD A WORKABLE INSTREAM FLOW REGIME

Over the past two decades, Rocky Mountain, Great Basin, and Pacific states have struggled to find a way to protect and regenerate their riparian systems after more than a century of unchecked water appropriation. Federal laws such as the Endangered Species Act and the Wild and Scenic Rivers Act have imposed flow requirements on certain reaches, but the protection and enhancement of most rivers and streams is still possible only through state law. Western states have struggled with how to provide instream flows to over-appropriated rivers. The law of each state reviewed in this article has aspects that are necessary for a workable instream flow regime, but no state has yet to realize its potential.

The "use-it-or-lose-it" nature of the prior appropriation doctrine has led to significant inefficiency in western water use. This inefficiency leaves massive amounts of water that could be used for instream flow and could produce truly win-win water programs.

Any state that is attempting to formulate a politically palatable and workable instream flow regime should codify or judicially recognize six simple points of policy and law. First, the state legislature should make an express finding that functioning riparian ecosystems and a healthy agricultural base are indispensable parts of the state's economy. Second, either the legislature or the courts should make a clear statement that "beneficial use" includes water reasonably used for ecological preservation or enhancement, and that physical diversion from a stream is not necessary to establish a water right. Third, conservation should be encouraged by allowing the continued ownership and transfer to instream use of excess water made available by the implementation of conservation measures. Fourth, private individuals and organizations should be able to hold instream water rights. Fifth, the quantity of any instream right should be conservatively presumed over the stretch of stream to which that right applies, and this right should be subject to expansion if the transferor performs a hydrological survey that shows the right extends over a longer stretch. Finally, cooperative, watershed-based management plans should be encouraged by promoting the participation of all stakeholders in negotiations and by allowing the flexibility needed to reach creative solutions.

A. Legislative Statement

Over the past several hundred years, unique agricultural communities have developed throughout the West. The existence of these communities and their particular cultures enrich all of our lives (even city dwellers) by maintaining our connection to the land and, perhaps more importantly, keeping our supermarkets well stocked.

The wild and scenic beauty of our mountains and rivers also adds immeasurably to the western psyche and economy. Tourism is vital to the economic well being of western states, and our wilderness is a major draw for vacationers from around the world. It is almost uniformly recognized that future generations should also be able to experience and enjoy our natural heritage, and functioning riparian ecosystems are indispensable to maintaining that heritage and the benefits that flow from it.

Recognition of the importance of irrigated agriculture and environmental preservation is sprinkled throughout the law of western states. But a clear legislative statement recognizing the connection of both irrigated agriculture and environmental preservation to the development of an instream flow regime would go far in guiding the courts and administrative agencies tasked with implementation. It would create a policy foundation from which irrigation right holders and would-be instream right holders could cooperate for the betterment of both while giving the courts and agencies a firm justification to uphold creative attempts to develop win-win agreements.

B. Non-Diversionary Ecological Uses as "Beneficial"

All of the states surveyed for this article have either expressly or impliedly included the use of water for fish or wildlife purposes within the meaning of "beneficial use." There is little justification for not expanding the definition of beneficial use to include water reasonably used for ecological preservation or enhancement. Nor is it necessary to cling to the outdated notion that physical diversion is necessary to claim a valid water right.

Historically, diversion was required as part of the prior appropriation system in order to give other appropriators on the stream

notice of an intent to appropriate.\textsuperscript{334} Over the past century, western states have adopted statutory schemes that provide notice as part of the permitting process. These schemes, along with modern communication technologies, have made the diversion requirement obsolete as a means of providing notice.

The diversion requirement also fails to fit into the changing definition of "beneficial use." Unlike the early appropriators and policy makers who saw water left in the stream as wasted, most people in the western states today would agree that the use of water to maintain, restore, or enhance riparian habitat is "beneficial." The law of most states has adapted to this change. However, several states, including Colorado, New Mexico, and Idaho, still lack a clear legislative or judicial statement declaring that diversion is not necessary for a valid water right.\textsuperscript{335} In order to allow private ownership of instream rights, physical diversion should no longer be required to secure a water right.

Most of the western states recognize fish, wildlife, and recreational uses of water as beneficial. Though these uses can be interpreted to include water used for ecological preservation and enhancement, leaving this open to judicial interpretation may risk the denial of rights for other ecological uses that might not fall squarely within the definition of fish, wildlife, or recreational use.

Solutions to the complex ecological problems created by over appropriation will be found only if the entities seeking the solutions have the flexibility to maximize their options. Along with the rejection of the diversion requirement, the simple addition of ecological preservation and enhancement to the definition of beneficial use will help give those entities that flexibility.

\section*{C. Encouraging Conservation}

Beneficial use, without waste, is the basis of measure and limit for the right to use water in prior appropriation states. This basic tenet creates a use-it-or-lose-it aspect to appropriative water rights that acts as a disincentive for conservation. Though much of the irrigation in the West could be considered "wasteful" by either an economic or best available technology measure, waste enforcement would be both expensive and, in some places, politically impossible.\textsuperscript{336} Without a legal


means for water users to reap the benefits of conservation, it is in their interest to use the most water-intensive means of accomplishing their purposes.\textsuperscript{337}

In order to free up water for other purposes, including instream flow, conservation could be realized by waste enforcement. However, legislation allowing the continued ownership and transfer of water made available to appropriators by the implementation of conservation measures would largely serve the same purpose, and it would be much more politically palatable.

In 1987, Oregon took the first step toward continued private ownership of conserved water by passing conservation program legislation.\textsuperscript{338} However, under the law, the right holder does not keep control of all of the conserved water, which has severely limited participation. The lackluster performance of the Oregon conserved water program shows us that, to maximize water conservation, right holders should be allowed to control all of the water made available by conservation measures.\textsuperscript{339} This would give an economic incentive to conserve, and it comports with western states' respect for private property rights.

D. Private Ownership of Instream Rights

Across the West farmers and ranchers are feeling the pinch of over appropriation. As water demand increases for municipal, industrial, and environmental purposes, agricultural water users are feeling pressure to transfer portions of their water rights, conserve water, and even fallow their land. Agriculture is bearing the brunt of calls for efficiency mainly because the sector represents 90 percent of the consumptive water use in the West.\textsuperscript{340}

Water that was initially meant for farmers has been co-opted in recent years to meet the requirements of the Endangered Species Act.\textsuperscript{341} Western state governments and water users alike fear federal intervention in western water law because it is seen as an infringement of state sovereignty and private property rights. However, unless state law provides a regime that allows increasing urban and environmental demands to be met, increased federal intervention is inevitable.

\textsuperscript{337} See \textit{generally id.} (discussing water conservation efforts in the West).
\textsuperscript{338} See \textit{supra} section II.F.4.
\textsuperscript{339} See \textit{id.}
\textsuperscript{340} \textit{WESTERN WATER POLICY REVIEW ADVISORY COMMISSION}, \textit{supra} note 3, at 2-24 (1998).
One way to lessen the risk of federal involvement is to encourage private involvement in habitat restoration and enhancement. Dozens of environmental organizations around the country are eager to secure instream flows, and they command millions of dollars to accomplish it. The money is there to lease and purchase water rights for instream purposes, but mandatory state ownership or trust status of the rights created severely limits the willingness of many consumptive users to participate. If the users themselves or the organization of their choice could control the instream rights, more people would be willing to transfer their rights instream.

One of the main arguments against private ownership of instream rights is that it would encourage speculation. An entity could purchase water rights, transfer them instream, wait for the price to rise, and then sell them to new consumptive users at a profit. This sort of speculation is contrary to the prior appropriation system and is indeed one of the reasons for a beneficial use requirement.

But a simple addition to state instream-flow law could largely alleviate speculation fears. Instream rights should only be transferable back to the land and purpose from which they originated. If such a reversionary transfer takes place, the right would have to be perfected again in order to be re-transferred. Though this might not stem all speculation, large-scale speculative endeavors through the holding of instream rights would be cumbersome and less attractive than purchasing and transferring existing consumptive rights.

The ability to privately hold instream rights in this manner would also encourage farmers to transfer water instream from economically marginal plots. They could fallow land that they would rather not cultivate (but continue to in order to avoid forfeiture of their water right), safe in the knowledge that if they ever wanted to farm the land again they could. Government and private entities could also contract for fallowing, which could be an additional source of income for the agricultural community—all without the farmer ever losing his right to farm.

Oregon has the most extensive private involvement in securing instream flows of any state surveyed for this article—and it does not have private ownership of instream rights. While Nevada allows private ownership of instream rights, it has seen little activity outside of the Truckee basin. The success of the Oregon instream flow program is due

342. Telephone Interview with Andrew Perkey, supra note 158.
344. A private land and water trust is responsible for transfers of water instream on the Truckee River pursuant to the Pyramid Lake Paiute settlement; however, the Pyramid Lake
mainly to its comprehensive statutory and regulatory scheme. Participation in Oregon's instream-flow program would greatly increase if the law allowed private ownership of instream rights.  

Oregon demonstrates that a functioning instream-flow regime can exist without private ownership, and Nevada shows that private ownership does not guarantee large-scale participation. However, private ownership provides considerable flexibility when developing strategies to deal with over appropriated streams.

E. Presumptions of Quantity over the Stretch Protected

Transaction cost is one of the biggest obstacles individuals and organizations face when attempting to secure instream flows by transferring consumptive rights. Accurately determining the quantity of an instream right over the stretch protected generally requires extensive—and expensive—hydrological study. Only Oregon lifts this burden from the entity applying for an instream transfer.

Instream transfers, like traditional transfers, cannot be detrimental to existing rights. Whether an instream transfer will be detrimental to existing rights depends on how the stretch of stream to which it applies is defined and the quantification of the right throughout the stretch. If an instream right protects only the former duty amount at the former point of diversion, then, by definition, it cannot be detrimental to any other existing rights. On the other hand, if an instream right protects the duty amount from the former point of diversion to the ocean, many downstream rights could be impaired if a large amount of water is lost on the way due to percolation or evaporation. Between these extremes lies a presumption that will protect a stretch below the former point of diversion and at the same time guarantee the resulting instream right will not be detrimental to existing rights.

Oregon's presumption errs on the side of the instream right. An instream right protects the full diversion amount from the former point of diversion to any identifiable return-flow point. Below that, it protects the consumptive use of the original right to the confluence of the next stream, and perhaps even further. Carriage losses are not taken into account. If an existing right holder believes that an instream right is...
detrimental to his right, he can challenge the extent of the right, but he bears the burden of proof. This presumption not only maximizes the protection potential of instream rights, it can significantly reduce transaction costs because no hydrological survey is required at the time of application.

In most other western states, the burden of proving no detriment is squarely on the party proposing the transfer. Oregon's liberal presumption simply will not be accepted in most jurisdictions. But this does not mean that a conservative presumption cannot be put in place that both ensures no injury while at the same time allowing the transferring party to avoid the costs associated with hydrological analysis. Even a conservative presumption of, for instance, 100 percent carriage loss over 1000 feet would allow a transferring party to either accept the presumption and avoid survey costs or perform a survey to protect a longer stretch.

Existing hydrological surveys should be made available to applicants so that they may make informed decisions about whether or not to undertake a survey themselves. Also, if hydrological surveys exist for the area involved in the instream transfer, the applicant should be allowed to rely on them to the extent that they can help define a protected stretch beyond the presumption.

A presumption that can reduce the sometimes oppressive transaction costs associated with instream transfers would likely increase private involvement in securing instream flows. Of course, the form such presumptions take will vary with their framers.

F. Cooperative Management

Fitting instream rights into the western prior appropriation system is not easy. States are trying to restore and protect their riparian habitat in a number of ways, including the development of the various instream flow regimes outlined in this article. But perhaps the most promising avenue for stream protection and restoration is cooperative, watershed-based management that emphasizes local participation and the development of creative solutions to over appropriation.

Even in Montana, where instream flow law provides few tools for private transactional solutions, riparian habitat is being protected and restored with cooperative local efforts. In Arizona, millions of dollars have been spent on research and restoration pursuant to a statute that expressly encourages cooperative local efforts. With the state-law tools

348. See Telephone Interview with Doug Parrow, supra note 168.
349. See supra section II.E.2.
350. See supra section II.A.3.e.
outlined in this article, along with a statute that encourages the participation of all stakeholders in cooperative watershed-based management schemes, the effects of over appropriation on riparian ecosystems can be mitigated, if not reversed.

The individual management schemes will vary by watershed, so any legislation should emphasize flexibility and creativity and leave development to the entities involved. Bringing disparate stakeholders together (including local residents, Indian tribes, irrigation districts, federal and state government agencies, and environmental organizations) and getting them to cooperate is not easy, nor is it cheap. Therefore, some source of funding is essential. Arizona’s financial commitment to its Water Protection Fund is exemplary, but in times of budget shortfall, every state will have to cultivate alternative funding sources. Private organizations and the federal government should be courted not only as participants in the development of management schemes but also as sources of funding.

Humans are a problem-solving species. We also fight fiercely if we feel our interests are being attacked. With “water wars” well underway in the West, we must give those that are attempting to solve the ecological problems created by over appropriation the tools to reach win-win situations where people are fighting for their way of life. One of the best tools a state can provide is legislation that encourages (and funds) the development of cooperative, watershed-based management schemes.

VI. CONCLUSION

This article is meant to be a starting point for water law practitioners who wish to become involved in private efforts to protect, restore, and enhance instream flows in the Rocky Mountain, Great Basin, and Pacific states. The state sections in this article deal only with state law mechanisms for private involvement in instream flow protection and enhancement, while the observations and suggestions in section V arise from and are aimed exclusively at state law.

A myriad of other forces play enormous roles in instream flow protection on the ground. These forces include federal laws such as the Endangered Species Act and the Wild and Scenic Rivers Act, Indian water rights, interstate compacts, and international treaties. They are not the subject of this article, but their importance cannot be ignored when facing real-world instream flow issues.

351. With early funding of $5 million per year, the Fund accomplished a great deal; however, the AWPF has received no appropriations during the last two years. See id.
The six legal and policy principles outlined in section V are meant to be viewed as a whole. The addition of one or more of those principles to a state's instream flow regime may at best make an incomplete regime slightly better and at worst increase its complexity with little or no benefit. A legislative statement recognizing the importance of healthy riparian ecosystems and an agricultural base is of little use without the tools to protect those values. Private ownership of instream rights is of little use if transaction costs prevent their creation; but, together, they are greater than the sum of their parts. If watershed planners are armed with the legal mandate and tools these principles create, the number of possible solutions to the problems caused by over appropriation will mushroom. No two watersheds will be forced into the same management box, and policy makers will be allowed to develop plans that incorporate each watershed's unique economy, ecology, and culture.