

# **Enhancing Stream Flows in Wyoming**

## **Final Report**

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### **Abstract**

Restoration of stream flows for fishery and other instream benefits often requires reduction of historical diversions under existing water rights. With growing interest in enhancing flows in critical locations, especially during low-flow periods, many states now provide legal mechanisms under which diversions may be reduced so that flows can remain in-channel. This project examined the relevant laws in Colorado, Idaho, Montana, Oregon, and Washington that allow such reduced diversions. It identified examples in each of these states to illustrate how the law enabled such reduced diversions to stay instream for fishery and other benefits. The project also examined existing Wyoming water law relating to instream flow protection. Based on the evaluation of what had worked well in other study states, recommendations were made for ways Wyoming might allow holders of water rights to reduce diversions for instream flow benefits while still retaining ownership of the water right.

### **Objectives**

To evaluate legal approaches followed in other states to encourage reduced diversions under existing water rights for instream benefits.

To evaluate how these approaches work in practice through case studies.

To examine existing Wyoming water law related to instream flow protection.

To recommend ways Wyoming law might be adapted to enable holders of water rights to reduce diversions for instream flow benefits.

### **Methodology**

Read literature examining instream flow water rights.

Examine state statutes and regulations governing the appropriation of water for instream flow benefits.

Telephone interviews with state personnel charged with implementation of instream flow laws.

Telephone interviews with members of NGOs working to enhance stream flows.

Analysis of information and preparation of a written report.

Revising draft report based on comments from outside reviewers.

### **Principal Findings and Significance**

At least five western states now allow the change of use of an existing appropriative water right to instream flow use.

In some cases, only the state may acquire and change the use of a water right; in other states, non-governmental entities also are allowed to acquire a water right and make the change of use.

In most cases, these changes are temporary; the holder of the original right maintains ownership.

There are a variety of approaches used to enable the appropriator to reduce diversions; in some cases, the reduction is only seasonal.

Such transactions are increasing.

They are producing measurable benefits for fisheries and other instream values.

They often produce efficiency benefits for the diversionary water user.

They occur with no injury to other existing water rights.

Water right holders are more interested in temporary arrangements than in permanent sale of the right; they want to maintain ownership of the right and often are themselves interested in being to use a portion of their right to improve stream flows on their property.

To facilitate such temporary changes it is important to protect the right from forfeiture so it is not lost because of non-diversion.

Another important incentive is provided by not reducing the historic consumptive use associated with the original use during the period of instream flow use.

Allowing NGOs to participate increases the funding available to facilitate the transactions.

Wyoming law presently only allows the State to acquire a water right and change its use to instream flow protection.

There is substantial interest in Wyoming to allow holders of water rights to temporarily change their use to instream flows; flow enhancements are desired to complement the habitat improvements being made by some landowners to improve the fishery on their property.

### **Student Support**

Project funds were used entirely to support student research and writing. Most of the research and writing summarizing state laws and case studies was performed by Curran Trick, Class of 2012, University of Wyoming College of Law. Assistance with citations was provided by Janna Wittenberg, Class of 2012, University of Wyoming College of Law.

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# Enhancing Stream Flows in Wyoming

## I. Introduction

Wyoming streams and rivers provide many important benefits including serving as sources of water for out-of-stream uses. They also still support valuable fisheries, especially at higher elevations. In some cases, these fisheries could be measurably improved if some existing diversions were reduced, especially during critical flow periods. Some owners of water rights have expressed an interest in modifying their traditional water use practices to benefit fish, but they are concerned about what would happen to their water rights. At present, Wyoming law does not allow a water right owner to temporarily change the use of a water right to maintain instream flows.<sup>1</sup> Failure to divert water can result in forfeiture of the right.<sup>2</sup> Diverting and consuming less water diminishes the amount of water that can be changed to a different use, reducing its value.<sup>3</sup>

This report explores modifications needed in existing law to enable holders of valid water rights in Wyoming—either on their own initiative or with support from other interested parties—to not divert water historically beneficially used out of the stream channel so that flows of water beneficial to fisheries and other in-channel values can be maintained.<sup>4</sup> It begins with examples of how people in Wyoming and elsewhere are

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<sup>1</sup> Wyo. Stat. Ann. § 41-3-1001 (2011). Only the State of Wyoming is allowed to hold a water right for the protection of instream flows of water. Wyo. Stat. Ann. § 41-3-1002(e) (2011). While the State may be able to temporarily change use of a water right it owns to instream uses, other water rights owners are not presently allowed to do this.

<sup>2</sup> Wyo. Stat. Ann. § 41-3-401(a) (2011). Non-diversion under a permit based on diversion would probably be considered non-use of the right. After five years, such non-diversion could result in loss of the right.

<sup>3</sup> Wyo. Stat. Ann. § 41-3-104 (a) (2011). A change of use may not result in the increase in the amount of water historically consumed under the original water right. By not diverting water and applying it to a consumptive use for some period of time, the historical average consumption would be reduced.

<sup>4</sup> Similarly, the owner of a storage right would be permitted not to divert and use the water but to release and leave the water instream to and beyond its historical point of diversion.

making changes in their traditional water use practices to enhance stream flows for fishery benefits. The report then discusses how neighboring states have adapted their laws to help facilitate such outcomes. Finally it offers suggestions for ways Wyoming law could be adapted to allow such modifications of historical uses to go forward without impairing the status of the water rights or injuring the rights of others. An appendix provides summaries of the laws of Colorado, Idaho, Montana, Oregon, Washington, and Wyoming related to protection of instream flows, with special attention to ways the laws in these states (other than Wyoming) permit at least temporary shifts of diversionary and storage rights to instream flow use.

## **II. Background**

Public interest in protecting some portion of remaining unappropriated water to maintain stream flows has grown markedly in recent decades.<sup>5</sup> In response, Wyoming and many other states have modified their laws to provide for such protection.<sup>6</sup> Wyoming allows the Water Development Commission, acting on behalf of the State, to obtain a water right from the State Engineer to maintain or improve flows for fish.<sup>7</sup> Since 1986, the State has applied for over 110 permits protecting specified unappropriated flows in more than 300 miles of stream.<sup>8</sup> Such appropriations are made within the priority system so there are no effects on existing water rights.

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<sup>5</sup> DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* (1997); INSTREAM FLOW COUNCIL, *INSTREAM FLOWS FOR RIVERINE RESOURCE STEWARDSHIP* 5–6 (rev. ed. 2004).

<sup>6</sup> INSTREAM FLOW PROTECTION IN THE WEST (LAWRENCE J. MACDONNELL & TERESA A. RICE, eds) (rev. ed. 1993); Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. OF DENVER WATER L. REV. 177 (1998); Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 225 (2009) (hereafter “*Environmental Flows*”).

<sup>7</sup> Wyo. Stat. Ann. § 41-3-1003 (2011). The State is authorized to acquire an existing water right and change its use to instream flows as well. Wyo. Stat. Ann. § 41-3-1007 (2011).

<sup>8</sup> Instream Flow Filings, Water Resources Data System, <http://www.wrds.uwyo.edu/>, December 2010.

While the work to identify stream reaches with important fisheries that still contain unappropriated water continues, interest has increased in ways to enhance flows in stream reaches with little or no unappropriated water but that still support or have the potential to support viable fisheries.<sup>9</sup> In some cases, this interest emerges from the desire of a landowner to improve fishing on his land, a city to improve fishing on streams within its limits, or a conservation group wanting to restore populations of native species. In some cases, stream restoration is driven by legal requirements.<sup>10</sup>

Trout Unlimited in Wyoming has been working with landowners and public entities to improve fisheries and their habitat in the Gros Ventre River and Spread Creek near Jackson, in the Smiths Fork and Thomas Fork of the Bear River in Wyoming and Idaho, and with broad programmatic efforts in the North Platte, Upper Green, and Bighorn river basins.<sup>11</sup> Many of these projects have streamflow components but can only occur on smaller tributaries with simple water rights systems. This was the case for flow restoration projects like Grade Creek (Smiths Fork drainage) and the Francis Fork of the Greybull River where only one water right holder exists, and TU was able to work directly with the private landowner to mutually benefit agricultural and fishery interests.

Trout Unlimited has identified water right owners interested in using at least a portion of their water rights to enhance stream flows to benefit fisheries and for other instream benefits. For example, the Laramie River Guest Ranch grows forage on approximately

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<sup>9</sup> INSTREAM FLOW COUNCIL, *supra* note 5; *Environmental Flows*, *supra* note 6.

<sup>10</sup> *See, e.g.*, John M. Volkman, *Endangered Species Act and the Ecosystem of the Columbia River Salmon*, 4 HASTINGS NORTH-NORTHWEST J. ENV'T'L LAW & POLICY 51 (1997). Flow restoration can help address water quality concerns as well.

<sup>11</sup> Personal communication with Scott Yates, Western Water Project Director, Trout Unlimited (Feb. 14, 2011.)

1,600 acres, irrigated from the Laramie River near Wheatland.<sup>12</sup> The Ranch considered taking certain lands out of production late-season to provide additional flows and bolster the wild brown and rainbow trout fishery. They have seen neighbors use the existing temporary change statute to move groundwater rights to Basin Electric in exchange for substantial financial benefits but are unable to temporarily change their water right to protect trout.

TU has also worked closely with ranchers along Rock Creek, a Wyoming tributary to Twin Creek in the Bear River Basin, to enhance the Bonneville cutthroat trout fishery. Project components have included new diversion structures and fish screens to ensure fish passage and reduce entrainment and the installation of gated pipe to use less water, supported by Federal Farm Bill funding made available through the Natural Resources Conservation Service. The families also are interested in eliminating water use during the late-season over a term of years to ensure adequate stream flows for the fish in exchange for funding from sources such as the federal farm bill that could be use to support other ranch operations.

A primary concern of many interested water right owners is their desire to retain ownership of the right. Water rights are property rights.<sup>13</sup> These owners would like more freedom to use their rights, including the ability to choose not to divert at least some of

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<sup>12</sup> *Wyoming Water, Wyoming Solutions: Partnering for Streamflow Restoration*. Trout Unlimited Wyoming Water Project. 2009.

<sup>13</sup> A water right represents the legally protected ability to use a specified portion of water from a particular source for a beneficial use. Its priority date determines its ability to divert and use water physically available in the source, with more senior rights able to use water when supplies are limited. Rights are defined in terms of points of diversion, maximum rates of diversion, purpose of use, and place of use. Irrigation rights in Wyoming are tied to the land on which they are used. Wyo. Stat. § 41-3-101: “Water being always the property of the state, rights to its use shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives public recognition, under the law and the administration provided thereby.” Ownership of the right is freely transferable, but changes of use are subject to review to ensure no injury to existing water rights. Wyo. Stat. § 41-3-104. Temporary changes of use are authorized under Wyo. Stat. § 41-3-110.

their rights, without fear of their loss to forfeiture—subject always to the no injury requirement.

Efforts in other states have led to identification of opportunities in some cases to reduce diversions from an especially critical stream reach while either finding alternative sources of water supply or reducing the amount of water that needs to be diverted through conservation to achieve the beneficial use. Thus, for example, Montana Trout Unlimited facilitated the replacement of a leaky ditch conveyance system with pumps and piping at a critical reach in the North Fork of the Blackfoot River, cutting diversions by more than 18 cubic feet per second (cfs) and enabling bull trout to move through this reach that was previously impassable in late summer and early fall.<sup>14</sup> In Oregon, Kevin Campbell switched from a direct flow diversion system to a pump and changed from flood irrigation to a pressurized wheel line, enabling him to reduce diversions by two cfs from Rudio Creek, a tributary of the North Fork of the John Day River while maintaining his hay production.<sup>15</sup> In Cache Valley, Utah an irrigator moved his point of diversion from Little Bear Creek to the South Fork of Bear Creek to increase flows needed by cutthroat trout in Little Bear.<sup>16</sup> By shifting from flood to center pivot irrigation, the irrigator was able to halve his diversion rate while maintaining his production. Similarly, an Idaho irrigator shifted his point of diversion from Badger Creek downstream to the Little Lost

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<sup>14</sup> Private Water Leasing: A Montana Approach. *Restoring Stream Flows in Key River Basins*, Trout Unlimited, <http://www.tu.org/conservation/western-water-project/montana> (last visited February 7, 2011). See also, *In Montana... Heading to Greater Efficiency*, Columbia Basin Water Project. 2005 (describing the North Fork Project, <http://cbwtp.org> (last visited February 7, 2011); *Big Blackfoot Chapter of Trout Unlimited: A Watershed Initiative to Restore Native Fish Populations*, U.S. Fish and Wildlife Service. <http://www.fws.gov/mountain-prairie/pfw/montana/mt5b.htm> (last visited February 7, 2011).

<sup>15</sup> See Appendix 4, Oregon.

<sup>16</sup> <http://www.tuutah.org>.

River, enabling bull trout to move up Badger Creek to spawning habitat.<sup>17</sup> Again, by shifting from flood to pivot irrigation he was also able to reduce his rate of diversion while maintaining his production. A variety of federal, state, and private funding sources are used to pay much or all of the costs of these changes.

Oregon allows use of what are called “split season” agreements.<sup>18</sup> Using this approach, the Austin Ranch irrigates with its water right up to July 20<sup>th</sup> and then ceases diversion for the remainder of the irrigation season to benefit the fishery.<sup>19</sup> In Montana, the Mannix Ranch entered into a lease with Montana Trout Unlimited under which diversions will cease whenever flows in Wasson Creek drop below a specified minimum level.<sup>20</sup>

The Wyoming Game and Fish Department (WGFD) has recently succeeded in obtaining a permanent change of use to instream flow for a storage water right it acquired in Fremont Lake.<sup>21</sup> This is the first time the State has acquired and changed a water right for the purpose of enhancing instream flows.<sup>22</sup> According to Tom Annear, Instream Flow Coordinator for WGFD, “there are many stream reaches around the state with fisheries that could benefit from reduced diversions and improved flows, especially in low-flow periods.”<sup>23</sup> While the state’s focus has been and remains protecting available unappropriated flows on important streams on public land, there are as many or more

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<sup>17</sup> *Bull Trout Recovery in the Little Lost Basin: Proving Partnerships Can Make the Difference*. Trout Unlimited, Idaho Water Project. 2008 (describing a variety of on-the-ground projects with private landowners and state and federal resource agencies, including the Badger Creek Reconnect, to restore ESA-listed bull trout).

<sup>18</sup> See Appendix 4, Oregon, for a discussion of this approach.

<sup>19</sup> *Id.*

<sup>20</sup> See Appendix 3, Montana.

<sup>21</sup> Wyoming Board of Control Order, Record No. 76, p.495-510, Dated January 21, 2011.

<sup>22</sup> In 2008, WGFD successfully obtained from the State Board of Control a change of use permit for a water right held by the State to provide water to a fish hatchery. *Environmental Flows*, *supra* note 5 at 375 (citing Telephone interview with Tom Annear, Instream Flow Supervisor, Wyoming Department of Game & Fish (April 29, 2008)).

<sup>23</sup> Personal Communication, Feb. 17, 2011.

opportunities to restore flows on private lands. According to Mr. Annear, “these opportunities are strictly the business of private property owners, and the state has no desire to acquire or hold water rights for instream flow on private lands.”<sup>24</sup> As he notes, “the benefits from such use would accrue to landowners so logically they should be the ones holding those rights – especially if they already hold them and use them for other purposes like irrigation. To require that existing water rights be held only by the state if changed temporarily to instream flow is both discriminatory and counter to recognizing and respecting the rights of private property owners.”<sup>25</sup>

### **III. Proposal**

Our review of approaches in other states suggests the most straightforward method for reducing diversions to enhance stream flows is to authorize the water right holder to simply choose not to divert water available in priority under the water right. This approach is widely used in Lemhi River in Idaho to reduce diversions at critical times when salmon are returning to spawn.<sup>26</sup> Agreements not to divert at such times help ensure the sufficiency of flows needed for the fish to make their way upstream. The State of Idaho manages the process, but no formal change of use proceeding is involved. Agreements are totally voluntary; the water right remains the property of the original owner. We would encourage Wyoming to consider authorizing holders of water right, either on their own initiative or under agreement with another party, to decide not to divert water if such non-diversion would benefit a fishery. As we envision such

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The legislature established a special bank in the Lemhi River Basin to facilitate transfers of irrigation water to instream flows to enable salmon to reach upstream spawning habitat in the watershed. *See* Appendix 2, Idaho; *see also Environmental Flows, supra* note 6 at 341, n.20 (citing Idaho Code Ann. §§ 42-1506; 1765A.)

agreements, they would be short-term and might even apply only for a portion of the irrigation season (split-season arrangements). Given their short-term nature, we would suggest a presumption of no-injury should apply.<sup>27</sup>

As mentioned, a change of use is subject to review by the Board of Control to ensure no injury to other water rights. The primary focus of such a review is to ensure the change does not result in an increased demand on the water source that would interfere with the ability of other diverters to enjoy their rights.<sup>28</sup> A decision not to divert leaves water in the channel that otherwise would have been diverted. A portion of that water, approximately 50% if the use was irrigation, would have been lost to evaporation or evapotranspiration by the crop.<sup>29</sup> All of the water that would have been diverted stays in the channel so none is lost. The instream benefit is the higher level of stream flow between the point of diversion and the place where unconsumed water would otherwise return to the stream (or to the headgate of the next appropriator downstream). Thus downstream appropriators benefit from improved flows. For short-term arrangements, especially if diversions only cease in the late season, the timing of the water in the stream will be little affected. Upstream junior appropriators cannot complain of injury since they would not have otherwise been able to consume water obligated to the downstream senior's headgate. For these reasons we believe a presumption of no injury is entirely

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<sup>27</sup> The presumption would be overcome if the agreement is protested by another water right holder.

<sup>28</sup> See, e.g., Leonard Rice & Michael D. White, ENGINEERING ASPECTS OF WATER LAW 78 (1987): "Making a change is an exercise in balancing depletions. . . . A junior priority holder cannot be said to be injured if the change of a senior priority imposes no greater or different burden on the stream than existed before the change."

<sup>29</sup> Wyoming follows a presumption that an irrigation right consumes half of the water diverted from the stream. Wyo. Stat. Ann. § 41-3-110(c) (2010).

warranted for short-term decisions not to divert. Longer-term changes to instream flow use would be expected to go through the usual, more extended injury analysis.<sup>30</sup>

State laws in Colorado, Montana, Idaho, Nevada, Oregon, Utah, and Washington have been changed in recent years to specifically provide a means whereby existing water rights can be temporarily made available for use instream.<sup>31</sup> Most commonly, these statutory provisions anticipate a lease of the existing right, followed by a change of use to instream flow purposes.<sup>32</sup> Several states authorize non-governmental as well as governmental parties to engage in leasing the water right for instream flow uses.<sup>33</sup> In

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<sup>30</sup> Often, this analysis will be considerably simpler than for a change of use to another consumptive use. *See, e.g., Hohenlohe v. State Dep't Natural Res. & Cons.*, 240 P.3d 628 (2010) (department's requirement for detailed return flow analysis not warranted by the facts).

<sup>31</sup> The **Colorado** Water Conservation Board may acquire an instream flow right by "grant, purchase, bequest, devise, lease, exchange or contractual agreement," from any person, including a government entity, as long as the rights acquired are not on the division engineer's abandonment list. COLO. REV. STAT. § 37-92-102(3) (2010). **Idaho** allows instream flow leases mostly through its water banks, which were codified by the legislature in 1979. Idaho Code Ann. § 42-1761 (2010); Idaho has essentially two systems of water bank or market, one for "natural flow" rights (i.e. surface and groundwater) operated directly by the Water Resource Board (Rule 1.02, IDAPA 37.02.03) and one for stored water (called a "rental pool") at specific storage locations, operated by local committees appointed by the IWRB. (Rule 010.09, IDAPA 37.02.03). *see also*, Sasha Charney, *Decades Down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 84 (2005). **Montana** has two statutory programs that allow for the conversion of consumptive water rights to instream flow purposes: one for private parties and one that is available to the Montana Department of Fish, Wildlife and Parks only; both utilize the Montana change of use statute. MONT. CODE ANN. § 85-2-402 (2010). In Montana, "appropriate" is defined as: (e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408. Mont. Code Ann. § 85-2-102(1). In **Nevada**, in 2007 the legislature authorized the temporary conversion of irrigation rights to wildlife purposes or to improve the quality or flow of water. NEV. REV. STAT. § 533.0243 (2009). **Oregon's** Instream Leasing program allows a water right holder to temporarily lease their water for instream use. ORS § 537.348 (2009). The **Utah** legislature in 2008 authorized "fishing groups" to file a change of use to instream flows for an existing right for up to 10 years to protect or restore habitat for native trout. H.B. 117, codified at Utah Code Ann. § 73-3-30(3) (2009). In **Washington**, water-right holders who participate in the Trust Program can sell, lease or donate all or part of their right to the state, on a temporary or permanent basis. WASH. REV. CODE § 90.42.005 & § 90.42.080(3) (2010). Washington also created a water bank along with the Trust Program as a means to "facilitate the voluntary transfer of water rights established through conservation, purchase, lease, or donation...and to achieve a variety of water resource management objectives throughout the state," including improving stream flows. WASH. REV. CODE § 90.42.005 (2010).

<sup>32</sup> *See* references in preceding footnote.

<sup>33</sup> For example, Nevada, Oregon, and Montana allow non-governmental parties. In Nevada, there is no state program for protection of environmental flows. Nevada law, however, authorizes appropriation of water for recreational uses, a provision that has been interpreted by the state's Supreme Court to include wildlife, and does not limit who may file for such appropriations. *State v. Morros*, 766 P.2d 263 (Nev. 1988). In Oregon,

general, such leases require a formal change of use review to ensure no injury to other water rights. For emergency or short-term uses, several states provide an expedited review process. Temporary leases in Oregon are given an expedited approval process, where approval can occur in as little as 30 days after receipt of the application.<sup>34</sup> Colorado authorizes the “loan” of an agricultural water right for instream flow purposes for no more than 120 days on an emergency basis.<sup>35</sup> It authorizes the State Engineer to determine whether any injury will result, rather than requiring the normal Water Court review process.<sup>36</sup> Colorado also has clarified its law to ensure that the historic consumptive use associated with water rights temporarily used for instream flows is not reduced while the right is being used instream.<sup>37</sup> Colorado also authorizes sale of the historic consumptive use during the lease period to a downstream user at the option of the

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“Any 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.” ORS § 537.348. In Montana, Mont. Code Anno., § 85-2-408(2)(a) notes that a “temporary change authorization under the provisions of this section is allowable only if the owner of the water right voluntarily agrees to: (i) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource; or (ii) lease a consumptive use water right to another person for instream flow to benefit the fishery resource.” Also, (b) notes that “for the purpose of this subsection (2), “person” means and is limited to an individual, association, partnership, or corporation.”

<sup>34</sup> Because of this expedited review allowance, there is potential for unobserved injury to other users, but according to the Oregon Water Resources Department, “if injury to another water right is found, the lease can be modified or terminated to prevent the injury.” Oregon Water Resources Dept., *Oregon’s Flow Restoration Toolbox*, [http://www.oregon.gov/OWRD/mgmt\\_instream\\_tools.shtml](http://www.oregon.gov/OWRD/mgmt_instream_tools.shtml) (last visited Feb. 5, 2011).

<sup>35</sup> Colo. Rev. Stat. § 37-83-105 (2)(a).

<sup>36</sup> *Id.* at 105 (2)(a) III.

<sup>37</sup> *Id.* at 105 (2)(c); Colo. Rev. Stat. § 37-92-102 (3): “The board shall file a change of water right application or other application with the water court to obtain a decreed right to use water for instream flow purposes under a contract or agreement for a lease or loan of water, water rights, or interests in water pursuant to this subsection (3). The resulting water court decree shall quantify the historical consumptive use of the leased or loaned water right and determine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right. Said method shall recognize the actual amount of consumptive use available under the leased or loaned water right and *shall not result in a reduction of the historical consumptive use of that water right during the term of the lease or loan*, except to the extent such reduction is based upon the actual amount of water available under said rights (emphasis added).”

lessor.<sup>38</sup> Several states make clear that the nondiversion of water by leased rights being used for instream purposes is not a basis for forfeiture of the right.<sup>39</sup>

Based on our examination of these approaches, we suggest Wyoming allow the holder of a valid diversionary or storage right (permitted or certificated and applied to beneficial use) to temporarily or permanently change the use to instream flow use. To provide some additional incentives we would encourage enabling other parties as well as the State to either purchase or lease a water right and change its use to instream flow. We would suggest specifically allowing so-called split season arrangements as well as changes that would entirely shift the right to instream flows for some specified period of time or permanently. To provide water right holders with the security they seek, Wyoming's forfeiture provisions should not apply to such transactions. Moreover, the historic consumptive use established in the change of use proceeding should be preserved and not reduced because of non-consumption during its use for instream flow purposes.

The owner, or a party leasing the right, would file an application with the State Engineer stating his intention not to divert water, when water will not be diverted (e.g., beginning and ending dates during the irrigation season, for a year, for a period of years), the purpose of non-diversion (the fisheries' benefit it would provide), evidence of historic

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<sup>38</sup> Colo. Rev. Stat. § 37-92-102(3). Thus an entity leasing the water right can generate income to pay for the lease by renting the water to a downstream user.

<sup>39</sup> Colorado tolls its period of nonuse for an abandonment proceeding during such time as a water right has been loaned to the CWCB for instream flow use under Colo. Rev. Stat. § 37-83-105 (a) or allows the CWCB to use all or a part of the right for instream flows under 37-92-102 (3). Colo. Rev. Stat. § 37-92-103 (2)(V), (VI). Oregon tolls the calculation of nonuse (five years) under the statutory forfeiture provision for temporary water transfers. Oregon Rev. Stat. § 540.530(1)(f) (2009); Washington protects water rights in the Trust Water Rights program as exempt from relinquishment. Wash. Rev. Code § 90.42.040(6) (2010); In Idaho, water rights credited to the water supply bank are not subject to forfeiture for nonuse while retained in or rented from the water supply bank. Idaho Code Ann. § 42-1764(2) (2011); Montana protects instream flow leases held by the Department of Fish, Wildlife, and Parks from abandonment, as well as instream flow leases that utilize temporary change procedures. Mont. Code Ann. § 85-2-404(4) (2010).

beneficial use under the right, and evidence that non-diversion will not injure other water rights. The application could resemble temporary water use agreements now used to enable other consumptive uses of water for relatively short periods of time.<sup>40</sup>

#### **IV. Summary and Conclusion**

Wyoming fisheries could benefit by reducing or eliminating existing diversions in some instances. Many states now provide mechanisms by which holders of water rights can choose to modify diversions to benefit a fishery. Wyoming law authorizes the State to acquire a water right and change its use to instream flow, but it does not allow the water right holder to make such a change, even temporarily. We suggest Wyoming consider allowing water right holders to make such changes while retaining ownership of the right. We would also suggest allowing the holders of water rights to lease their rights to others who would go through the change of use process. Temporary changes should be protected against forfeiture. The historic consumptive use of the right in its original use should be preserved while the right is temporarily used for instream flows. All such changes of use would be subject to the traditional no injury requirement, though simple non-divert agreements for less than one year would be given a presumption of no injury. The recent adoption of such approaches in other states illustrates the growing interest in enabling reduced diversions where desired by the water right holder and beneficial to fish. We encourage Wyoming to consider allowing such voluntary changes so long as no other water users are harmed.

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<sup>40</sup> The Wyoming State Engineer authorizes such temporary water user agreements under Wyo. Stat. § 41-3-110.

## APPENDIX ONE: INSTREAM FLOWS IN COLORADO

Colorado is a prior appropriation state,<sup>41</sup> and the only prior appropriation state that uses a water court system to govern the appropriation, use, transfer, and loss of water rights.<sup>42</sup> The Colorado General assembly enacted Colorado's instream flow law in 1973 under Senate Bill 97,<sup>43</sup> when they declared preservation of the natural environment as a beneficial use of water, and eliminated the need to divert water in order to gain a water right.<sup>44</sup> The driving factor behind the initial enactment of the instream flow law was the protection of aquatic habitat.<sup>45</sup> The constitutionality of the bill was affirmed by the Colorado Supreme Court in 1979 with the “Crystal River” decision.<sup>46</sup> The law is currently codified under Colorado Revised Statute Section 37-92-102(3) (2010). There are two predominant ways to put water to instream flow use in Colorado, by new appropriation and by water right acquisition. As of October 2010, the CWCB has appropriated minimum flows in 1,500 stream segments covering 8,500 miles of stream, established minimum level protection for approximately 477 lakes, and has completed over 20 voluntary water acquisition transactions.<sup>47</sup>

### I. Instream Flow Appropriations

Instream flow rights exist as a part of the established prior-appropriation system in Colorado, in order of priority date, and are subject to senior decreed rights and

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<sup>41</sup> Colo. Const. art. XVI, § 6.

<sup>42</sup> A. DAN TARLOCK, ET AL., WATER RESOURCE MANAGEMENT 158 (6th ed. 2009).

<sup>43</sup> Steven J. Shupe, *The Legal Evolution of Colorado's Instream Flow Program*, THE COLORADO LAWYER, May 1988, at 861.

<sup>44</sup> *Id.* at 861-2.

<sup>45</sup> *Id.*; see generally Steven O. Sims, *Colorado's Instream Flow Program: Integrating Instream Flow Protection Into A Prior Appropriation System*, in INSTREAM FLOW PROTECTION IN THE WEST, REV. ED., 12-1 (Lawrence J. MacDonnell and Teresa A. Rice, Eds., 1993) (discussing concerns over the adverse environmental effects of the 1950s Fryingpan-Arkansas project).

<sup>46</sup> Sims, *supra* note 45 at 12-2.

<sup>47</sup> Colo. Water Conservation Bd., *Instream Flow Program*, <http://cwcb.state.co.us/environment/instream-flow-program/Pages/main.aspx> (last visited Feb. 22, 2011).

“present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation.”<sup>48</sup> Colorado's instream flow law provides that the Colorado Water Conservation Board (CWCB) (state agency with governor-appointed board members representing each major water basin)<sup>49</sup> is the only entity that may hold an instream flow right on behalf of the public.<sup>50</sup> No other entity is allowed to hold an instream flow right in the state.<sup>51</sup> Instream flow rights may be appropriated for either minimum stream flows or minimum lake level protection, to preserve the natural environment to a reasonable degree.<sup>52</sup> The measuring stick for preserving the environment is usually fishery health, whether cold or warm water fishery, but also includes waterfowl habitat, salamander habitat, and endangered native fish habitat.<sup>53</sup> The Colorado Division of Wildlife is usually the entity responsible for quantifying and/or verifying the amount of water necessary to maintain the environmental value protected.<sup>54</sup> The appropriation process is outlined in the Board's adopted instream flow (ISF) rules.<sup>55</sup> The Board has the authority to adopt instream flow rules pursuant to Colorado Revised Statute Section 37-60-108 and 37-92-102(3) (2010).<sup>56</sup> The CWCB adopted new rules concerning the instream flow program in March of 2009.<sup>57</sup>

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<sup>48</sup> COLO. REV. STAT. § 37-92-102(3)(b) (2010).

<sup>49</sup> Colo. Water Conservation Bd., *The CWCB Board*, <http://cwcb.state.co.us/about-us/cwcb-board/Pages/main.aspx> (last visited Feb. 22, 2011).

<sup>50</sup> COLO. REV. STAT. § 37-92-102(3) (2010).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Colo. Water Conservation Bd., *Instream Flow Program*, *supra* note 47.

<sup>54</sup> Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 347 (2009).

<sup>55</sup> 2 COLO. CODE REGS. § 408-2 (2011); *see generally* Colo. Water Conservation Bd., *Instream Flow Appropriations*, <http://cwcb.state.co.us/environment/instream-flow-program/Pages/InstreamFlowAppropriations.aspx> (last visited Feb. 22, 2010).

<sup>56</sup> COLO. REV. STAT. § 37-60-108 (2010); COLO. REV. STAT. § 37-92-102(3) (2010); *see also* 2 COLO. CODE REGS. 408-2(3) (2011).

<sup>57</sup> Colo. Water Conservation Bd., *Rules*, <http://cwcb.state.co.us/legal/Pages/Rules.aspx> (last visited Feb. 22, 2011).

ISF Rule 5 outlines the board process for ISF appropriations, and sets out the annual schedule for initiating, processing, and appropriating instream flow rights.<sup>58</sup>

Each February, the CWCB Board holds a Workshop to request recommendations for proposed stream and lake protections.<sup>59</sup> The Workshop is open to the public, and notice is provided through the CWCB website and by mailing list.<sup>60</sup> Any person or entity may submit recommendations (in writing) to the Board.<sup>61</sup> From February through the remainder of the first year, the Board provides public notice, and CWCB staff “analyzes the information provided by the recommending entities in order to provide the Board with accurate information to make the required findings as outlined in Instream Flow (ISF) Rule 5i.”<sup>62</sup> The Board takes public input during this time.<sup>63</sup> In March of the second year, the proposed stream reaches that the Board intends to adopt (which were recommended in the previous year) are compiled and the Board gives notice to the public.<sup>64</sup> Also in the second year, the CWCB staff works with the Board members and the public to identify problems and concerns through a formal hearing process for contested appropriations.<sup>65</sup>

Before making an appropriation, the board must find that 1) there is a natural environment that can be preserved to a reasonable degree, 2) that the necessary water to preserve the natural environment is available, and 3) that there is no material injury to

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<sup>58</sup> 2 COLO. CODE REGS. § 408-2(5)(c) (2011).

<sup>59</sup> Colo. Water Conservation Bd., *Instream Flow Appropriations*, *supra* note 55.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Colo. Water Conservation Bd., *Instream Flow Recommendation Process*, <http://cwcb.state.co.us/environment/instream-flow-program/Documents/Appropriations/InstreamFlowRecommendationProcedures.pdf>; *accord* 2 COLO. CODE REGS. § 408-2(5i) (2011) (required findings include water availability and injury to other users).

<sup>63</sup> Colorado Water Conservation Bd., *New Appropriation Processing Timeline*, <http://cwcb.state.co.us/environment/instream-flow-program/Documents/Appropriations/NewAppropriationsTimeline.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

other water rights.<sup>66</sup> If objections are resolved and the Board decides to adopt the recommendation in the latter part of the second year, the appropriation goes through the Water Court process for decree.<sup>67</sup> The Board has the authority to modify a previously decreed instream flow by decreasing its appropriation if necessary, as long as the Board follows the proper public review and court proceeding processes.<sup>68</sup>

## II. Water Acquisitions

The CWCB may acquire an instream flow right by “grant, purchase, bequest, devise, lease, exchange or contractual agreement,” from any person, including a government entity, as long as the rights acquired are not on the division engineer's abandonment list.<sup>69</sup> Before the acquisition is approved, the CWCB must obtain confirmation from the division engineer that the right will be capable of being administered.<sup>70</sup> If the right cannot be administered, it will not be granted.<sup>71</sup> The CWCB may not exercise eminent domain to acquire water rights for instream flow purposes.<sup>72</sup> In 2009, the Colorado Legislature allocated up to one million dollars per year from the CWCB's construction fund to the CWCB strictly for water acquisition purposes, prioritizing the money for instream flow water rights that preserve the natural environment to a reasonable degree.<sup>73</sup> This funds allocation allows the state to acquire water rights without having to rely solely on charitable donations. In 2010, the

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<sup>66</sup> COLO. REV. STAT. § 37-92-102(3)(c) (2010); 2 COLO. CODE REGS. § 408-2(5i) (2011).

<sup>67</sup> MacDonnell, *supra* note 54.

<sup>68</sup> COLO. REV. STAT. § 37-92-102(4)(b) (2010).

<sup>69</sup> COLO. REV. STAT. § 37-92-102(3) (2010).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; e.g., Colo. Water Conservation Bd., *Water Acquisitions*, <http://cwcb.state.co.us/environment/instream-flow-program/Pages/WaterAcquisitions.aspx> (last visited Feb. 22, 2011).

<sup>73</sup> COLO. REV. STAT. § 37-60-123.7 (2010); Email from Linda J. Bassi, Chief, Stream and Lake Protection Section, Colorado Water Conservation Board, Department of Natural Resources, to author (March 4, 2011, 4:36 pm MST)(on file with author).

Legislature added a provision whereby the CWCB, if it has already expended the initial one million dollar allocation, may apply to the wildlife commission for additional moneys under the habitat stamp program.<sup>74</sup> The CWCB must report to the General Assembly at the end of the fiscal year as to how this spending authority was exercised.<sup>75</sup>

Colorado Revised Statute Sections 37-60-108 and 37-92-102(3) (2010) give the CWCB the authority to adopt criteria for evaluating proposed contracts or agreements for leases or transfers of water.<sup>76</sup> ISF Rule 6 outlines the additional procedures and considerations for acquiring water rights or interests in water for instream flow purposes.<sup>77</sup> The Board must determine within 120 days (from the first day the board considers the contract or agreement) what terms and conditions the Board will accept in a contract or agreement for the acquisition.<sup>78</sup> Rule 6e requires the board to consider the appropriateness of any acquisition of water, including “stacking,”<sup>79</sup> and the effect of the transaction on any relevant interstate compact issue.<sup>80</sup> The Board is directed to give consideration to donations before considering purchase acquisitions.<sup>81</sup>

ISF Rule 6 also states that under all contracts or agreements for acquisitions of water, including leases and loans, the Board shall file a change of water right application or other application with the water court to obtain a decreed right to use water for ISF purposes.<sup>82</sup> This will take the form of a joint application to the water court including the

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<sup>74</sup> COLO. REV. STAT. § 37-60-123.7(1.5) (2010).

<sup>75</sup> COLO. REV. STAT. § 37-60-123.7(2) (2010).

<sup>76</sup> COLO. REV. STAT. § 37-60-108 (2010); COLO. REV. STAT. § 37-92-102(3) (2010).

<sup>77</sup> 2 COLO. CODE REGS. § 408-2(6) (2011).

<sup>78</sup> 2 COLO. CODE REGS. § 408-2(6b) (2011).

<sup>79</sup> 2 COLO. CODE REGS. § 408-2(6c) (2011). “As used in Rule 6, the terms “stack” or “stacking” refer to an instance in which the Board holds more than one water right for the same lake or reach of stream and exercises the rights independently according to their decrees.” 2 COLO. CODE REGS. § 408-2(4o) (2010).

<sup>80</sup> 2 COLO. CODE REGS. § 408-2(6e)(7) (2011).

<sup>81</sup> 2 COLO. CODE REGS. § 408-2(6f)(3) (2011).

<sup>82</sup> 2 COLO. CODE REGS. § 408-2(6i) (2011).

Board and the “Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person.”<sup>83</sup>

### **III. Temporary Loans of Water**

In 2005, the Colorado Legislature passed HB 05-1039, which allows water right owners to loan water to the CWCB on a temporary basis (not to exceed 120 days per year, and cannot be done more than three years in a ten-year period), for instream flow purposes pursuant to an already decreed instream flow water right held by the CWCB.<sup>84</sup> Prior to acceptance, the CWCB must compile information about the duration of the loan, the original points of diversion, as well as any other information needed for the State Engineer to determine that the loan will not injure existing decreed water rights.<sup>85</sup> The CWCB Director must provide a response to an offer of a temporary loan of water within five working days of receipt of the offer.<sup>86</sup> If accepted, the CWCB staff works with the proponent to provide public notice and to prepare the necessary documentation for the State Engineer’s Office to perform an injury analysis.<sup>87</sup> As with other instream flow rights, the CWCB is the only entity allowed to accept the loan and hold the right.<sup>88</sup> During the time period of the loan, contract, or agreement with the CWCB in which the Board uses all or part of a water right for instream flow purposes, any period of nonuse is tolled and that water right is protected from abandonment.<sup>89</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> COLO. REV. STAT. § 37-83-105(2)(a) (2010).

<sup>85</sup> *Id.*

<sup>86</sup> 2 COLO. CODE REGS. § 408-2(6k)(1) (2010).

<sup>87</sup> *Id.*

<sup>88</sup> COLO. REV. STAT. § 37-83-105(2)(a)(II) (2010).

<sup>89</sup> COLO. REV. STAT. § 37-92-103(2) (2010).

#### **IV. Instream Flow Monitoring**

The CWCB has an active ISF protection program. The CWCB staff must review the monthly resumes of all water divisions for possible injury to an ISF right.<sup>90</sup> The CWCB is responsible for reviewing all new water right applications, and will file a Statement of Opposition if an ISF right will be injured.<sup>91</sup> The CWCB can file objections to new appropriations, plans for augmentation, changes of water rights, and/or place calls on junior rights to enforce instream flow appropriations.<sup>92</sup> Most of the Board objections involve augmentation plans and changes of water rights.<sup>93</sup>

#### **V. Project Example: Pitkin County**

In 2009, the Colorado Water Conservation Board (CWCB) completed a voluntary transaction to restore streamflows in the Roaring Fork Valley of Colorado in partnership with Pitkin County, facilitated by the Colorado Water Trust (a nonprofit organization that supports voluntary streamflow efforts in Colorado).<sup>94</sup> The Colorado Water Trust, Colorado Water Conservation Board, and Pitkin County utilized a revocable trust agreement (“Trust”) in which Pitkin County agreed to a long-term loan of water rights to the CWCB for Colorado’s Instream Flow Program.<sup>95</sup> This was the first long term loan of a water right offered to the CWCB since the Colorado General Assembly passed HB 08-1280.<sup>96</sup> Pitkin County loaned senior water rights totaling 4.3cfs/119.25af with an

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<sup>90</sup> 2 COLO. CODE REGS. § 408-2(8a) (2011).

<sup>91</sup> Colo. Water Conservation Bd., *Monitoring and Enforcement*, <http://cwcb.state.co.us/environment/instream-flow-program/Pages/MonitoringEnforcement.aspx> (last visited Feb. 22, 2011).

<sup>92</sup> MacDonnell, *supra* note 54 at 348.

<sup>93</sup> Email from Linda J. Bassi, *supra* note 73.

<sup>94</sup> Colorado Water Trust, <http://www.coloradowatertrust.org/> (last visited Feb. 28, 2011).

<sup>95</sup> Memorandum from Linda J. Bassi, Chief, Stream and Lake Protection Section, Colorado Water Conservation Board, Department of Natural Resources, to Colorado Water Conservation Board Members (January 20, 2009) (on file with author).

<sup>96</sup> *Id.* HB 08-1280 was passed in 2008, and specified that the time during which the CWCB uses water rights for instream flow purposes pursuant to a contract shall not be considered as abandonment of the

appropriation date of 1904 (decree date of 1933) to the CWCB from the Stapleton Brothers Ditch to be utilized for instream flow purposes in Maroon Creek and the Roaring Fork River.<sup>97</sup> The rights were historically used for irrigation purposes.<sup>98</sup> The Stapleton Brothers Ditch historically diverted water from Maroon Creek, two miles upstream of its junction with the Roaring Fork River.<sup>99</sup> The predominant purpose of the instream flow transaction is to enhance the habitat of fish and aquatic species.<sup>100</sup> In addition to the long-term loan of the 4.3 cfs/119.25af senior water right from the Stapleton Brothers Ditch, the Trust contemplates the addition of 34 other water rights owned by Pitkin County for future ISF purposes.<sup>101</sup>

The CWCB and Pitkin County chose the Trust arrangement because of how the water rights were acquired by Pitkin County. Some of the water rights were acquired through the County's Open Space and Trails Department; others through the County's Airport Enterprise Fund. The rights purchased with Open Space and Trails dollars were purchased with restricted funds that necessitate voter approval and replacement of the water rights if they are to be sold and converted.<sup>102</sup> The water rights purchased with the Airport Enterprise Fund require compliance with Taxpayers' Bill of Rights (TABOR) restrictions if they are to be sold or leased.<sup>103</sup> The trust arrangement allowed a long-term loan of the water rights that avoided these restrictions, by providing the flexibility

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water right, and that the lessor or donor of the water may bring about the historic consumptive use as fully consumable reusable water downstream of the instream flow reach. H.B. 08-1280, 66th Gen. Assemb., 2nd Reg. Sess., §§ 1-3 (2008).

<sup>97</sup> Application for Change of Water Right, Colorado Water Conservation Board, Dist. Ct., Water Div. No. 5., June 30, 2010 at 2-3 (on file with author).

<sup>98</sup> *Id.*

<sup>99</sup> Bassi, Memo, *supra* note 95.

<sup>100</sup> Colorado Water Trust, *Pitkin County*, <http://www.coloradowatertrust.org/acquisitions/detail/pitkin-county/> (last visited Feb. 22, 2011).

<sup>101</sup> Bassi, Memo, *supra* note 95.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

necessary to address the restrictions while allowing the CWCB to use the water rights in the state's instream flow program.<sup>104</sup>

The Trust term is perpetual unless terminated by Pitkin County, although it may only be terminated after ten years from creation of the Trust agreement.<sup>105</sup> First, Pitkin County and the CWCB will apply to Water Court within six months of the Trust execution to change the Stapleton Brothers Ditch water right to add instream flow use as a beneficial use.<sup>106</sup> In the first phase of the arrangement, one of the County's water rights will be adjudicated.<sup>107</sup> Then other water rights will be changed in a later case.<sup>108</sup> If any other water rights are added to the agreement, they must be evaluated according to the previously mentioned procedures under the CWCB's ISF Rule 6.<sup>109</sup> An additional boon to the transaction is a recently passed sales tax in Pitkin County of 0.1%, called the Healthy Rivers and Streams Fund, which may generate additional funds to protect the quality and quantity of water in the Roaring Fork Basin, as well as enable acquisition of additional water rights for that purpose.<sup>110</sup>

The CWCB, as part of the trust agreement, committed to being responsible for administration, monitoring, and measurement of the ISF water right, and shall provide annual updates to Pitkin County.<sup>111</sup> The board and Pitkin will each bear their own costs and expenses in Water Court cases and each shall bear ½ for consulting engineers.<sup>112</sup>

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<sup>104</sup> *Pitkin County, supra* note 100.

<sup>105</sup> Bassi, Memo, *supra* note 95.

<sup>106</sup> Linda J. Bassi, Chief, Stream and Lake Protection Section, Colorado Water Conservation Board, CWCB Staff Presentation: Stapleton Brothers Ditch Water Acquisition (November 16-18, 2009) (on file with author).

<sup>107</sup> *Pitkin County, supra* note 100.

<sup>108</sup> *Id.*

<sup>109</sup> Bassi, Staff Presentation, *supra* note 106.

<sup>110</sup> *Pitkin County, supra* note 100.

<sup>111</sup> Bassi, Staff Presentation, *supra* note 106.

<sup>112</sup> Bassi, Memo, *supra* note 95.

Pitkin County may add or withdraw all or part of the water rights in the Trust Estate by delivering an instrument in writing to the board.<sup>113</sup>

## **VI. Project Example: Blue River**

In 2004, the Colorado Water Trust CWT donated nearly 800 acre feet (af) of 1904 and 1915 senior water rights to the Colorado Water Conservation Board (CWCB) for use in Boulder Creek and the Blue River in Summit County, Colorado.<sup>114</sup> The instream flow will benefit and improve habitat conditions in Boulder Creek for brook trout, and the Blue River for rainbow and brown trout. Boulder Creek was suffering from low flows in the late summer months (3 to 5 cfs) before the transaction.<sup>115</sup>

The Colorado Water Trust purchased the Peabody Ditch irrigation water from the Mosers, owners of Slate Creek Ranch in Summit County, Colorado, for \$130,000.<sup>116</sup> The transaction was funded in part by the Colorado Conservation Trust and the Gates Family Foundation.<sup>117</sup> Then CWT donated the water to the CWCB as per the authority provided to the Board by Section 37-92-102(3) of Colorado's Revised Statutes (2010). The CWCB approved the donation at its regular board meeting in September of 2004.<sup>118</sup> However, although it was a straightforward donation, a fairly new idea was brought to fruition as part of this transaction: after the water flows through the designated instream flow reach (after which it will end up in the Colorado River), the historic consumptive use (HCU) will be purchased and used by the Colorado River Water Conservation District.<sup>119</sup> CWT

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<sup>113</sup> *Id.*

<sup>114</sup> Colorado Water Trust, *Moser/Blue River*, <http://www.coloradowatertrust.org/acquisitions/detail/moser-blue-river/> (last visited Feb. 28, 2011).

<sup>115</sup> Bob Berwyn, *Water Trust Finalizes First Sale*, SUMMIT DAILY NEWS, June 3, 2005.

<sup>116</sup> Jerd Smith, *Water deal will benefit nature, People*, ROCKY MTN. NEWS, May 28, 2005.

<sup>117</sup> Berwyn, *supra* note 115.

<sup>118</sup> *Moser/Blue River*, *supra* note 114.

<sup>119</sup> Email from Amy Beatie, Executive Director, Colorado Water Trust, to author (Feb. 15, 2011, 1:15pm MST) (on file with author).

was able to complete this HCU sale because of the newly passed legislation that allowed the sale of HCU downstream of an instream flow reach.<sup>120</sup> By selling the HCU, CWT was effectively reimbursed for the original purchase price of the water, and was able to allow a downstream user to put the water to use instead of letting it flow out of the state.

Finally, the CWT submitted a change of use application to water court to finalize the transaction.<sup>121</sup> The change of use decree is still pending at this time and all objectors are out of the case.<sup>122</sup> As for the Mosers, the sale of the water right will not affect the ability to grow hay on the ranch, since they still have other water rights in Slate Creek that the ranch can use for irrigation.<sup>123</sup>



Confluence of Boulder Creek and Blue River  
Photo by Colorado Water Trust

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<sup>120</sup> HB 08-1280, *Supra* note 96.

<sup>121</sup> Email, *supra* note 119.

<sup>122</sup> Colo. Water Conservation Bd., *Completed Transactions*, <http://cwcb.state.co.us/environment/instream-flow-program/Pages/CompletedTransactions.aspx> (last visited Feb. 28, 2011).

<sup>123</sup> Berwyn, *supra* note 115.

## APPENDIX TWO: INSTREAM FLOWS IN IDAHO

Idaho is a prior appropriation state, declared by Article 15, Section 3 of the Idaho Constitution.<sup>124</sup> Around 1965, Idaho passed a “State Water Plan,” creating an agency responsible for state water planning, partly in response to threats from California and other downstream states to appropriate Idaho water.<sup>125</sup> The State Water Plan paved the way for the current statutory instream flow program (approved in 1978 as the Minimum Stream Flow Act),<sup>126</sup> codified in Idaho Code, Title 42, Sections 1501 – 1508 (2011). Under Idaho law, minimum stream flows are declared a beneficial use of water, for the protection of “fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality.”<sup>127</sup>

Furthermore, the maintenance of instream flow values is declared to be beneficial for the purpose of “protecting such waters from interstate diversion to other states or by the federal government for use outside the boundaries of the state of Idaho.”<sup>128</sup> To protect in-state waters, Idaho has also specifically declared that: “Minimum stream flows as established [under Idaho Code Title 42, Chapter 15] shall be prior in right to any claims asserted by any other state, government agency, or person for out of state diversion.”<sup>129</sup> To date, Idaho has 297 licensed or permitted water rights for minimum stream flows, and 4 for minimum lake levels, covering 1,577 miles of stream, and comprising 2 percent of the total stream miles in the state.<sup>130</sup>

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<sup>124</sup> Idaho Const. art. XV, § 3 (2011).

<sup>125</sup> Josephine P. Beeman, *Instream Flows in Idaho*, in *INSTREAM FLOW PROTECTION IN THE WEST*, REV. ED., 13-1 (Lawrence J. MacDonnell and Teresa A. Rice, Eds., 1993).

<sup>126</sup> IDAHO CODE ANN. § 42-1501 (2011).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Idaho Water Resource Board, *Minimum Streamflows*, [http://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/minimum\\_stream\\_flow.htm](http://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/minimum_stream_flow.htm) (last visited Feb. 12, 2011).

## I. Filing on Unappropriated Waters

The Idaho Water Resource Board (IWRB) is the agency authorized to file for and hold an instream flow right (which they hold in trust for the people of the state); though any person, association, county, municipality, or state agency can request that the board file for instream flow rights to unappropriated waters.<sup>131</sup> The IWRB consists of eight governor-appointed members serving four-year terms representing four geographical districts within the state of Idaho.<sup>132</sup> When the Water Resource Board wishes to appropriate a minimum stream flow on unappropriated waters, the Board files an application with the Director of the Idaho Department of Water Resources (IDWR), listing the name of the stream, minimum flow amount proposed, purpose for the minimum flow, and period of time or season for which the flow is proposed.<sup>133</sup> The Department of Fish and Game, Environmental Quality, Parks and Recreation, and any other public entity with an interest in the matter is given copies of the proposed instream flow by the Director of the IDWR, who also prepares the statutorily required public notice.<sup>134</sup> The IWRB holds a hearing, where concerned parties can testify in support of or in opposition to the proposed minimum stream flow.<sup>135</sup> The Water Resource Board may ask the Departments of Fish and Game, Parks and Recreation, or the Department of

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<sup>131</sup> IDAHO CODE ANN. § 42-1504 (2011); *see generally*, Bureau of Land Management, *Western States Water Laws*, <http://www.blm.gov/nstc/WaterLaws/idaho.html> (last visited Feb. 12, 2011).

<sup>132</sup> IDAHO CODE ANN. § 42-1732 (2011).

<sup>133</sup> IDAHO CODE ANN. § 42-1503 (2011).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; *see generally* Idaho Department of Water Resources, *Idaho Minimum Stream Flow Program*, (2010), [http://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/PDFs/MSF\\_Brochure.pdf](http://www.idwr.idaho.gov/waterboard/WaterPlanning/Minimum%20Stream%20Flow/PDFs/MSF_Brochure.pdf).

Environmental Quality to review and give an assessment of minimum stream flow applications.<sup>136</sup>

After the public hearing and notice procedures, the Director of IDWR will issue an order denying or approving the application, and may issue approval for the right as a whole, in part, or with conditions attached.<sup>137</sup> Aggrieved parties (who were formal parties at the hearing) have the right to judicial review of the Director's decision.<sup>138</sup> Approval of the application must be based upon a finding that the instream flow right: 1) will not interfere with any vested senior right, 2) is in the public interest, 3) is necessary for the preservation of the beneficial use for which it is declared, 4) is the minimum (not ideal) flow necessary for the beneficial use, and 5) is capable of being maintained and administered.<sup>139</sup> As a final step, the Idaho legislature gives final approval for an instream flow permit,<sup>140</sup> which is one major difference between Idaho and other Western states concerning minimum streamflows. Once the legislature affirms by "concurrent resolution," the minimum streamflow water right is deemed approved.<sup>141</sup> If the legislature fails to act or approve the permit by the end of the regular session, the application is considered approved.<sup>142</sup> The priority date for filing on unappropriated waters for minimum stream flows is the date the completed application was received and

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<sup>136</sup> SASHA CHARNEY, *DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* 84 (JULY 2005).

<sup>137</sup> *Idaho Minimum Stream Flow Program*, *supra* note 135.

<sup>138</sup> IDAHO CODE ANN. § 42-1503 (2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; *see generally Idaho Minimum Stream Flow Program*, *supra* note 135.

<sup>142</sup> IDAHO CODE ANN. § 42-1503 (2011).

filed in the IDWR Director's office.<sup>143</sup> The new instream flow right is administered within the existing priority system, like any other water right.<sup>144</sup>

## **II. Changing Existing Appropriative Rights to Instream Use**

Idaho's change of use and forfeiture laws are found in Idaho Code, Title 42, Section 222 (2011). In Idaho, anyone who wishes to change the period of use, place of use, point of diversion, or nature of use of an appropriative water right is required to gain approval from the Department of Water Resources.<sup>145</sup> Processing requirements include an application, a fee, and notice to other water users.<sup>146</sup> The Director of the IDWR is responsible for examining the proposed change of use for injury, enlargement, and public interest concerns, and to approve or deny accordingly (possibly with conditions attached).<sup>147</sup> Currently it is not possible for a water user to *permanently* change the place and type of use on their consumptive water right certificate or decree to an instream flow purpose.<sup>148</sup> In Idaho, the preferred mechanism for private parties to transfer their water to an instream flow purpose or place of use is through an established water bank.

## **III. Water Banks in Idaho**

All instream flow leases in Idaho are accomplished by utilizing the Water Bank. The Water Banking program in Idaho was codified by the legislature in 1979,<sup>149</sup> although rental pools were used for many years prior to formalization of the program.<sup>150</sup> Water Banking is a tool for making dormant and unused water rights available for use by others

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<sup>143</sup> IDAHO CODE ANN. § 42-1505 (2011).

<sup>144</sup> *Idaho Minimum Stream Flow Program*, *supra* note 135.

<sup>145</sup> IDAHO CODE ANN. § 42-222 (2011).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Telephone Interview with Morgan Case, Staff Biologist, Idaho Department of Water Resources (July 13, 2010).

<sup>149</sup> IDAHO CODE ANN. § 42-1761 (2011); *see, e.g.*, CHARNEY, *supra* note 136.

<sup>150</sup> Idaho Water Resource Board, *History of the Water Supply Bank*, [http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterSupply/history\\_of\\_bank.htm](http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterSupply/history_of_bank.htm) (last visited Feb. 12, 2011).

through lease and/or rental, and is a way to circumvent formal change-in-use or point of diversion procedures under Title 42, Section 222, Idaho Code (2011).<sup>151</sup> Water rights in use by the bank are protected from forfeiture,<sup>152</sup> since any “nonuse” calculation is suspended while the water right is in the bank.<sup>153</sup> The Water Banking program is found in Idaho Code, Title 42, Section 1761-65 (2011). Its principal purpose is to “make use of and obtain the highest duty for beneficial use from water, provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies.”<sup>154</sup>

Idaho has essentially two systems of water bank or market, one for “natural flow” rights (i.e. surface and groundwater) operated directly by the Water Resource Board,<sup>155</sup> and one for stored water (called a “rental pool”) at specific storage locations, operated by local committee appointed by the IWRB.<sup>156</sup> There are rental pools on the upper Snake River, Boise River, and Payette River.<sup>157</sup> It is the responsibility of the Idaho Water Resource Board (IWRB) to operate the water supply bank,<sup>158</sup> as well as to adopt rules for its operation (in accordance with the Idaho Administrative Procedure Act).<sup>159</sup> Applications to lease and rent water are processed by the IDWR.<sup>160</sup>

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<sup>151</sup> IDAHO CODE ANN. § 42-1764(1) (2011); *see generally* Idaho Department of Water Resources, *Overview of the Idaho Water Supply Bank*, (2010), <http://www.idwr.idaho.gov/WaterManagement/WaterRights/WaterSupply/PDFs/BankOverviewFAQ.pdf>.

<sup>152</sup> The statutory period for forfeiture is five years in Idaho. IDAHO CODE ANN. § 42-1764 (2011).

<sup>153</sup> IDAHO CODE ANN. § 42-1764(2) (2011); However, “The five (5) year period of nonuse shall continue to accrue if a period of nonuse occurred prior to the effective date of acceptance of the right into the bank and the right was not beneficially used while in the bank.” *Id.*

<sup>154</sup> IDAHO CODE ANN. § 42-1761 (2011).

<sup>155</sup> IDAHO ADMIN. CODE r. 37.02.03.010.02 (2010).

<sup>156</sup> IDAHO ADMIN. CODE r. 37.02.03.010.09 (2010).

<sup>157</sup> *Overview of the Idaho Water Supply Bank*, *supra* note 151.

<sup>158</sup> IDAHO CODE ANN. § 42-1761 (2011).

<sup>159</sup> IDAHO CODE ANN. § 42-1762 (2011).

<sup>160</sup> *Overview of the Idaho Water Supply Bank*, *supra* note 151.

Rentals from the Board’s water bank must be approved by the Director of the IDWR, who may reject approval, or partially approve rentals with a lesser quantity of water or with conditions attached.<sup>161</sup> The director must also consider various factors outlined by statute<sup>162</sup> when considering water rentals outside the state of Idaho, such as in-state water demands.<sup>163</sup> The Board is allowed to “purchase, lease, or otherwise obtain decreed, licensed or permitted water rights to be credited to the water supply bank,” as well as to act as an intermediary between parties to the rental.<sup>164</sup> Water right rentals can be authorized without having to undertake formal transfer proceeding requirements (i.e. change in point of diversion, place, or nature of use), but the authorization is usually only temporary in nature (rentals less than five years).<sup>165</sup> The IDWR is required to publish notice and obtain Board review for rentals of water lasting more than five years.<sup>166</sup> The owner of the water right may not use the right for their own use while it is leased to the Board’s Bank, even if the water right is not rented at that time.<sup>167</sup>

The Water Resource Board is authorized by statute to appoint local committees to market and facilitate rentals of stored water (from the local Rental Pools) under rules and regulations adopted by the board.<sup>168</sup> There are currently six committee-operated (and Board-appointed) rental pools in Idaho, four designated for the rental and lease of storage water, and two special rental pools: one in Water District 74 on the Lemhi River,<sup>169</sup> and one in the Wood River Basin (the only rental pools managing the exchange of natural

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<sup>161</sup> IDAHO CODE ANN. § 42-1763 (2011).

<sup>162</sup> IDAHO CODE ANN. § 42-401(3) (2011).

<sup>163</sup> IDAHO CODE ANN. § 42-1763 (2011).

<sup>164</sup> IDAHO CODE ANN. § 42-1762(2) (2011).

<sup>165</sup> IDAHO CODE ANN. § 42-1764(1) (2011); *see, e.g., Overview of the Idaho Water Supply Bank, supra* note 151.

<sup>166</sup> *Overview of the Idaho Water Supply Bank, supra* note 151.

<sup>167</sup> *Id.*

<sup>168</sup> IDAHO CODE ANN. § 42-1765 (2011).

<sup>169</sup> *Overview of the Idaho Water Supply Bank, supra* note 151.

flow water rights).<sup>170</sup> One additional rental pool is operated independently by the Shoshone-Bannock Tribe.<sup>171</sup> The Lemhi Rental Pool was created by special legislation to authorize a committee to lease and rent natural flow rights to satisfy the IWRB's minimum streamflow water right on the Lemhi River (as opposed to having to operate through the Board's water supply bank).<sup>172</sup> In fact, the legislation mandates that the Lemhi River minimum stream flow be met through this water bank.<sup>173</sup> This special rental pool was formed to prevent a call on water rights under the Endangered Species Act in the lower 7.5 mile reach of the Lemhi River.<sup>174</sup> The Wood River Rental Pool was established in a similar manner to the Lemhi River Rental Pool after the success of that program; however, the Wood River pool will only allow *donations* of water rights to supply the bank.<sup>175</sup> The Wood River Rental Pool authorizing legislation is scheduled to sunset on December 31, 2012, unless the legislature renews that provision.<sup>176</sup>

#### **IV. Project Example: Fourth of July Creek**

Fourth of July Creek is a tributary of the Salmon River in Idaho's Stanley Basin, and provides quality habitat for spawning, migration, and rearing to ESA-listed bull trout and juvenile chinook salmon.<sup>177</sup> In 2004, the Idaho Water Resource Board began leasing 1916 and 1927 irrigation water rights from William and Anne Vanderbilt on an annual basis, to restore aquatic habitat on Fourth of July Creek during the summer months when the creek became flow-limited. The Vanderbilts would lease half of their water right to

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<sup>170</sup> IDAHO CODE ANN. §§ 42-1765A, -1765B (2011).

<sup>171</sup> *Overview of the Idaho Water Supply Bank*, *supra* note 151.

<sup>172</sup> IDAHO CODE ANN. § 42-1506 (2011); *see, e.g., Overview of the Idaho Water Supply Bank*, *supra* note 151.

<sup>173</sup> IDAHO CODE ANN. § 42-1506(2) (2011).

<sup>174</sup> *Overview of the Idaho Water Supply Bank*, *supra* note 151.

<sup>175</sup> IDAHO CODE ANN. § 42-1765B (2011).

<sup>176</sup> *Id.*

<sup>177</sup> Memorandum from Morgan Case, Staff Biologist, Idaho Department of Water Resources, to Idaho Water Resource Board (January 23, 2009) (on file with author).

the Water Supply Bank, and the Idaho Water Resource Board (IWRB) would rent that water for minimum streamflow deliveries to the Salmon River at its confluence with Fourth of July Creek.<sup>178</sup> As a consequence, the Vanderbilts refrained from irrigating about 43 acres, and flows in Fourth of July Creek increased by approximately 2.9 cubic feet per second (cfs) during the irrigation season.<sup>179</sup> What started as a series of one-year leases turned into a 20-year lease, lasting from May 1 to Oct 31 of each year, signed in 2009 and ending in 2028.<sup>180</sup>

The Vanderbilts will receive an annual payment of \$1,185 over 20 years, totaling \$23,705.<sup>181</sup> The project was funded through the IWRB and the Columbia Basin Water Transactions Program.<sup>182</sup> The Water Supply Bank receives a ten percent surcharge for facilitating the transaction, for a total cost of \$26,338 for the lease.<sup>183</sup> The lease contract includes an option to apply the lease payments toward any future option for IWRB to buy the water rights permanently.<sup>184</sup> The IWRB has an active monitoring and stream gauge program to keep tabs on the instream effects of the lease, and will compile annual data reports.<sup>185</sup> The Vanderbilts still maintain a portion of the water rights for other habitat use on the ranch.<sup>186</sup> The Vanderbilts are satisfied that their partnership with IWRB will

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<sup>178</sup> Idaho Water Resource Board, *Idaho Water Transactions Program*, <http://www.idwr.idaho.gov/waterboard/WaterPlanning/Water%20Transaction%20Program/PDFs/WaterTransactionProgram.pdf>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Case, Memo, *supra* note 177.

<sup>182</sup> *Id.* For background information on the Columbia Basin Water Transactions Program, see Appendix 7, *infra*.

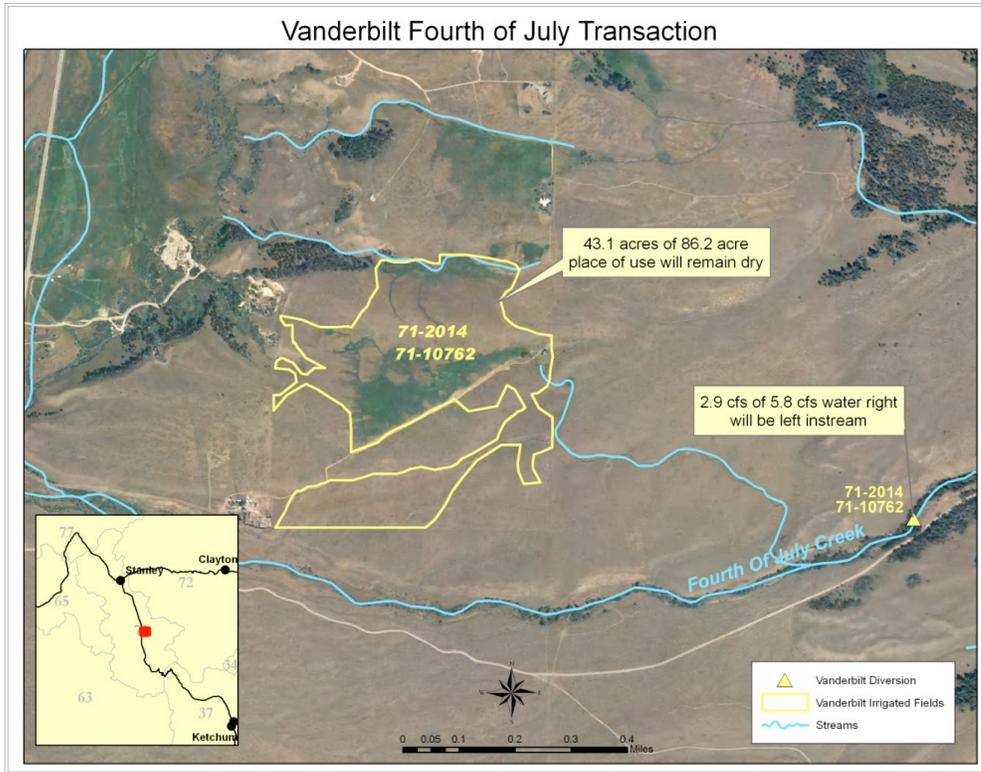
<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Idaho Water Resource Board, *Stream Gauges*, [http://www.idwr.idaho.gov/waterboard/WaterPlanning/Water%20Transaction%20Program/streamgages/stream\\_gages.htm](http://www.idwr.idaho.gov/waterboard/WaterPlanning/Water%20Transaction%20Program/streamgages/stream_gages.htm) (last visited Feb. 26, 2011).

<sup>186</sup> Telephone interview with Morgan Case, *supra* note 148.

enable them to help a threatened species in the Salmon River by leaving half of their water in Fourth of July Creek.<sup>187</sup>



Map by Idaho Department of Water Resources

<sup>187</sup> *Idaho Water Transactions Program, supra* note 178.

### APPENDIX 3: INSTREAM FLOWS IN MONTANA

Montana is a prior appropriation state that operates on a permit system.<sup>188</sup>

Montana began an instream flow program in 1969 in an effort to protect twelve of the state's "blue ribbon" trout streams, whereby the Fish and Game Commission was allowed to file on unappropriated waters to maintain minimum flows for the preservation of fish and wildlife habitat.<sup>189</sup> These became known as "Murphy Rights."<sup>190</sup> The state legislature subsequently passed the Montana Water Use Act,<sup>191</sup> which significantly changed the state's water right laws, including the following: 1) establishing a permit system for new water rights, 2) mandating an adjudication process for all water rights existing prior to July 1, 1973, 3) establishing an authorization system for changing water rights, 4) establishing a centralized records system, and 5) establishing a reservation system for future consumptive uses in order to maintain minimum instream flows for water quality and wildlife habitat.<sup>192</sup>

Montana recognizes the following uses of water as a beneficial use: 1) "agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses," 2) water appropriated by the Department of Natural Resources and Conservation (DNRC) under the state water leasing program, 3) use of water by the Department of Fish, Wildlife and Parks (FWP) "through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource," 4) use of water for aquifer recharge or storage, and 5) a

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<sup>188</sup> SASHA CHARNEY, *DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* 91 (JULY 2005).

<sup>189</sup> Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. Denv. Water L. Rev. 177, 182 (1998).

<sup>190</sup> Charney, *supra* note 188.

<sup>191</sup> MONT. CODE ANN. Title 85, Chapter 2 (2010).

<sup>192</sup> Montana Department of Natural Resources and Conservation, et. al., *Water Rights in Montana*, 2-3 (2009), <http://leg.mt.gov/content/Publications/Environmental/2009waterrightshandbook.pdf>.

temporary change of use in an appropriation right “to enhance instream flow to benefit the fishery resource.”<sup>193</sup>

## I. Water Reservations

The reservation process is one way an instream flow may be established in Montana; however, this option is not available to private parties. The 1973 Water Use Act established a process allowing both federal and state agencies (including political subdivisions of the state) to request a water reservation (of unappropriated waters) on any stream for minimum flow purposes.<sup>194</sup> Reservations have already been established in the Yellowstone River Basin and the Missouri River Basin.<sup>195</sup> The Department of Natural Resources and Conservation (DNRC) is the agency responsible for establishing reservations, and does so by a procedural process similar to the consumptive permit process.<sup>196</sup> The state or federal agency applies to the DNRC, which then processes it through procedures outlined in Montana Code Annotated (2010), Section 85-2-307 through 85-2-309 (DNRC also performs the required public notice procedures).<sup>197</sup> In order to receive a permit, the applicant must show that the reservation is in the public interest, as well as the purpose, need, and amount of water necessary for the reservation.<sup>198</sup> Permits are issued by the Montana Department of Natural Resources and Conservation.<sup>199</sup>

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<sup>193</sup> MONT. CODE ANN. § 85-2-102(4) (2010).

<sup>194</sup> MONT. CODE ANN. § 85-2-316; *see, e.g.*, Covell, *supra* note 189.

<sup>195</sup> *Water Rights in Montana*, *supra* note 192 at 40.

<sup>196</sup> Covell, *supra* note 189.

<sup>197</sup> Matthew J. McKinney, *Instream Flow Policy In Montana: A History And Blueprint For The Future*, in *INSTREAM FLOW PROTECTION IN THE WEST*, REV. ED., 15-1, 15-3 (Lawrence J. MacDonnell and Teresa A. Rice, Eds., 1993).

<sup>198</sup> Covell, *supra* note 189.

<sup>199</sup> *Id.*

The quantity of water of a reservation is limited to “a maximum of 50% of the average annual flow of record on gauged streams.”<sup>200</sup> Ungauged streams are not limited.<sup>201</sup> The priority date of appropriation for new filings on unappropriated waters is the date of the receipt of the filing of the application with the DNRC.<sup>202</sup> Instream flow reservations in Montana (except for those subject to the Department of Agriculture/Forest Service - Montana Compact<sup>203</sup>) are subject to review at least once every ten years, to “ensure that the objectives of the reservations are being met.”<sup>204</sup> If the objectives of the reservation are not being met, the department may “extend, revoke, or modify the reservation.”<sup>205</sup> A new appropriation for instream flow may not adversely affect any right already in existence, and may be subject to any “terms, conditions, restrictions, and limitations” the department deems necessary.<sup>206</sup> An instream flow may be reallocated to another qualified reservant, following notice and a hearing, if the new reservant shows that their need outweighs the need of the original reservant,<sup>207</sup> and if the total amount of the instream flow reservation is no longer needed.<sup>208</sup> The reservation retains its original priority date, “despite reallocation to a different entity for a different use.”<sup>209</sup> However, this type of reallocation may not occur more than once every five years.<sup>210</sup> A state water reservation may also be voluntarily transferred from one qualified reservant to another.<sup>211</sup>

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<sup>200</sup> MONT. CODE ANN. § 85-2-316 (6) (2010).

<sup>201</sup> *Id.*

<sup>202</sup> MONT. CODE ANN. § 85-2-316 (7) (2010).

<sup>203</sup> MONT. CODE ANN. § 85-20-1401 (2010).

<sup>204</sup> MONT. CODE ANN. § 85-2-316(10) (2010).

<sup>205</sup> *Id.*

<sup>206</sup> MONT. CODE ANN. § 85-2-316(9) (2010).

<sup>207</sup> MONT. CODE ANN. § 85-2-316(11) (2010).

<sup>208</sup> McKinney, *supra* note 197 at 15-5.

<sup>209</sup> MONT. CODE ANN. § 85-2-3169 (11) (2010).

<sup>210</sup> MONT. CODE ANN. § 85-2-316(11) (2010).

<sup>211</sup> MONT. CODE ANN. § 85-2-316(13) (2010).

## II. Leases and Temporary Transfers

Montana has two statutory programs that allow for the conversion of consumptive water rights to instream flow purposes, one for private parties and one that is available to the Montana Department of Fish, Wildlife and Parks only. Both of these programs utilize the Montana Change of Use statute, found in Section 85-2-402 of the Montana Code (2010).<sup>212</sup> This section recognizes the right to make a temporary change in a permit, an existing water right, or a state reservation.<sup>213</sup> Essentially there are three basic options for the private water user to convert an appropriative right to an instream flow: 1) Employ the change of use statute<sup>214</sup> to convert all or part of a consumptive right to an instream flow (usually without a lease), 2) lease the right to the Montana Department of Fish, Wildlife, and Parks for an instream flow purpose, or 3) lease the right to a private entity for an instream flow purpose.<sup>215</sup> In each instance, the applicant must file the proper application with the DNRC for a change in their appropriative right.<sup>216</sup> Applicants must also prove by a preponderance of the evidence that “the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource.”<sup>217</sup> Water rights that are leased for instream flow purposes or changed to an instream flow purpose through the change of use procedures are protected from abandonment.<sup>218</sup>

As a general rule, changes in use must have the prior approval of the Department of Natural Resources and Conservation, and in some instances, the legislature.<sup>219</sup> As with

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<sup>212</sup> *Id.*; MONT. CODE ANN. § 85-2-402 (2010).

<sup>213</sup> MONT. CODE ANN. § 85-2-402(1)(a) (2010).

<sup>214</sup> MONT. CODE ANN. § 85-2-402 (2010).

<sup>215</sup> Stan Bradshaw, *A Buyer's Guide To Montana Water Rights*, <http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/TU%20WATERRIGHTS%20CORRECTED%20web.pdf>.

<sup>216</sup> *Water Rights in Montana*, *supra* note 192 at 37.

<sup>217</sup> MONT. CODE ANN. § 85-2-408(3) (2010).

<sup>218</sup> MONT. CODE ANN. § 85-2-404(4) (2010).

<sup>219</sup> MONT. CODE ANN. § 85-2-402(1)(a) (2010).

most states, approval of all types of changes of use requires the applicant to prove that the change of type of use or place of use will not adversely affect other water rights.<sup>220</sup> As an additional protection, if a water right is leased, other water right holders are allowed to object to the change even after the DNRC has approved it, if those other water rights holders did not anticipate an adverse effect before the lease was in place.<sup>221</sup>

Private individuals are allowed to change an appropriative right to an instream flow use, consecutively or intermittently, for a period not to exceed ten years.<sup>222</sup> The DNRC is responsible for approving or denying the change.<sup>223</sup> The priority date remains the same as the original appropriative right.<sup>224</sup> The temporary change may be renewed at the end of the initial ten year period, for an additional period of a maximum of ten years, with no limit on the number of renewals allowed.<sup>225</sup> If the temporary change of the right is not renewed, it automatically reverts back to the original “purpose, place of use, point of diversion, or place of storage after the period for which a temporary change was authorized expires.”<sup>226</sup> All renewals are subject to a notice process performed by the DNRC, whereby any other appropriators (holding permits before the original change of use application) potentially affected by the temporary change renewal have 90 days to submit evidence of their injury to DNRC.<sup>227</sup> If another appropriator is adversely affected by the renewal, the DNRC may not allow it.<sup>228</sup> In fact, any appropriator with a permit in

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<sup>220</sup> MONT. CODE ANN. § 85-2-402 (2)(a) (2010); *see, e.g., Water Rights in Montana, supra* note 192 at 35.

<sup>221</sup> MONT. CODE ANN. § 85-2-407(4)(b) (2010); *see, e.g., Stan Bradshaw and Laura Ziemer, Water Leasing in Montana Through Trout Unlimited’s Eyes, PERC REPORTS, Vol. 25, No. 2, Summer 2007, at 15.*  
<http://www.perc.org/pdf/june07.pdf>.

<sup>222</sup> MONT. CODE ANN. § 85-2-407(2) (2010).

<sup>223</sup> MONT. CODE ANN. § 85-2-407 (2010).

<sup>224</sup> MONT. CODE ANN. § 85-2-407(5) (2010).

<sup>225</sup> MONT. CODE ANN. § 85-2-407(2),(3) (2010).

<sup>226</sup> MONT. CODE ANN. § 85-2-407(6) (2010).

<sup>227</sup> MONT. CODE ANN. § 85-2-407(3) (2010).

<sup>228</sup> *Id.*

place before the change of use application may object to the initial temporary change application, the renewal process, or may object once during the term of the temporary change permit.<sup>229</sup>

Section 85-2-436 of the Montana Code authorizes the Department of Fish, Wildlife, and Parks (DFWP) to change the purpose of use and the place of use of an appropriative right, whether the right is leased or owned, to an instream flow purpose “to protect, maintain, or enhance streamflows to benefit the fishery resource.”<sup>230</sup> This statutory provision sunsets on June 30, 2019.<sup>231</sup> The Commission of the Department of Fish, Wildlife, and Parks must consent to any lease of water from existing appropriative rights to the DFWP.<sup>232</sup> To be approved, the change in purpose of use or place of use by Fish & Wildlife must not injure other appropriators, and must comply with the procedures used in the normal permitting process,<sup>233</sup> priority date procedures,<sup>234</sup> and normal change of use proceedings.<sup>235</sup> This includes filing an application with DNRC, using proper public notice proceedings, and resolving possible objections to the filing of an instream flow permit.<sup>236</sup> The application must include specific information on the reach of stream that is protected, maintained, or enhanced, and must also provide a detailed measuring plan for that stream.<sup>237</sup> The priority date of the original appropriation

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<sup>229</sup> MONT. CODE ANN. § 85-2-407(4)(b) (2010).

<sup>230</sup> MONT. CODE ANN. § 85-2-436(1) (2010).

<sup>231</sup> MONT. CODE ANN. § 85-2-436 (2010).

<sup>232</sup> MONT. CODE ANN. § 85-2-436(3)(a) (2010).

<sup>233</sup> MONT. CODE ANN. § 85-2-307-309 (2010).

<sup>234</sup> MONT. CODE ANN. § 85-2-401 (2010).

<sup>235</sup> MONT. CODE ANN. § 85-2-402 (2010).

<sup>236</sup> MONT. CODE ANN. § 85-2-436(3)(b) (2010).

<sup>237</sup> MONT. CODE ANN. § 85-2-436(3)(c) (2010).

is preserved in the change proceeding and/or in the lease transaction, and sticks with the new instream flow purpose.<sup>238</sup>

Leases for instream flows by the DFWP can last for up to ten years, with no limit on number of renewals, as long as the renewals only last ten years each.<sup>239</sup> Leases of water made available by conservation or storage projects may last for an amount of time equal to the expected life of the project, but may not exceed 30 years.<sup>240</sup> The maximum quantity of water that can be changed to instream flow use is the amount historically diverted.<sup>241</sup> And only the historical consumptive use (or a smaller amount) may be used “to protect, maintain, or enhance streamflows below the point of diversion that existed prior to the change in appropriation right.”<sup>242</sup> The Department of Fish, Wildlife, and Parks is responsible for the costs associated with gauging and monitoring the instream flow.<sup>243</sup>

The Department of Natural Resources and Conservation reserves the right to modify or revoke a change in appropriation right authorization at any time.<sup>244</sup> This is allowed up to ten years after approval, if a senior water rights holder submits “new evidence not available at the time the change in appropriation right was approved that proves by a preponderance of evidence that the appropriator's water right is adversely affected.”<sup>245</sup>

The DFWP is responsible for submitting to the DNRC, the Fish, Wildlife, and Parks Commission, and the Environmental Quality Council, a biennial progress report in

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<sup>238</sup> MONT. CODE ANN. § 85-2-436(g) (2010).

<sup>239</sup> MONT. CODE ANN. § 85-2-436(3)(e) (2010).

<sup>240</sup> *Id.*

<sup>241</sup> MONT. CODE ANN. § 85-2-436(3)(d) (2010).

<sup>242</sup> *Id.*

<sup>243</sup> MONT. CODE ANN. § 85-2-436(3)(j) (2010).

<sup>244</sup> MONT. CODE ANN. § 85-2-436(3)(f) (2010).

<sup>245</sup> *Id.*

December of odd-numbered years, which includes a summary of all rights they have changed from appropriative to instream flow purposes in the previous two years.<sup>246</sup> This includes information on each length of stream reach, including the volume of water needed to protect the streamflow, steps taken to minimize harm to other appropriators, and monitoring methods.<sup>247</sup> Most importantly, if the legislature does not renew the statutory provision after 2019, the DFWP “may not enter into any new lease agreements pursuant to [Section 85-2-436] or renew any leases that expire after that date.”<sup>248</sup>

### **III. Project Example: Mannix Brothers Ranch**

As part of the Montana Water Project, Trout Unlimited (TU) has restored streamflows in Montana through voluntary transactions since 1998.<sup>249</sup> In 2006, TU partnered with the Mannix Brothers Ranch in Montana to enter into a ten year lease of pre-1900 irrigation rights on Wasson Creek for instream flow purposes.<sup>250</sup> Wasson Creek is located in the Blackfoot River Valley, near Helmville Montana, and is habitat for a pure-strain of westslope cutthroat trout (WSCT). It is a tributary to Nevada Spring Creek, which is a tributary to the Middle Blackfoot. The Mannix Ranch is the primary landowner on Wasson creek. The Mannix Ranch has historically relied on the waters of Wasson Creek for irrigation purposes for pasture grass for their cattle.<sup>251</sup>

This lease transaction was key to restoring native westslope cutthroat trout populations in Wasson Creek and the middle reach of the Blackfoot River.<sup>252</sup> TU had

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<sup>246</sup> MONT. CODE ANN. § 85-2-436(4)(a) (2010).

<sup>247</sup> MONT. CODE ANN. § 85-2-436(4)(b) (2010).

<sup>248</sup> MONT. CODE ANN. § 85-2-436(7) (2010).

<sup>249</sup> Trout Unlimited, *Montana Water Project*, <http://www.tu.org/conservation/western-water-project/Montana> (last visited Feb 25, 2011).

<sup>250</sup> Columbia Basin Water Transactions Program, *Transaction Proposal Form*, (2006), [http://www.cbwtp.org/jsp/cbwtp/checklist\\_pdf/checklist\\_pdf.jsp?project\\_id=52&transaction\\_id=214](http://www.cbwtp.org/jsp/cbwtp/checklist_pdf/checklist_pdf.jsp?project_id=52&transaction_id=214).

<sup>251</sup> Bradshaw, *supra* note 215.

<sup>252</sup> *Id.*

already completed a significant amount of channel and riparian restoration work on Wasson creek, and securing the lease from the Mannix Ranch was a major component in the overall restoration plan.<sup>253</sup> The transaction began with three years of one-season agreements not to divert when the flow of Wasson Creek dropped to 0.5 cubic feet per second (cfs), and the immediate restorative results of the short term leases evolved into a ten-year lease.<sup>254</sup> The ten-year lease will provide 0.75cfs throughout the entire irrigation season, and will address both base flow conditions of the creek, as well as channel maintenance flows.<sup>255</sup> The flows will improve WSCT habitat by improving temperature throughout the stream reach, and provide migration opportunity in July/August for the WSCT to migrate to Nevada Spring Creek.<sup>256</sup> The Mannix Ranch received \$75,000 for the ten-year lease, funded in part by the Columbia Basin Water Transactions Program, Northwestern Energy, and the Chutney Foundation.<sup>257</sup> The payment calculation was based on the lost hay and forage value to the Mannix Brothers Ranch.<sup>258</sup>

To effectuate the change, the Mannix Brothers Ranch and TU applied to the Department of Natural Resources and Conservation (DNRC) for a temporary change in use of the water right, allowed under Montana Law for instream flow leases.<sup>259</sup> The Mannix lease retained its original priority date, and because of the Montana leasing statute, the Mannix Ranch still owns the water right, and that right is protected from abandonment.<sup>260</sup> TU will actively monitor the flows of the stream for the duration of the

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Transaction Proposal Form, supra* note 250.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* For background information on the Columbia Basin Water Transactions Program, see Appendix 7, *infra*.

<sup>258</sup> *Id.*

<sup>259</sup> *See supra*, Appendix 3, Section II, “Leases and Temporary Transfers.”

<sup>260</sup> MONT. CODE ANN. § 85-2-404(4) (2010); Bradshaw, *supra* note 215.

lease.<sup>261</sup> The Montana Department of Fish, Wildlife, and Parks will monitor the benefits to the fish population at monitoring sites on Wasson Creek and Nevada Spring Creek.<sup>262</sup>

In determining the proper location for a water lease transaction, each stream is unique. But according to Stan Bradshaw and Laura Ziemer of TU, “Just the right combination of seniority of the water right, location of the diversion, the amount of water to be left instream, the condition of the stream itself, and the willing participation of the irrigator all play a part in a successful water lease.”<sup>263</sup> The Mannix transaction is an example of such a combination of factors for the benefit of an instream flow.

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<sup>261</sup> *Transaction Proposal Form*, *supra* note 250.

<sup>262</sup> *Id.*

<sup>263</sup> Bradshaw and Ziemer, *supra* note 221.

## APPENDIX FOUR: INSTREAM FLOWS IN OREGON

Oregon is a prior-appropriation state with riparian vestiges,<sup>264</sup> and operates on a permit system.<sup>265</sup> The Oregon Water Resources Department (ORWD) is the state agency with the authority to administer the state's water supplies, overseen by the Water Resources Commission ("Commission"), a governor-appointed, senate-confirmed body comprised of seven members who serve four-year terms.<sup>266</sup> The ORWD and the Commission generally manage the state's water by basin, and set comprehensive policies for managing the river systems in each of the state's eighteen (18) basins.<sup>267</sup> The basin planning process may include instating basin "closures," where new appropriations of water are not allowed in that basin, or are greatly restricted by administrative rule or order.<sup>268</sup> Oregon declares that beneficial uses of water are any "Public Uses,"<sup>269</sup> which include recreation, pollution abatement, navigation, and conservation or enhancement of fish and wildlife habitat, including "any other ecological values."<sup>270</sup>

### I. Instream Water Right Act

Oregon's Instream Water Right Act was adopted in 1987, and since that time, the State of Oregon has worked with a variety of water users and organizations to restore streamflows for "fish and wildlife, recreation, and pollution abatement."<sup>271</sup> Since 1987, the OWRD has converted "more than 500 of the state's minimum perennial stream flows

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<sup>264</sup> SASHA CHARNEY, *DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* 110 (JULY 2005). For a definition of the riparian doctrine, see *infra* note 360.

<sup>265</sup> Oregon Water Resources Dept., *Water Rights in Oregon: An Introduction to Oregon's Water Laws*, 7 (2009), [http://www.oregon.gov/OWRD/PUBS/docs/Centennial\\_Aquabook.pdf](http://www.oregon.gov/OWRD/PUBS/docs/Centennial_Aquabook.pdf).

<sup>266</sup> *Id.* at 5.

<sup>267</sup> *Id.* at 13.

<sup>268</sup> OR. REV. STAT. § 536.410 (2009); *Water Rights in Oregon*, *supra* note 265 at 13.

<sup>269</sup> OR. REV. STAT. § 537.334 (2009).

<sup>270</sup> OR. REV. STAT. § 537.332 (2009).

<sup>271</sup> Oregon Water Resources Dept., *Flow Restoration in Oregon*, [http://www.oregon.gov/OWRD/mgmt\\_Instream.shtml](http://www.oregon.gov/OWRD/mgmt_Instream.shtml) (last visited Feb. 5, 2011).

to instream water rights, and has issued more than 900 state agency-applied instream water rights.”<sup>272</sup> Oregon leads the country in flow restoration, with “more than 1,100 individual instream leases, instream transfers, and allocations of conserved water.”<sup>273</sup> Oregon has restored nearly double the amount of instream flow of Washington, Idaho, and Montana combined, placing about 900 cfs instream, compared to Washington (400 cfs), Idaho (100 cfs), and Montana (14 cfs based on a 2006 survey).<sup>274</sup> In fact, it is the policy of the state of Oregon that “establishment of minimum perennial streamflows is a high priority of the Water Resources Commission and the Water Resources Department.”<sup>275</sup> According to the OWRD, more than 70 percent of water put instream on a permanent basis is senior water, with certificates pre-dating Oregon's 1909 water law.<sup>276</sup> Oregon has one of the most abundant toolboxes for converting water to instream flow use, by: (1) instream lease and time-limited transfer, (2) permanent transfer, and (3) allocation of conserved water.<sup>277</sup>

## **II. Minimum Perennial Streamflows**

The Instream Flow Provision for the State of Oregon is codified in Section 537.332 through 537.360, Oregon Revised Code (2009). Under this provision, certain state agencies may establish minimum streamflows by administrative rule. The procedures for doing so are outlined in Oregon Administrative Rules, Division 690-076 and 690-077 (2011). The State Department of Fish and Wildlife may request an instream flow certificate from the Commission for the purposes of “conservation, maintenance and

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> OR. REV. STAT. § 536.235 (2009).

<sup>276</sup> Oregon Water Resources Dept., *2009 Instream Accomplishments*, [http://www1.wrd.state.or.us./pdfs/2009\\_Instream\\_Accomplishments.pdf](http://www1.wrd.state.or.us./pdfs/2009_Instream_Accomplishments.pdf).

<sup>277</sup> *Flow Restoration in Oregon*, *supra* note 271.

enhancement of aquatic and fish life, wildlife and fish and wildlife habitat.”<sup>278</sup> The Department of Environmental Quality may request an instream flow certificate from the Commission to “protect and maintain water quality standards.”<sup>279</sup> State Parks and Recreation may do so for recreation and scenic attraction purposes.<sup>280</sup> Once the proper application is submitted, ORWD must provide an opportunity for public comment and review, and conduct a hearing on the proposed action.<sup>281</sup> If approved, the Water Resources Commission will issue a certificate for an instream right, in the name of the Water Resources Department as a trustee for the public.<sup>282</sup> The new instream flow right functions within the established prior appropriation system, and does not affect the rights of senior users.<sup>283</sup> The priority date is the date the application is submitted to the Commission by the appropriate state agency.<sup>284</sup> Also, the legislature approved provisions whereby any minimum perennial streamflow established before June 25, 1988 was converted to an instream flow right by the Commission, and issued a certificate.<sup>285</sup>

### **III. Permanent Transfers, Leasing, and Time-Limited Transfers**

Oregon allows private water right owners to sell, lease, or donate water rights for instream flow purposes, and allows any person to “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.”<sup>286</sup> Essentially there are three options available to private water users: permanent transfer, time-limited transfer, or lease. Transfers of all

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<sup>278</sup> OR. REV. STAT. § 537.336 (1) (2009).

<sup>279</sup> OR. REV. STAT. § 537.336 (2) (2009).

<sup>280</sup> OR. REV. STAT. § 537.336 (3) (2009).

<sup>281</sup> OR. ADMIN. R. 690-076-0020 (2011).

<sup>282</sup> OR. REV. STAT. § 537.341 (2009).

<sup>283</sup> OR. ADMIN. R. 690-076-0015 (2011); *see, e.g., Water Rights in Oregon, supra* note 265.

<sup>284</sup> OR. ADMIN. R. 690-076-0015 (2011).

<sup>285</sup> OR. REV. STAT. § 537.346 (2009).

<sup>286</sup> OR. REV. STAT. § 537.348 (2009); *see Water Rights in Oregon, supra* note 265 at 23.

types involve changing the point of diversion or appropriation, the place of use, the beneficial use of the water right, or a combination thereof.<sup>287</sup> The relevant statutory authority to make any transfer by changing the place of use, type of use, or point of diversion is found in Section 540.505 - 540.587, Oregon Revised Statutes (2009). To complete the lease or donation transaction, the water right holder must complete the proper application and obtain prior approval from the Water Resources Department. The OWRD then provides notice to the public and conducts a non-injury analysis.<sup>288</sup> If the transfer is approved, OWRD issues a certificate,<sup>289</sup> and the underlying water right is protected from forfeiture of the water right for the duration of the transfer.<sup>290</sup>

The Instream Leasing program is the most flexible tool allowed under Oregon law, whereby a water right holder can voluntarily lease their water temporarily for instream use.<sup>291</sup> The owner can lease surface water, storage water, or water saved through conservation measures.<sup>292</sup> Leases may last for an initial period of up to five years, with renewal options at the lease holder's discretion.<sup>293</sup> The water converted to instream use by lease retains its original priority date.<sup>294</sup> When leased, the water is unavailable for the original owner's use.<sup>295</sup> Temporary leases in Oregon are given an expedited approval process, whereby approval can occur in as little as 30 days after

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<sup>287</sup> Oregon Water Resources Dept., *Water Right Transfers*, [http://www.oregon.gov/OWRD/management\\_transfers.shtml](http://www.oregon.gov/OWRD/management_transfers.shtml) (last visited Feb. 5, 2011).

<sup>288</sup> OR. REV. STAT. § 540.520 (2009); e.g., *Water Right Transfers*, *supra* note 287.

<sup>289</sup> OR. REV. STAT. § 537.348 (2009).

<sup>290</sup> OR. REV. STAT. § 540.530(1)(f) (2009).

<sup>291</sup> Oregon Water Resources Dept., *Oregon's Flow Restoration Toolbox*, [http://www.oregon.gov/OWRD/management\\_instream\\_tools.shtml](http://www.oregon.gov/OWRD/management_instream_tools.shtml) (last visited Feb. 5, 2011).

<sup>292</sup> Oregon Water Resources Dept., *Instream Leasing Program*, [http://www.oregon.gov/OWRD/management\\_leases.shtml](http://www.oregon.gov/OWRD/management_leases.shtml) (last visited Feb. 5, 2011).

<sup>293</sup> OR. REV. STAT. § 540.523 (1) (2009); e.g., *Oregon's Flow Restoration Toolbox*, *supra* note 291.

<sup>294</sup> OR. REV. STAT. § 537.348 (2009).

<sup>295</sup> OR. REV. STAT. § 540.523(7) (2009); e.g., *Oregon's Flow Restoration Toolbox*, *supra* note 291.

receipt of the application.<sup>296</sup> Because of this expedited review allowance, there is potential for unobserved injury to other users, but according to the OWRD, “if injury to another water right is found, the lease can be modified or terminated to prevent the injury.”<sup>297</sup> At the end of the lease term, the water right reverts back to its original place of use and conditions of use.<sup>298</sup>

A special kind of lease, a Split Season Instream Lease, allows the water right owner to use the water during one part of the irrigation season and then lease their water right instream during the other part of the season.<sup>299</sup> This type of lease works well with partial fallowing.<sup>300</sup> For example, the landowner may use the water right from April through June for one cutting of hay, then lease the right for an instream flow from July through September when streamflows are critical for salmon in Oregon.<sup>301</sup>

Permanent transfers are another means of putting water instream. Permanent transfers result in the issuance of an instream water right, held in trust by the Water Resources Department.<sup>302</sup> As of 2009, ORWD has completed 57 permanent transfers totaling more than 280 cubic feet per second (cfs).<sup>303</sup> A Time-Limited transfer, on the other hand, is a semi-permanent tool which is similar to a permanent transfer, but allows a water right holder to change their water to an instream use for a specified period of years.<sup>304</sup> Time-Limited transfers are similar to leases in function; the main differences are that a Time-Limited transfer can last for any length of time (as opposed to the five

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<sup>296</sup> *Oregon’s Flow Restoration Toolbox*, *supra* note 291.

<sup>297</sup> *Id.*

<sup>298</sup> OR. REV. STAT. § 540.523 (3) (2009); *e.g.*, *Oregon’s Flow Restoration Toolbox*, *supra* note 291.

<sup>299</sup> *Oregon’s Flow Restoration Toolbox*, *supra* note 291.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *2009 Instream Accomplishments*, *supra* note 276.

<sup>304</sup> *Oregon’s Flow Restoration Toolbox*, *supra* note 291.

year limit on leases), and cannot be later “unwound” if injury to another water right holder is discovered.<sup>305</sup> For example, the Time-Limited transfer can last 10, 20, or 50 or more years.<sup>306</sup> Because of its length and permanency, the Time-Limited transfer is subject to a more rigorous review process than a lease.<sup>307</sup> Additionally, Time-Limited transfers can be customized to terminate upon the occurrence of a condition (such as a change in land ownership).<sup>308</sup>

Since the inception of the leasing program, Oregon has restored flow through over 1,000 instream leases.<sup>309</sup> According to the OWRD, “The instream leasing program [in Oregon]...depends on active partnerships with the Klamath Basin Rangeland Trust (30% of flow during 2008), Deschutes River Conservancy (30%), and the Oregon Water Trust (8%).”<sup>310</sup>

#### **IV. Allocation of Conserved Water**

The Allocation of Conserved Water Program in Oregon was officially authorized by the Legislature in 1987.<sup>311</sup> It is a declared policy of the state of Oregon to aggressively promote water conservation, and to allow the sale or lease of the right to use conserved water.<sup>312</sup> The Conserved Water Program is a voluntary program that allows the use of conserved water to augment and enhance streamflows.<sup>313</sup> “Conserved Water” is defined for this purpose as the difference between “the smaller of the amount stated on the water right or the maximum amount of water that can be diverted using the existing

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Flow Restoration in Oregon, supra* note 271.

<sup>311</sup> Oregon Water Resources Dept., *Allocation of Conserved Water*, [http://www.oregon.gov/OWRD/mgmt\\_conserved\\_water.shtml](http://www.oregon.gov/OWRD/mgmt_conserved_water.shtml) (last visited Feb. 5, 2011).

<sup>312</sup> OR. REV. STAT. § 537.460(2) (2009).

<sup>313</sup> OR. REV. STAT. § 537.463 (2010); *e.g., Oregon’s Flow Restoration Toolbox, supra* note 291.

facilities,” and “the amount of water needed after implementation of conservation measures to meet the beneficial use under the water right certificate.”<sup>314</sup> Conservation can be achieved by “improving the technology or method for diverting, transporting, applying or recovering the water or by implementing other approved conservation measures.”<sup>315</sup> Moving physical points of diversion, lining canals, and changing from flood to drip irrigation are common conservation practices.<sup>316</sup>

The OWRD uses an application process outlined under O.R.S. § 537.465(2) (2009), where applicants must describe the conservation measures proposed, the amount of water expected from the implementation of the measures, choice of priority dates, and intended use for the conserved water.<sup>317</sup> Water users are also allowed to apply for allocations of conserved water if they have implemented the conservation measure within five years prior to the application.<sup>318</sup> The applicant does not need to apply for a separate change of use or transfer approval.<sup>319</sup> If the ORWD approves the conserved water application, new water right certificates are issued for the original water right (with priority date intact) and the new water right to which the conserved water is allocated (with priority date assigned either the same as the original right or one minute junior).<sup>320</sup>

Although it is not required, water users who implement efficiency measures have a significant incentive to work with the OWRD instream flow program, since the absence of Department approval means that the user is not allowed to “re-use” their conserved

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<sup>314</sup> OR. REV. STAT. § 537.455(2) (2009).

<sup>315</sup> OR. REV. STAT. § 537.455(1) (2009).

<sup>316</sup> *Oregon’s Flow Restoration Toolbox*, *supra* note 291.

<sup>317</sup> OR. REV. STAT. § 537.465(2) (2009).

<sup>318</sup> OR. REV. STAT. § 537.465(1)(b) (2009).

<sup>319</sup> OR. REV. STAT. § 537.470(5) (2009).

<sup>320</sup> OR. REV. STAT. § 537.470(6) (2009).

water to meet new needs.<sup>321</sup> Instead, the water becomes available to the next appropriator.<sup>322</sup> In fact, according to the OWRD:

In exchange for granting the user the right to “spread” a portion of the conserved water to new uses, the law requires allocation of a portion to the state for instream use. After mitigating the effects on any other water rights, the Water Resources Commission allocates 25 percent of the conserved water to the state and 75 percent to the applicant, unless the applicant proposes a higher allocation to the state or more than 25 percent of the project costs come from federal or state non-reimbursable sources. A new water right certificate is issued with the original priority date reflecting the reduced quantity of water being used with the improved technology. Other certificates are issued for the applicant’s portion of the conserved water and for the state’s instream water right. The priority dates for these certificates are either the same as the original right, or one minute junior.<sup>323</sup>

The first allocation of conserved water was approved in 1996.<sup>324</sup> As of 2009, the OWRD has approved at least 43 applications for allocation of conserved water, adding up to almost 80 cfs of instream flow protection.<sup>325</sup>

#### **V. Project Example: Austin Ranch**

In 2006, The Freshwater Trust (FWT),<sup>326</sup> a nonprofit organization that works to restore freshwater ecosystems in Oregon, reached an agreement with Pat and Hedy Voigt, third generation ranchers and owners of the Austin Ranch on the Middle Fork of the John Day River. The agreement was for the FWT to compensate the Voigts in exchange for them not to divert their senior irrigation water rights<sup>327</sup> for Alfalfa production past July

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<sup>321</sup> *Allocation of Conserved Water*, *supra* note 311.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Oregon Water Resources Dept., *20th Anniversary of Instream Water Right Act: Milestones*, [http://www.oregon.gov/OWRD/mgmt\\_instream\\_milestones.shtml](http://www.oregon.gov/OWRD/mgmt_instream_milestones.shtml) (last visited Feb. 5, 2011).

<sup>325</sup> *Flow Restoration in Oregon*, *supra* note 271.

<sup>326</sup> The Freshwater Trust was formerly known as the Oregon Water Trust. The Oregon Water Trust was the first water trust in the United States. The Freshwater Trust, *History*, <http://www.thefreshwatertrust.org/who-we-are/about-us> (last visited Feb. 25, 2011).

<sup>327</sup> The priority dates for the rights were 1892, 1895, 1898, 1960, and 1962. Columbia Basin Water Transactions Program, *Transaction Proposal Form*, (2005), [http://www.cbwtp.org/jsp/cbwtp/checklist\\_pdf/checklist\\_pdf.jsp?project\\_id=13&transaction\\_id=156](http://www.cbwtp.org/jsp/cbwtp/checklist_pdf/checklist_pdf.jsp?project_id=13&transaction_id=156).

20th of each year, in order to preserve and restore critical aquatic habitat.<sup>328</sup> The transaction was funded in part through the Columbia Basin Water Transactions Program (CBWTP).<sup>329</sup> This permanent agreement will preserve a flow of 10 cubic feet per second (cfs) in the John Day river system for wild fish runs of summer steelhead, spring chinook salmon, and bull trout.<sup>330</sup> The Voigts wanted to be able to protect the environmental resource while still keeping their ranch operational, and a split season agreement allows them to achieve that goal.<sup>331</sup>

The John Day River is a tributary of the Columbia River System in Northeastern Oregon. It is the longest undammed river in the Pacific Northwest.<sup>332</sup> The Middle Fork of the John Day, where the Austin Ranch is located, supports as much as one-third of the spawning salmon and steelhead in the river basin.<sup>333</sup> The Voigts raise Alfalfa and run cattle, and through this agreement, instead of yielding two cuttings of Alfalfa in a season, they only yield one.<sup>334</sup> After July 20th of each year, they stop diverting water for Alfalfa production and graze cattle on the pasture.<sup>335</sup> The water then restores flows in the Middle Fork of the John Day, and two of its tributaries: Vinegar Creek and Clear Creek. In exchange for the loss of income from the second cutting of Alfalfa, the Voigts received \$700,000 from the Freshwater Trust; money they are using to update their existing irrigation system.<sup>336</sup> The Voigts feel that the transaction is working beneficially for them,

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<sup>328</sup> The Freshwater Trust, *Austin Ranch*, <http://www.thefreshwatertrust.org/conservation/stream-flow/projects/austin-ranch> (last visited Feb. 25, 2011).

<sup>329</sup> For background information on the Columbia Basin Water Transactions Program, see Appendix 7, *infra*.

<sup>330</sup> *Austin Ranch*, *supra* note 328.

<sup>331</sup> *Id.*

<sup>332</sup> ROBERT GEROME GLENNON, UNQUENCHABLE: AMERICA'S WATER CRISIS AND WHAT TO DO ABOUT IT 287 (2009).

<sup>333</sup> *Id.* at 288.

<sup>334</sup> *Id.* at 289.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

as well as for The Freshwater Trust.<sup>337</sup> Pat Voigt said of the Freshwater Trust after the transaction: “[T]hey displayed a great deal of respect for agriculture.”<sup>338</sup>

To achieve this transaction legally, the Voigts submitted an affidavit to the Oregon Water Resources Department (OWRD) to “abandon” the water right for the latter part of the summer irrigation season beginning July 20, under the authority of Oregon Revised Statute § 540.621 (2005).<sup>339</sup> The OWRD approved the “water right diminishment” and issued new certificates.<sup>340</sup> This is what makes the transfer permanent, as opposed to an annual leasing option or time-limited transfer option. The FWT and the Voigts did not actually employ a change of use method or a split season lease method under Oregon law.

The “diminishment” was an option that worked well for the Voigts and the FWT, since there will be no downstream appropriation of the Austin Ranch water below the instream flow reach (because the John Day Basin is closed to new appropriations, and the next nearest consumptive user is twenty miles downstream).<sup>341</sup> Possible injury to other water users was minimal in this transaction, as the OWRD does not need to regulate other water users to put the 10cfs back in the stream.<sup>342</sup> The Austin Ranch project is an example of a creative solution to put water back in the stream (by essentially reducing “demand” on the stream) without actually having to issue “formal” instream flow rights. As with most instream flow leases, a combination of circumstances unique to that particular stream reach resulted in a workable project for both parties.

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<sup>337</sup> *Austin Ranch*, *supra* note 328.

<sup>338</sup> *Austin Ranch*, *supra* note 328.

<sup>339</sup> Robert David Pilz, *At The Confluence: Oregon’s Instream Water Rights Law in Theory and Practice*, 36 *Envtl. L.* 1383, 1416 (2006).

<sup>340</sup> *Transaction Proposal Form*, *supra* note 327.

<sup>341</sup> Pilz, *supra* note 339.

<sup>342</sup> *Id.*

## VI. Project Example: Lower Rudio Creek

As part of a comprehensive restoration plan for the John Day Basin, the Freshwater Trust secured a permanent Water Use Agreement for a point of diversion (POD) change to put a minimum of 2 cubic feet per second (cfs) back instream on Lower Rudio Creek, a tributary to the John Day River in northeastern Oregon. In 2007, the Freshwater Trust began working with Kevin Campbell, owner of Campbell Crossing and an 1885 senior irrigation right on Lower Rudio Creek, which he uses for irrigation of hay and pasture.<sup>343</sup> Rudio Creek is an important salmon and steelhead habitat and passage area, and historically the lower two miles of the creek would go dry in the late summer months.<sup>344</sup>

The current irrigation diversion is a dam structure on Rudio Creek. As part of the agreement, Kevin Campbell will stop diverting water from the existing structure when one of two conditions is triggered: either flows of the creek reach 2 cfs, or the date reaches July 1, whichever comes first.<sup>345</sup> Then, after implementing new efficiency measures, Campbell Crossing will use a new pumping station located downstream (on the North Fork of the John Day River) to provide water to their pastures and hay meadows, thereby restoring flows to Rudio Creek.<sup>346</sup> The old 1885 priority date is kept intact for the new POD.<sup>347</sup> Some lands that were previously flood irrigated will have sprinklers and center pivot systems, and will get water from the new pumping station downstream,

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<sup>343</sup> Telephone Interview with David Pilz and Natasha Bellis, Flow Restoration Managers, The Freshwater Trust (July 20, 2010).

<sup>344</sup> Columbia Basin Water Transactions Program, *Transaction Proposal Form*, (2007), [http://www.cbwtp.org/jsp/cbwtp/checklist\\_pdf/checklist\\_pdf.jsp?project\\_id=56&transaction\\_id=274](http://www.cbwtp.org/jsp/cbwtp/checklist_pdf/checklist_pdf.jsp?project_id=56&transaction_id=274).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* See also “Rudio Creek Simple Project Model,” *infra*.

<sup>347</sup> Telephone Interview, *supra* note 343.

therefore not taking any lands out of production.<sup>348</sup> Additionally, some of the areas along Rudio creek will be fenced off from livestock.<sup>349</sup>

This project did not create a “traditional” instream flow right on Rudio Creek. To implement the change legally, Campbell Crossing only had to file for an additional point of diversion approval with Oregon Water Resources Department (OWRD).<sup>350</sup>

Technically Campbell Crossing could still divert from the old POD. However, the instream flow transaction is adequately secured for the future because Campbell Crossing will be monitored by OWRD: Campbell Crossing will only be able to use water out of the new POD when measurements show that the required instream flows are present in Rudio Creek, thereby effecting a water “exchange” between Rudio Creek water and John Day water.<sup>351</sup> Flow metering on Rudio Creek will provide the means to implement the monitoring, but will also protect others users on the North Fork of the John Day from injury.<sup>352</sup> This exchange will operate as a “condition” on the ranch’s water rights, and will attach to any possible future owners.<sup>353</sup> Although the transaction does not result in a formal instream water right, in practice the project will essentially operate as an instream flow right for the lower two miles of Rudio Creek.<sup>354</sup>

Although this project is unique and site-specific (like most water projects), for the Freshwater Trust and Campbell Crossing, it was hard to find a downside.<sup>355</sup> Rudio Creek and the John Day will become a model for habitat improvements, and Kevin Campbell received \$140,000 in compensation, along with the added benefit of improving irrigation

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<sup>348</sup> *Transaction Proposal Form, supra* note 344.

<sup>349</sup> *Id.*

<sup>350</sup> Telephone Interview, *supra* note 343.

<sup>351</sup> *Transaction Proposal Form, supra* note 344.

<sup>352</sup> Telephone Interview, *supra* note 343.

<sup>353</sup> *Transaction Proposal Form, supra* note 344.

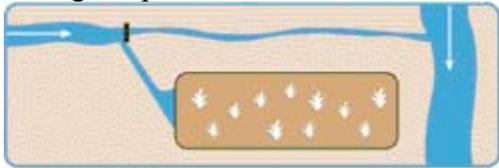
<sup>354</sup> *Id.*

<sup>355</sup> Telephone Interview, *supra* note 343.

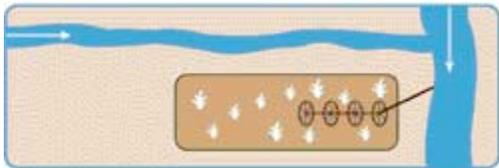
efficiency on the ranch, which was a goal of his for the last few years.<sup>356</sup> There were many funding partners for this project, including the Columbia Basin Water Transactions Program, the Oregon Watershed Enhancement Board, and the Wild Salmon Center.<sup>357</sup>

**Rudio Creek Simple Project Model:<sup>358</sup>**

Change in point of diversion from tributary stream to main river



*Old point of diversion*



*New point of diversion*

Diagrams by Oregon Water Resources Department

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<sup>356</sup> *Id.*

<sup>357</sup> *Id.* For background information on the Columbia Basin Water Transactions Program, see Appendix 7, *infra.*

<sup>358</sup> *Oregon's Flow Restoration Toolbox, supra* note 291.

## APPENDIX FIVE: INSTREAM FLOWS IN WASHINGTON

Washington is a “dualistic” water state,<sup>359</sup> possessing both prior-appropriation and riparian<sup>360</sup> aspects. In 1917, the Washington Legislature passed the State Water Code,<sup>361</sup> which established prior appropriation as the exclusive means for creating new rights to surface water in Washington State,<sup>362</sup> and also established a centralized permitting system and procedures for adjudicating existing water rights.<sup>363</sup> Riparian rights that were recognized prior to the enactment of the 1917 State Water Code and put to a beneficial use before December 31, 1932 are still recognized.<sup>364</sup>

The State of Washington began enacting legislation concerning minimum stream flows in 1949,<sup>365</sup> mainly for the protection of salmon and steelhead trout fisheries.<sup>366</sup> In 1949, the Washington Legislature amended the Fisheries Code to allow the Washington State Department of Ecology (“Ecology”) to protect fish habitat by attaching a “condition” to new water rights (whereby diversion is curtailed when streamflow falls below a specified level).<sup>367</sup> Ecology is a state environmental regulatory agency with a director (also the administrative and executive head) who is appointed by the governor

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<sup>359</sup> Kenneth O. Slattery and Robert F. Barwin, *Protecting Instream Resources in Washington State*, in *INSTREAM FLOW PROTECTION IN THE WEST*, REV. ED., 20-1, 20-2 (Lawrence J. MacDonnell and Teresa A. Rice, Eds., 1993).

<sup>360</sup> “The *riparian doctrine* of water law allows for the historic reasonable use of water on land adjacent to a water source. The priority of water rights established under the riparian doctrine was based on the date action was first taken to separate the land from federal ownership. In times of water shortage under the riparian doctrine, all users were to curtail their water uses proportionally.” Wash. St. Dept. of Ecology, *Washington Water Law, a Primer*, (2006), <http://www.ecy.wa.gov/pubs/98152.pdf>.

<sup>361</sup> Now codified as WASH. REV. CODE § 90.03 (2011).

<sup>362</sup> SASHA CHARNEY, *DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES* 125 (JULY 2005).

<sup>363</sup> *Water Law, a Primer*, *supra* note 360.

<sup>364</sup> *Id.*

<sup>364</sup> CHARNEY, *supra* note 362; *see, e.g., Washington Water Law, a Primer*, *supra* note 360.

<sup>365</sup> Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. Denv. Water L. Rev. 177, 182 (1998).

<sup>366</sup> Slattery and Barwin, *supra* note 359 at 20-1.

<sup>367</sup> Wash. Env. Council, *Instream Flow Toolkit*, 10 (2003), <http://wecprotects.org/issues-campaigns/water-for-washington/streamtoolkit.pdf>; *see, e.g., Slattery and Barwin, supra*, note 359 at 20-3.

and approved by the Senate.<sup>368</sup> Ecology is the entity vested with the exclusive authority to “establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state.”<sup>369</sup> No other entity or person may establish or hold instream flow rights.<sup>370</sup> The current (and rather comprehensive) statutory laws governing the instream flow process are found in the Revised Code of Washington (RCW), Chapter 90 (2011). There are three pieces of legislation that became the current statutory scheme relating to instream flows in Washington: the 1967 Minimum Water Flows and Levels Act,<sup>371</sup> the 1971 Water Resources Act,<sup>372</sup> and the 1991 Water Resources Management Act.<sup>373</sup>

The 1967 Minimum Water Flows and Levels Act provided that the Washington State Department of Ecology may establish minimum flows by administrative rule,<sup>374</sup> acting under its own volition or by the recommendation of the Department of Fish and Wildlife.<sup>375</sup> The 1967 Act is codified in RCW, Section 90.22 (2011), which outlines the current procedures for establishing minimum flows by rule.<sup>376</sup> The Department of Ecology may establish minimum stream flows 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.”<sup>377</sup> Ecology may

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<sup>368</sup> WASH. REV. CODE § 43.21A.050 (2011); *see generally*, Wash. St. Dept. of Ecology, *Homepage*, <http://www.ecy.wa.gov/> (last visited Feb. 27, 2011).

<sup>369</sup> WASH. REV. CODE § 90.03.247 (2011).

<sup>370</sup> *Id.*

<sup>371</sup> Now codified as WASH. REV. CODE §§ 90.22 (2011).

<sup>372</sup> WASH. REV. CODE § 90.54 (2011).

<sup>373</sup> *See generally*, *Washington Water Law, a Primer*, *supra* note 360.

<sup>374</sup> Ecology is vested with rulemaking power as per its statutory mandate: WASH. REV. CODE § 43.21A.064 (2011).

<sup>375</sup> WASH. REV. CODE § 90.22.010 (2011); *see also*, *Washington Water Law, a Primer*, *supra* note 360.

<sup>376</sup> WASH. REV. CODE § 90.22.010-060 (2011).

<sup>377</sup> WASH. REV. CODE § 90.22.010 (2011).

also establish a minimum stream flow to protect water quality.<sup>378</sup> In fact, the state of Washington recognizes a wide variety of water uses as beneficial:

domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.<sup>379</sup>

Before establishing or modifying minimum stream flows, Ecology must hold a public hearing and post notice by publication (in the county in which the affected stream is located).<sup>380</sup> The notice must include: “1) The name of each stream, lake, or other water source under consideration; 2) The place and time of the hearing; [and] 3) A statement that any person, including any private citizen or public official, may present his or her views either orally or in writing.”<sup>381</sup> Notice of the hearing must be given to the departments of health, social services, natural resources, fish and wildlife, and transportation.<sup>382</sup> When stream flows are established by rule, the priority date is thirty days after the date of rule adoption.<sup>383</sup> An instream flow in Washington set by rule functions within the established prior-appropriation system. The new instream flow right does not affect existing surface water or storage rights, but water rights issued after the rule adoption are junior to the instream flow right in priority.<sup>384</sup> All minimum stream flow levels set by Ecology are filed in the “Minimum Water Level and Flow Register.”<sup>385</sup>

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<sup>378</sup> *Id.*

<sup>379</sup> WASH. REV. CODE § 90.54.020 (2011).

<sup>380</sup> WASH. REV. CODE § 90.22.020 (2011).

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> Wash. St. Dept. of Ecology, *Instream Flow Laws and Rules*, <http://www.ecy.wa.gov/programs/wr/instream-flows/isfrul.html> (last visited Feb. 27, 2011).

<sup>384</sup> WASH. REV. CODE § 90.22.030 (2011); *see, e.g., Instream Flow Laws and Rules*, *supra* note 383.

<sup>385</sup> WASH. REV. CODE § 90.22.030 (2011).

## I. The Watershed Planning Process

The Water Resources Act of 1971 was codified in RCW Chapter 90.54 (2011), and recognized that a comprehensive state planning process was necessary to meet the competing water needs of Washington State.<sup>386</sup> The Act mandated Ecology to engage in water resources data collection,<sup>387</sup> as well as pilot the development and management of comprehensive basin plans, or Water Resource Inventory Areas (WRIAs).<sup>388</sup> The legislature declared that, “through comprehensive planning, conflicts among water users and interests can be reduced or resolved.”<sup>389</sup> As a result of the WRIA planning process, the state of Washington is now divided into 62 watersheds,<sup>390</sup> five of which can be monitored online.<sup>391</sup> The WRIA process allows local citizens and local governments to join together with state agencies and tribal groups to form planning units to develop watershed management plans for their respective basins.<sup>392</sup>

WRIA planning units may set instream flows (sometimes called “baseflows”), in collaboration with the Department of Ecology.<sup>393</sup> This involves setting minimum instream flow levels basin-wide before issuing any new water rights. The stakeholders convene to assess each WRIA's water supply and use, and recommend strategies for satisfying minimum instream flows and other water supply needs.<sup>394</sup> This statewide planning process addresses all beneficial uses of water in each basin, including instream

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<sup>386</sup> WASH. REV. CODE § 90.54.010 (2011).

<sup>387</sup> WASH. REV. CODE § 90.54.030(1) (2011).

<sup>388</sup> WASH. REV. CODE § 90.54.045 (2011); *see also*, Wash. St. Dept. of Ecology, *Water Resource Inventory Area (WRIA) Maps*, <http://www.ecy.wa.gov/services/gis/maps/wria/wria.htm> (last visited Feb. 27, 2011) (providing background information and map of WRIA areas in the state).

<sup>389</sup> WASH. REV. CODE § 90.54.010 (2011).

<sup>390</sup> WASH. ADMIN. CODE § 173-500-040 (2010).

<sup>391</sup> Wash. St. Dept. of Ecology, *Instream Flow Data*, [http://www.ecy.wa.gov/programs/wr/instream-flows/irpp\\_wrp.html](http://www.ecy.wa.gov/programs/wr/instream-flows/irpp_wrp.html) (last visited Feb. 27, 2011).

<sup>392</sup> WASH. REV. CODE § 90.54.010 (2011).

<sup>393</sup> *Washington Water Law, a Primer*, *supra* note 360.

<sup>394</sup> *Id.*

flows.<sup>395</sup> The legislature supplied funding to support these local planning efforts.<sup>396</sup> RCW Chapter 90.54 (2011) states that base flows must be maintained in the state’s rivers and streams to “provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values,” and only when “overriding considerations of the public interest” are present can a withdrawal of water conflict with that purpose.<sup>397</sup> If data is lacking to make sufficient planning decisions, Ecology is given the authority to “set aside” certain waters in a particular basin, preventing additional appropriations until better data becomes available.<sup>398</sup> RCW Chapter 90.54 (2011) also states that Washington officially recognizes the interrelationship between groundwater and surface water (known as hydraulic continuity).<sup>399</sup>

The Watershed planning process was further refined in the 1997 Watershed Planning Act,<sup>400</sup> which designated a more precisely defined process for local groups to conduct watershed planning, receive agency assistance, and receive grant funding for WRIA formation and management.<sup>401</sup>

## **II. Water Markets, Water Banks, and the Trust Water Rights Program**

Ecology has three programs to implement an active water market: the Trust Water Rights Program, the Water Acquisition Program, and Water Banking.<sup>402</sup> However, the Trust Water Rights Program is the central facilitation mechanism for both the Water

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<sup>395</sup> Slattery and Barwin, *supra* note 359 at 20-4.

<sup>396</sup> WASH. REV. CODE §§ 90.54.035, 060 (2011).

<sup>397</sup> WASH. REV. CODE § 90.54.020 (2011).

<sup>398</sup> WASH. REV. CODE § 90.54.050 (2011).

<sup>399</sup> “Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.” WASH. REV. CODE § 90.54.020 (2011).

<sup>400</sup> WASH. REV. CODE § 90.82 (2011).

<sup>401</sup> *Id.*

<sup>402</sup> Wash. St. Dept. of Ecology, *Water Market*, <http://www.ecy.wa.gov/programs/wr/market/market.html> (last visited Feb. 27, 2011).

Banking and Water Acquisition programs.<sup>403</sup> The Washington Legislature established the Trust Water Rights program as part of the Water Resources Management Act of 1991.<sup>404</sup> The initial focus was to increase stream flow in 16 watersheds in Washington that were experiencing chronic water shortages.<sup>405</sup> A Water Bank was created along with the Trust Program as a means to “facilitate the voluntary transfer of water rights established through conservation, purchase, lease, or donation...and to achieve a variety of water resource management objectives throughout the state,” including improving streamflows.<sup>406</sup> Water-right holders who participate in the Trust Program can sell, lease or donate all or part of their water right to the state,<sup>407</sup> on a temporary or permanent basis.<sup>408</sup> People who donate water rights to the Trust Program may specify that the rights be used for instream flow purposes,<sup>409</sup> and may receive a federal tax deduction for doing so.<sup>410</sup>

Water rights acquired through the Trust program are managed by the Department of Ecology, which holds the rights in trust and may use them for instream flows, irrigation, municipal, or other “beneficial uses consistent with applicable regional plans...or to resolve critical water supply problems.”<sup>411</sup> Before establishing a Trust water right, Ecology must post a general notice in the applicable county’s newspaper, as well as give direct notice to the appropriate state agencies, local governments, and tribal

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<sup>403</sup> WASH. REV. CODE § 90.42.100 (2011); *see also*, Wash. Dept. of Ecology, *Trust Water Rights Program*, <http://www.ecy.wa.gov/programs/wr/market/trust.html> (last visited Feb. 27, 2011).

<sup>404</sup> WASH. REV. CODE § 90.42.005 (2011).

<sup>405</sup> Wash. St. Dept. of Ecology, *Washington Water Acquisition Program Strategy*, <http://www.ecy.wa.gov/programs/wr/instream-flows/wacqstra.html> (last visited Feb. 27, 2011).

<sup>406</sup> WASH. REV. CODE § 90.42.005 (2011).

<sup>407</sup> *Id.*

<sup>408</sup> WASH. REV. CODE § 90.42.080(3) (2011).

<sup>409</sup> CHARNEY, *supra* note 362 at 126.

<sup>410</sup> WASH. REV. CODE § 90.42.080(7) (2011).

<sup>411</sup> WASH. REV. CODE § 90.42.040(1) (2011).

governments affected.<sup>412</sup> For shorter-term transactions, Ecology is allowed to use its website and/or email to publish proper notice.<sup>413</sup> Before exercising a Trust right (acquired for more than a five year period), Ecology must ensure that neither existing water rights nor the public interest are harmed.<sup>414</sup> If injury is present, Ecology will alter the right to eliminate the impairment.<sup>415</sup> For permanent Trust Water Rights, Ecology issues a water right certificate in the name of Washington State, which includes quantity, reach of stream intended for the place of use, and the use type.<sup>416</sup> For non-permanent conveyances, Ecology issues a certificate or other instrument reflecting change of use information, such as place of use or point of diversion.<sup>417</sup> Trust water rights retain the priority date from the originating water right,<sup>418</sup> and the trust water right is considered as “exercised” while it is in the Trust program.<sup>419</sup> Trust water rights are not subject to relinquishment for nonuse.<sup>420</sup> If a water right is leased to the Trust Water Rights Program, the amount available for use by the state is limited to the historic consumptive use, calculated using the five years directly preceding the lease; nor may the lease result in enlargement of the underlying water right.<sup>421</sup>

The State may also provide financial assistance to a water right holder for the expense of implementing conservation measures, with the requirement that, in exchange for the state funding, the water right holder convey the “conserved” portion of their water

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<sup>412</sup> WASH. REV. CODE § 90.42.040(5) (2011).

<sup>413</sup> *Id.*

<sup>414</sup> WASH. REV. CODE § 90.42.040(4)(a) (2011); WASH. REV. CODE § 90.42.040(8) (2011).

<sup>415</sup> WASH. REV. CODE § 90.42.080(4) (2011).

<sup>416</sup> WASH. REV. CODE § 90.42.040(2) (2011).

<sup>417</sup> *Id.*

<sup>418</sup> WASH. REV. CODE § 90.42.040(3) (2011).

<sup>419</sup> WASH. REV. CODE § 90.42.040(4)(c) (2011).

<sup>420</sup> WASH. REV. CODE § 90.42.040(6) (2011).

<sup>421</sup> WASH. REV. CODE § 90.42.080(8) (2011).

right to the Trust Water Rights program.<sup>422</sup> Ecology issues a water right certificate, as well as a “superseding” certificate that specifies the amount of water the water right holder is still entitled to use after the conservation project.<sup>423</sup>

### **III. Project Example: Salmon Creek**

Salmon Creek is a tributary of the Okanogan River, located in north central Washington’s and southern British Columbia’s vast Okanogan Basin (part of the Columbia River system).<sup>424</sup> The Okanogan Basin is home to the ten thousand acre Okanogan Irrigation District (OID), as well as a Bureau of Reclamation (BOR) dam and diversion system to provide water for its users and their hayfields, pasture, and fruit orchards.<sup>425</sup> The Okanogan River Basin is also critical ESA-listed salmon and steelhead habitat.<sup>426</sup> Salmon Creek is typically dry during the irrigation season, preventing migration for salmon and steelhead species.<sup>427</sup>

Endangered Species concerns combined with limited water supplies in the basin led to a conflict between the Confederated Tribes of the Colville Reservation, the Okanogan Irrigation District, and the Bureau of Reclamation.<sup>428</sup> Litigation seemed imminent until the parties, along with the Washington Water Trust (WWT),<sup>429</sup> facilitated a solution: a memorandum of agreement between the parties that was signed in 2006, and

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<sup>422</sup> WASH. REV. CODE § 90.42.030 (2011); *see also*, CHARNEY, *supra* note 362 at 126.

<sup>423</sup> WASH. REV. CODE § 90.42.040(2) (2011).

<sup>424</sup> Columbia Basin Water Transactions Program, *Stories From The Field*, <http://www.cbwtp.org/jsp/cbwtp/stories/stories.jsp> (last visited Feb. 26, 2011).

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> Telephone Interview with Greg McLaughlin, Project Manager, Washington Water Trust (Feb. 25, 2011).

<sup>429</sup> The Washington Water Trust was established in 1998, and works to improve and protect stream flows and water quality throughout Washington using market-based transactions and cooperative partnerships. Washington Water Trust, <http://washingtonwatertrust.org/> (last visited Feb. 26, 2011).

a long term water leasing arrangement.<sup>430</sup> The WWT requested funding through the Columbia Basin Water Transactions Program (CBWTP) in 2006 for a temporary out-of-court solution to the problem.<sup>431</sup> The WWT started working with the OID to obtain non-diversionary agreements for 2007 and 2008 (because many of the users in the OID were initially distrustful of Washington’s Trust Water Rights program), while WWT worked on a long-term solution to the issue.<sup>432</sup> This “pilot agreement” between OID and WWT restored flows of 25 cubic feet per second (about 700 acre-feet, or “af”) during steelhead spawning season in spring and early summer.<sup>433</sup> This project reconnected the Okanogan River with pristine summer steelhead habitat above the OID diversion point for a 4.6 mile stretch that has been dry (except during spring runoff) since the 1930s.<sup>434</sup>

However, there was a problem: if OID continued to do non-diversion agreements every year, they were in danger of losing their water rights by Washington’s forfeiture statute. But because of the success of the short-term agreements, and some negotiations between the WWT, the OID, and the Bureau of Reclamation, a long-term solution was finally reached to sustain the 700af flow enhancement in Salmon Creek until 2018.<sup>435</sup> The long-term project was funded 75% through CBWTP and 25% through the Department of Ecology, with the Bureau of Reclamation providing an additional 500af of water under a cost share plan to bring the project total to 1200af and 30cfs.<sup>436</sup> The new agreement is funneled through Washington’s Trust Water Rights program, resulting in a win-win situation for the OID, the Tribe, the BOR, the WWT, and the ESA-listed salmon

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<sup>430</sup> Telephone Interview, *supra* note 428.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Stories From The Field*, *supra* note 424.

<sup>434</sup> Washington Water Trust, *Salmon Creek*, <http://washingtonwatertrust.org/projects/salmon-creek> (last visited Feb. 27, 2011).

<sup>435</sup> Telephone Interview, *supra* note 428.

<sup>436</sup> *Id.*

and steelhead.<sup>437</sup> The OID received a payment of about \$800,000 for the lease and can still provide irrigation water to their members, the BOR is relieved from a Section 7 consultation under the Endangered Species Act, the Tribe can protect their rights without having to initiate litigation, and the salmon can re-populate areas where they historically had habitat.<sup>438</sup>

Finally, there is a lease-to-purchase clause written into the lease, whereby WWT can apply lease payments already made to any future permanent purchase acquisition with OID, should the district choose to sell the water right.<sup>439</sup> Because of the legal protections of the Trust Water Rights program and the initiative of the parties involved, a workable non-litigation solution was reached in Washington for the protection of two ESA-listed species.



Picture of Okanogan Basin by Wikipedia

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<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

## APPENDIX SIX: INSTREAM FLOWS IN WYOMING

Wyoming is a prior appropriation state, and the waters within its boundaries are declared property of the state, as recognized by the Wyoming Constitution.<sup>440</sup> Wyoming operates on a permit system, administered through the State Board of Control (BOC). The State Engineer (a governor-appointed position) is designated as the president of the Board of Control.<sup>441</sup>

Wyoming recognizes the following uses of water as a beneficial use: domestic, stockwatering, transportation, steam power plant, hot water heating plant, ice manufacture, industrial, municipal, and irrigation.<sup>442</sup> Wyoming also recognizes the storage of water “for the purpose of providing a recreational pool or the release of water for instream flows to establish or maintain new or existing fisheries” as a beneficial use of water.<sup>443</sup> The appropriation of unappropriated waters (on a case-by-case basis and approved by the State Engineer) to maintain or improve fisheries, as long as it doesn’t injure other water users in the state, is declared a beneficial use.<sup>444</sup> Wyoming allows water for “existing rights not preferred” to be condemned to supply water for preferred uses, with certain limitations.<sup>445</sup> Designated aesthetic and recreational uses are not considered a beneficial use under the current law, only the use of sustaining fisheries is allowed (but other public values may be protected by default).

In Wyoming, water rights “for the direct use of the natural unstored flow of any stream cannot be detached from the lands, place or purpose for which they are

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<sup>440</sup> Wyo. Const. Art. VIII § 1, 3 (2011); e.g., Bureau of Land Management, *Western States Water Laws*, <http://www.blm.gov/nstc/WaterLaws/wyoming.html> (last visited Feb. 28, 2011).

<sup>441</sup> Wyo. Const. Art. VIII, § 5 (2011)

<sup>442</sup> WYO. STAT. ANN. § 41-3-102 (2011).

<sup>443</sup> WYO. STAT. ANN. § 41-3-1001(a) (2011).

<sup>444</sup> WYO. STAT. ANN. § 41-3-1001(b) (2011).

<sup>445</sup> WYO. STAT. ANN. § 41-3-102 (2011).

acquired,<sup>446</sup> except in a few specific circumstances, such as when the Board of Control deems “a preferred use is to be made,” and/or the proper change of use procedures are followed.<sup>447</sup> In Wyoming, the water right is “attached to and defined by the place of use, not the point of diversion.”<sup>448</sup> Additionally, Wyoming limits each permit allotment “for the direct use of the natural unstored flow of any stream” to one (1) cubic foot per second (cfs) for each seventy (70) acres of land.<sup>449</sup>

The Wyoming instream flow program was enacted by statute in 1986.<sup>450</sup> It is codified in Title 41, Section 3, Subsections 1001-1014 of the Wyoming Statutes, 2011. Wyoming allows for the use of unappropriated water and/or storage water for an instream flow purpose to establish, maintain, or improve fisheries.<sup>451</sup> The flow available is limited to the minimum amount necessary for the fisheries purpose, and is confined to the designated reach of stream granted.<sup>452</sup> The Wyoming Water Development Commission (“Commission”) is responsible for filing applications for permits to appropriate water for instream flows in the State’s name.<sup>453</sup> Once the water has been allocated to and passes through its instream location, it becomes available for “reappropriation, diversion, and beneficial use” downstream.<sup>454</sup>

Wyoming also allows the conversion of existing water rights to an instream flow purpose, but the rights may only be acquired by the State, by transfer or gift, and can only

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<sup>446</sup> WYO. STAT. ANN. § 41-3-101 (2011).

<sup>447</sup> WYO. STAT. ANN. § 41-3-103 (2011).

<sup>448</sup> *Western States Water Laws*, *supra* note 440.

<sup>449</sup> WYO. STAT. ANN. § 41-4-317 (2011).

<sup>450</sup> Pat Tyrell, Green River Basin Plan, *Instream Flows in Wyoming*, (2001).[http://waterplan.state.wy.us/plan/green/techmemos/instream\\_lores.pdf](http://waterplan.state.wy.us/plan/green/techmemos/instream_lores.pdf).

<sup>451</sup> WYO. STAT. ANN. § 41-3-1001(a),(b) (2011).

<sup>452</sup> WYO. STAT. ANN. §§ 41-3-1001(c),(d), -1002 (2011).

<sup>453</sup> WYO. STAT. ANN. § 41-3-1003 (2011).

<sup>454</sup> WYO. STAT. ANN. § 41-3-1002(b) (2011).

be held or owned by the State.<sup>455</sup> The original owner must comply with the Change of Use requirements, and the Game and Fish Commission is responsible for filing the change of use petition for this purpose.<sup>456</sup> The intended change of use to an instream flow must not interfere with or impair existing rights.<sup>457</sup> The original priority date is transferred to and preserved in the new instream flow use.<sup>458</sup> Once changed to an instream flow purpose, the right may subsequently be conveyed, sold, or transferred to another purpose (as long as the owner complies with the change of use proceedings<sup>459</sup> and the BOC holds the required public hearing).<sup>460</sup>

The Game and Fish Commission is responsible for 1) constructing measuring devices for the administration of an instream flow right, 2) reporting to the Commission annually those stream segments that Game and Fish considers to have the most critical need for instream flows, 3) identifying the stream reaches (beginning and end points) as well as time of year and minimum amount of water necessary for the recommended reaches, 4) filing change of use applications in the name of the State for the recommended reaches (for transfer of existing rights only), and 5) paying fees and costs of the Commission associated with permit applications and adjudication of water rights.<sup>461</sup>

The Wyoming Water Development Commission is responsible for 1) filing applications for permits to appropriate water for instream flows based on the

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<sup>455</sup> WYO. STAT. ANN. § 41-3-1007(e) (2011).

<sup>456</sup> WYO. STAT. ANN. § 41-3-1007 (2011).

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> WYO. STAT. ANN. § 41-3-104 (2011).

<sup>460</sup> WYO. STAT. ANN. § 41-3-1002(c) (2011).

<sup>461</sup> WYO. STAT. ANN. § 41-3-1003 (2010).

recommendations of Game and Fish,<sup>462</sup> 2) conducting a feasibility study for recommended stream segments from unappropriated waters or storage facilities, which shall include “a determination of [the amount of] water necessary to maintain or improve existing fisheries” or to establish fisheries.<sup>463</sup> Finally, the Commission is required to make a report of its findings to Game and Fish and the Legislature.<sup>464</sup>

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<sup>462</sup> WYO. STAT. ANN. § 41-3-1003(c) (2010).

<sup>463</sup> WYO. STAT. ANN. § 41-3-1004 (2010).

<sup>464</sup> *Id.*

## APPENDIX SEVEN: COLUMBIA BASIN WATER TRANSACTIONS PROGRAM

Since 2002, the Columbia Basin Water Transactions Program (CBWTP) has worked to restore streamflows and habitat using voluntary water acquisitions, leases, and efficiency programs in Washington, Oregon, Idaho, and Montana.<sup>465</sup> The program is managed by the National Fish and Wildlife Foundation, with the majority of funding from the Bonneville Power Association (BPA) and the Northwest Power and Conservation Council.<sup>466</sup> The Bonneville Power Association is the U.S. Department of Energy agency that manages dams on the Columbia River System.<sup>467</sup>

The Program was started in 2001, when BPA issued a request for help with implementing an operations plan formulated under the National Marine Fisheries Service's (NMFS) 2000 Biological Opinion on the Operation of the Federal Columbia River Power System.<sup>468</sup> The National Fish and Wildlife Foundation (NFWF) was selected as the regional entity for the CBWTP, and the NFWF accessed their established Pacific Northwest Regional Office to develop partnerships with federal and nonfederal entities as part of the CBWTP.<sup>469</sup> This regional office "currently manages over 250 projects in the Northwest worth over \$35 million."<sup>470</sup>

According to its website, the CBWTP "works with qualified local and state program partners [called "Qualified Local Entities" or QLEs] who join with irrigation

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<sup>465</sup> Columbia Basin Water Transactions Program, *Overview*, <http://www.cbwtp.org/jsp/cbwtp/program.jsp> (last visited Feb. 28, 2011).

<sup>466</sup> *Id.*

<sup>467</sup> ROBERT GEROME GLENNON, UNQUENCHABLE: AMERICA'S WATER CRISIS AND WHAT TO DO ABOUT IT 289-90 (2009).

<sup>468</sup> Columbia Basin Water Transactions Program, *Program History*, <http://www.cbwtp.org/jsp/cbwtp/program/history.jsp> (last visited Feb. 28, 2011).

<sup>469</sup> *Id.*

<sup>470</sup> *Id.*

districts, landowners, producers and others on projects to enhance stream flows.”<sup>471</sup> QLEs can submit proposals for water transactions at any time to the Program.<sup>472</sup> NFWF “receives, evaluates, and ranks innovative water proposals submitted by local entities, and facilitates the implementation of projects and individual water transactions with funding from BPA, NFWF and other sources.”<sup>473</sup> NFWF makes funding recommendations on the proposals and obtains BPA approval to fund projects.<sup>474</sup> NFWF ensures effective implementation of funded projects and compliance with the National Environmental Policy Act, and also “develops outreach information, issues transaction solicitations,” and approves QLEs.<sup>475</sup>

The Columbia Basin Water Transactions Program is an important funding source for water banks, water markets, and instream flow project implementations in Oregon, Washington, Idaho, and Montana. Without this source, it is likely that many of the successful instream flow transactions in these states would not otherwise be possible.

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<sup>471</sup> Columbia Basin Water Transactions Program, *Partners*, <http://www.cbwtp.org/jsp/cbwtp/program/partners.jsp> (last visited Feb. 28, 2011).

<sup>472</sup> Columbia Basin Water Transactions Program, *Applying for Funds*, <http://www.cbwtp.org/jsp/cbwtp/program/apply.jsp> (last visited Feb. 28, 2011).

<sup>473</sup> *Program History*, *supra* note 468.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*