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Left in the Dust: Wyoming's Instream Flow Laws from a Mountain West Perspective

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COMMENT

**Left in the Dust: Wyoming's Instream Flow Laws
from a Mountain West Perspective**

*Allison E. Connell**

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I. INTRODUCTION

“Water is the lifeblood of Wyoming. If you restrict water, you restrict economic development. Tying up water for instream flows stagnates Wyoming!”¹ Such was the forceful opposition of Sublette County Representative Dan Budd to a bill introduced during the 1985 legislative session that would

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¹ Matthew Reynolds, *Wyoming's New Instream Flow Act: An Administrative Quagmire*, 21 LAND & WATER L. REV. 455, 461 (1986).

allow for instream flow rights.² However, one year later, Wyoming passed the Instream Flow Act, creating limited instream flow rights within the state.³ On a fundamental level, instream flow refers to water flowing within a stream channel.⁴ Instream flow rights are the legal methods of protecting water in streams.⁵

Over thirty years after Dan Budd's strong resistance to instream flow rights, water remains the lifeblood of the state, but keeping water in streams can hardly be said to stagnate Wyoming.⁶ Rivers and streams benefit the tourism and outdoor recreation economy and protect and enhance riparian environments.⁷ Society increasingly recognizes the economic benefits of outdoor recreation, and water-related recreational activity is rising.⁸ Wyoming rivers contribute to the thriving tourism and outdoor recreation economy—the second-largest economic sector in the state—and support valuable fisheries.⁹ Fishing contributes to the outdoor recreation economy, which brought \$5.6 billion in consumer spending to Wyoming in 2016.¹⁰ Environmentally, instream flows maintain populations of endangered fish, enrich riparian areas and wetlands, and create vital habitat for animals.¹¹ Scientists continue to expand their understanding of the role that stream

² *Id.* at 460–61. “Instream flow” commonly refers to water flowing within a stream channel. DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 1 (1997). Instream flow rights prevent subsequent appropriators from diverting water within or above the protected segment during the specified time if such a withdrawal would lower the amount of available water below the protected amount. *Id.* at 165.

³ Reynolds, *supra* note 1, at 458–61; WYO. STAT. ANN. §§ 41-3-1001 to -1014 (Supp. 1986).

⁴ GILLILAN & BROWN, *supra* note 2, at 1.

⁵ *Instream Flow Information*, WYO. GAME & FISH DEP'T, <https://wgfd.wyo.gov/Fishing-and-Boating/Instream-Flow-XStream-Angler>.

⁶ *See infra* notes 7–11.

⁷ GILLILAN & BROWN, *supra* note 2, at 61 (noting that recreationists spend money on lodging, transportation, food, equipment, licenses, stamps, tags, permits, and more); *see also* *INSTREAM FLOW PROTECTION IN THE WEST*, at 1-3 to 1-4 (Lawrence J. MacDonnell et al. eds., rev. ed. 1993) (discussing the environmental benefits of instream flows).

⁸ OUTDOOR INDUS. ASS'N, *THE OUTDOOR RECREATION ECONOMY* 17 (2017), https://outdoor-industry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf; ERO RES. CORP. & WWC ENGINEERING, *GREEN RIVER BASIN PLAN II: FUTURE RECREATION AND ENVIRONMENTAL WATER USE PROJECTIONS* 3 (Oct. 2009), http://waterplan.state.wy.us/plan/green/2010/techmemos/GRB_Rec-Env_Use.pdf.

⁹ *See More About: Instream Flow Filings*, WYO. WATER DEV. COMM'N, http://wwdc.state.wy.us/instream_flows/instream_flows_about.html [hereinafter *Instream Flow Filings*]; Christine Peterson, *New Numbers Show Outdoor Rec is Economic Force in Wyoming*, CASPER STAR TRIB. (July 29, 2017), http://trib.com/lifestyles/recreation/new-numbers-show-outdoor-rec-is-economic-force-in-wyoming/article_fe813cc5-53ef-50f2-92d0-d434a0f129c6.html; LAWRENCE J. MACDONNELL, *ENHANCING STREAM FLOWS IN WYOMING: FINAL REPORT* 5 (2011) [hereinafter *MACDONNELL REPORT*], https://www.uwyo.edu/owpl/_files/project30finalreport.pdf.

¹⁰ *See Instream Flow Filings*, *supra* note 9; Peterson, *supra* note 9.

¹¹ *INSTREAM FLOW PROTECTION IN THE WEST*, *supra* note 7, at 1-3 to 1-4.

flows play in maintaining healthy fish habitat and riparian vegetation.¹² Despite these realities, Wyoming's instream flow laws have not changed significantly in the past twenty years.¹³

At the beginning of its statehood, Wyoming's water laws set it apart as a pioneer and innovator and served as an example for other western states.¹⁴ This Comment considers the instream flow laws of other Mountain West states and suggests changes to Wyoming's laws to once more bring the state to the forefront of western water law. Part II briefly describes the history and current state of Wyoming water law and instream flow law.¹⁵ Part III compares features of instream flow laws in Colorado, Idaho, Montana, and Utah.¹⁶ The features considered are: (1) who can hold an instream water right; (2) for which purposes such a right can be used; (3) how the right can be acquired; and (4) when, if at all, the right is subject to time limitations.¹⁷ Finally, Part IV recommends changes that Wyoming should implement to allow for flexibility and encourage development of instream flow rights. Part IV also provides draft statutory language options to implement these changes, serving as a menu of options for the Legislature.¹⁸

II. WYOMING INSTREAM FLOW LAWS

A. *Historical Background*

Western water law has a rich history, and Wyoming played a trailblazing role as it transitioned from territory to state.¹⁹ As in much of the west, the doctrine

¹² Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335, 378–79 (2011) [hereinafter MacDonnell, *Environmental Flows*].

¹³ See Cynthia F. Covell et al., *Update to a Survey of State Instream Flow Programs in the Western United States*, 20 U. DENV. WATER L. REV. 355, 363 (2017) (“Over the last two decades, the legislature rejected many attempts to allow instream flows for other uses. The legislature also rejected attempts to allow water right holders to temporarily dedicate water to instream flow purposes.”).

¹⁴ CRAIG O. COOPER, A HISTORY OF WATER LAW, WATER RIGHTS & WATER DEVELOPMENT IN WYOMING 1868–2002, at 4 (2004), http://wwdc.state.wy.us/history/Wyoming_Water_Law_History.pdf.

¹⁵ See *infra* notes 19–43 and accompanying text.

¹⁶ See *infra* notes 44–156 and accompanying text.

¹⁷ See *infra* notes 44–156 and accompanying text.

¹⁸ See *infra* notes 157–209 and accompanying text. This Comment provides several legislative options, that can be taken either in whole or in part, because the Legislature has resisted changes to these laws for over two decades. See *supra* note 13 and accompanying text.

¹⁹ Lawrence J. MacDonnell, *The Development of Wyoming Water Law*, 14 WYO. L. REV. 327, 331–35 (2014) [hereinafter MacDonnell, *Development of Wyoming Water Law*] (noting that the 1888 Wyoming Territorial Legislature established much of Wyoming's basic water law, and those provisions were “considerably more advanced than those adopted in most other western states at that time.”). The Wyoming State Constitution expresses the state's strong interest in managing

of prior appropriation has governed water rights in Wyoming since statehood.²⁰ Elwood Mead substantially influenced Wyoming's early water laws prior to the twentieth century.²¹ Mead developed an unprecedented system that emphasized ownership of water by the State, and added a layer of governmental control to the doctrine of prior appropriation through the first-ever administrative water adjudication system.²² Under Mead's system, a prospective appropriator had to go through a permitting process, and only when an application was approved could an appropriator begin development of the proposed diversion.²³ The permit established a time frame for a potential appropriator to complete a diversion and put the water to "beneficial use" to secure the right.²⁴ In 1909, the Wyoming State Legislature (Legislature) enumerated preferred uses of water, which included domestic and stock drinking water, municipal purposes, steam engines, railway use, domestic needs, and irrigation.²⁵ Wyoming's early water laws also included the innovation of abandonment, which penalized users with the loss of their rights if they failed to use water beneficially for two consecutive years.²⁶

water, and also declares all water to be the property of the state. WYO. CONST. art. I § 31; *id.* art. VIII. Furthermore, Wyoming was the first state to require a permit prior to appropriating water. MacDonnell, *Development of Wyoming Water Law*, *supra* note 19, at 335.

²⁰ WYO. CONST. art. I; *id.* art. VIII. "Prior appropriation" is a system of water management in which an appropriation—a property right to use water—is obtained by applying unappropriated water from a natural stream to a beneficial use through the physical diversion or withdrawal of the water. BARTON H. THOMPSON, JR. ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 175 (6th ed. 2018). Beginning with Wyoming in 1890, many western states also require a permit, in addition to the physical diversion of water, to obtain an appropriation. *Id.* at 177. "Beneficial use" is a term of art with two elements: (1) the purpose for which the water is used, and (2) the amount of water used, which must not be wasteful. *Id.* at 271 (citing *State Dept. of Ecology v. Grimes*, 852 P.2d 1044 (Wash. 1993)).

²¹ See Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 269–71 (2015) [hereinafter MacDonnell, *Prior Appropriation*]. Elwood Mead was Wyoming's first territorial engineer. *Id.* at 269.

²² *Id.* at 269–72.

²³ *Id.* at 271–72. A prospective appropriator filed a water permit application with the State Engineer that specified the point of diversion, purpose for use, and place for use. *Id.*; Cooper, *supra* note 14, at 26. The State Engineer reviewed the application to make sure the appropriator provided all the information, determined the existence and amount of unappropriated water, and established whether or not the application would be detrimental to the public welfare. COOPER, *supra* note 14, at 27.

²⁴ MacDonnell, *Prior Appropriation*, *supra* note 21, at 272 (noting that the designated time frame established in the permit ensured that prospective appropriators diligently pursued actual water development).

²⁵ COOPER, *supra* note 14, at 39. For a current list of beneficial water uses in Wyoming, see *Recognized Beneficial Uses*, WYO. STATE ENGINEERS OFF., http://seo.wyo.gov/seo-files/Recognized_Beneficial_Uses.pdf (last visited Dec. 1, 2018).

²⁶ COOPER, *supra* note 14, at 16.

Prior to the 1986 Instream Flow Act, Wyoming's water laws made it impossible to permit water for an instream flow.²⁷ Pressure to pass an instream flow law began to build from Wyoming citizens in the 1970s, and proponents of the change immediately faced heavy resistance.²⁸ The Wyoming State Engineer opposed instream flow legislation due to a belief that instream uses would waste a scarce resource, and the Wyoming Farm Bureau argued that such legislation would prevent economic development.²⁹ After over a decade of studies and failed bills, legislators reached a compromise, and the Instream Flow Act passed in 1986, opening the door for instream flow water rights in Wyoming.³⁰

B. Current Instream Flow Laws

In Wyoming, only the State can hold an instream flow right, and such a right applies to a segment of a stream.³¹ Instream flows can only be used for the purposes of establishing, maintaining, or, in some cases, improving fisheries.³² Statutory law restricts the amount of instream flow to the "minimum flow necessary" to achieve these purposes.³³ For instream rights in natural streams, the law defines "minimum" as the amount necessary "to maintain or improve existing fisheries."³⁴ For instream rights that use stored water, the statute defines "minimum" as the amount "needed to establish or maintain new or existing fisheries."³⁵

The Wyoming Department of Game and Fish identifies potential instream flows.³⁶ The Wyoming Water Development Commission (WWDC) then chooses whether to file an application for an instream flow right with the State Engineer's Office.³⁷ Once the WWDC has filed an application, the State Engineer's Office

²⁷ See Reynolds, *supra* note 1, at 455. Prior to 1986, the law required an appropriator to physically divert water out of the stream to have a protected beneficial use. *Id.* An instream flow right kept water in the stream, and without a physical diversion, the requirements for a right under the doctrine of prior appropriation could not be satisfied. See *id.* Additionally, instream flows could not be permitted until the Legislature declared them a beneficial use, which it did in the 1986 Instream Flow Act. *Id.* at 455 n.6. See also *supra* notes 2–3 and accompanying text.

²⁸ Reynolds, *supra* note 1, at 458.

²⁹ *Id.* at 458–59.

³⁰ *Id.* at 458–61.

³¹ WYO. STAT. ANN. § 41-3-1002(a), (e) (2018).

³² *Id.* § 41-3-1001(a)–(b).

³³ *Id.* § 41-3-1001(c)–(d).

³⁴ Technical Memoranda from Pat Tyrell, States W. Water Res. Corp., to Wyo. Water Dev. Off. on the Green River Basin Plan: Instream Flows in Wyoming 1 (Apr. 21, 2001), http://waterplan.state.wy.us/plan/green/techmemos/instream_lores.pdf.

³⁵ *Id.*

³⁶ *Instream Flow Filings*, *supra* note 9.

³⁷ *Id.*

conducts a public hearing to present information and solicit public comment.³⁸ If the State Engineer's Office approves the instream flow right, the Board of Control adjudicates the right.³⁹ The State can also secure instream flow rights through the transfer or gift of an existing water right by petitioning for a change in use to turn it into an instream flow right.⁴⁰

In Wyoming, water rights are not subject to a time limit or expiration unless a permit holder does not use the water for five years, at which point abandonment proceedings may commence.⁴¹ Instream flow rights are not subject to abandonment proceedings, however, and are therefore *de facto* permanent once acquired.⁴²

III. INSTREAM FLOW LAWS OF MOUNTAIN WEST STATES⁴³

Wyoming shares with several of its neighbors not only the Rocky Mountains, but also the sporadic and incremental protection of instream flow.⁴⁴ Systems based upon prior appropriation, like those of the Mountain West states, tend to favor off-stream (consumptive) water uses over instream (nonconsumptive) uses.⁴⁵ The

³⁸ *Id.*

³⁹ *Id.* Adjudication of a water right is a "determination by the Board of Control that water has been and is being beneficially applied." See also *Adjudicate*, WYO. STATE ENG'RS OFF., <http://seo.wyo.gov/adjudication> (last visited Dec. 1, 2018). The adjudication finalizes the point of diversion location, priority date, and areas and rate of use. *Id.* Once a water right is adjudicated, the Board issues a Certificate of Appropriation. *Id.*

⁴⁰ See WYO. STAT. ANN. § 41-3-1007(a) (2018). A water right holder may change the current use to another type of beneficial use or change the place of use by filing a petition with the Board of Control requesting permission for such a change. JAMES J. JACOBS ET AL., UNIV. OF WYO. AGRIC. EXPERIMENT STATION, WYOMING WATER LAW: A SUMMARY 10 (Vicki Hamende ed., 2003), <http://www.wyomingextension.org/agpubs/pubs/B849r.pdf>.

⁴¹ WYO. STAT. ANN. §§ 41-3-401 to -402. Abandonment proceedings may be brought by any person who can benefit from a declaration of abandonment, who may be injured by the reactivation of the water right, or by the State Engineer. *Id.*

⁴² See WYO. STAT. ANN. § 41-3-1011 (2018).

⁴³ For purposes of this Comment, "Mountain West states" includes Colorado, Idaho, Montana, Utah, and Wyoming.

⁴⁴ GILLILAN & BROWN, *supra* note 2, at 132.

⁴⁵ See *id.* at 132–33. Consumptive use is a water use that permanently withdraws water from its source. JUSTICE GREGORY J. HOBBS JR., COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO WATER LAW 9 (Karla A. Brown, ed., 2d ed. 2004). Instream uses are nonconsumptive in that "water that flows through a protected reach is subsequently available for other uses." GILLILAN & BROWN, *supra* note 2, at 133.

following sub-sections describe the four features of instream flow laws introduced above, and compare how Colorado, Idaho, Montana, and Utah accommodate these features in their respective laws.⁴⁶ The descriptions provided below will inform the recommendations made in Part IV.⁴⁷

A. *Who Can Hold an Instream Flow Right?*

Unlike consumptive water use rights, instream flow rights are often subject to rules that restrict which entities can hold the right.⁴⁸ Colorado and Wyoming adopted restrictions due to fears that “lunatics” and “radicals” would appropriate all available water for instream flows.⁴⁹ In Wyoming, only the WWDC, on behalf of the State, can apply for and receive an instream flow right.⁵⁰ Similarly, only the Colorado Water Conservation Board (CWCB) may appropriate waters for instream flows in Colorado.⁵¹ Likewise, in Idaho, only the Idaho Water Resource Board (IWRB) may file for minimum flow rights, which fulfill the same purpose as instream flows.⁵² Unlike Wyoming, in Idaho, any person may petition the IWRB to pursue a minimum stream flow right.⁵³ In certain instances, the Idaho Legislature specifically authorizes and directs the IWRB to establish minimum flows.⁵⁴

In contrast, Montana allows any federal agency or any political subdivision or agency of the State to apply for and acquire an instream flow right.⁵⁵ Under Montana’s system, entities like the Department of Fish, Wildlife, and Parks (DFWP), the Department of Environmental Quality, and the federal Bureau of Land Management currently hold instream flow rights.⁵⁶ Montana is unique amongst Mountain West states for its broad inclusion of diverse entities that may hold an instream flow right.

⁴⁶ See *infra* notes 48–156 and accompanying text.

⁴⁷ See *infra* notes 48–156, 159–209 and accompanying text.

⁴⁸ See GILLILAN & BROWN, *supra* note 2, at 120–22. Some of the arguments for restricting who can hold instream flow rights include that instream uses provide a public benefit and should therefore be held by public agencies, public agency control of protection better enables coordination with other state water-use objectives, and public use of rivers and streams should be out of reach of private control and ownership. *Id.* at 120–23.

⁴⁹ *Id.* at 123.

⁵⁰ WYO. STAT. ANN. § 41-3-1002(e) (2018); *supra* note 31–41 and accompanying text.

⁵¹ COLO. REV. STAT. ANN. § 37-92-102(3) (2018).

⁵² See IDAHO CODE §§ 42-1502 to -1503 (2018).

⁵³ *Id.* § 42-1504.

⁵⁴ See *id.* §§ 42-1506 to -1507 (2018) (authorizing and establishing minimum stream flow appropriations on the Lemhi and Snake Rivers).

⁵⁵ MONT. CODE ANN. § 85-2-316(1) (2018).

⁵⁶ MacDonnell, *Environmental Flows*, *supra* note 12, at 360.

Finally, Utah allows two state agencies, the Division of Wildlife Resources (UDWR) and the Division of Parks and Recreation (UDPR), to hold an instream flow right.⁵⁷ As of 2008, Utah stands out as the first and only Mountain West state to allow non-governmental organizations to hold instream flow rights.⁵⁸ In 2008, the Utah Legislature passed a bill that allows “fishing groups” to secure limited instream flow rights.⁵⁹ Utah law defines fishing groups as non-profits that “promote . . . fishing opportunities in the state.”⁶⁰ In 2016, Trout Unlimited became the first fishing group to secure an instream flow under this legislation.⁶¹

In sum, Montana stands out for its willingness to allow multiple agencies and divisions of government to apply for an instream flow right, and Utah broke new ground when it allowed non-governmental organizations to hold instream flow rights.⁶² Wyoming, Colorado, and Idaho restrict these rights to the state alone.⁶³

B. What Purposes Does the Right Serve?

Wyoming’s laws only allow for the appropriation of instream flows for fisheries.⁶⁴ Water stored for instream flows can be used to establish or maintain new or existing fisheries, while instream flows in natural streams can be used to maintain or improve only existing fisheries.⁶⁵ The Wyoming Department of Game and Fish’s policy focuses on popular fisheries and streams located on public land.⁶⁶

Colorado’s original 1973 instream flow program initially authorized instream flows as required to preserve the natural environment to a reasonable degree, and was later amended to limit those appropriations to minimum stream

⁵⁷ UTAH CODE ANN. § 73-3-30 (1)(a), (2) (2018).

⁵⁸ See MacDonnell, *Environmental Flows*, *supra* note 12, at 372.

⁵⁹ *Id.* at 372 n.187; UTAH CODE ANN. § 73-3-30(3) (2018).

⁶⁰ UTAH CODE ANN. § 73-3-30(1)(b) (2018).

⁶¹ Paul Burnett, *Utah Approves TU’s First In-Stream Flow Lease*, TROUT UNLIMITED BLOG (Dec. 14, 2016), <https://www.tu.org/blog-posts/utah-approves-tus-first-in-stream-flow-lease>. Trout Unlimited explained the significant time gap between the statutory change and its first use as follows: “Our in-stream flow lease didn’t happen overnight. It was the result of a long-term effort working with water users on the lower Weber River to protect and restore this incredibly valuable home river for thousands of anglers.” *Id.*

⁶² See *supra* notes 55–61 and accompanying text.

⁶³ See *supra* notes 48–54 and accompanying text.

⁶⁴ See *supra* note 32 and accompanying text.

⁶⁵ WYO. STAT. ANN. § 41-3-1001 (2018); see *supra* note 32–33 and accompanying text.

⁶⁶ MacDonnell, *Environmental Flows*, *supra* note 12, at 374.

flows.⁶⁷ However, in 2002, the Colorado Legislature removed the “minimum stream flow” language and replaced it with the current language that authorizes amounts the CWCB determines to be appropriate.⁶⁸ The 2002 legislation also gave the CWCB the authority to appropriate water to “improve” the natural environment.⁶⁹ In addition to allowing instream flows in quantities to improve, rather than just maintain, the environment, Colorado recently took steps to keep water in streams to protect recreational rights through recreational in-channel diversions (RICDs).⁷⁰ In 2001, the Colorado State Legislature passed legislation that added “recreational in-channel diversion” to the definition of “beneficial use,” and gave counties, municipalities, and water districts the right to obtain RICDs.⁷¹ Colorado is the only state to create such a right.⁷² Although not technically instream flow designations, RICDs are “essentially instream flow rights,” because, while the purpose of RICDs is to allow the building and operation of whitewater parks, the effect is to keep water in streams between specific points.⁷³

Hydrologically richer than any other state in the Mountain West, Idaho boasts 90,000 miles of waterways, and protects a wider variety of instream flow purposes than any other Mountain West state.⁷⁴ The IWRB can require minimum flows for protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation, and water quality.⁷⁵ Notably, Idaho is the only state in the Mountain West to include aesthetic beauty as a beneficial use in its instream flow laws.⁷⁶

⁶⁷ Zach Smith, *Making Colorado's Rivers a (Senior) Priority*, 20 U. DENV. WATER L. REV. 369, 380–81 (2017).

⁶⁸ *Id.*; see also COLO. REV. STAT. ANN. § 37-92-102(3) (2018).

⁶⁹ Smith, *supra* note 67, at 381; see also COLO. REV. STAT. ANN. § 37-92-102(3) (2018). This statutory change affected negotiations regarding a water right donation that was ongoing at the time. Smith, *supra* note 67, at 381–82. CWCB had been offered a donation of a fifteen cubic feet per second (cfs) water right, but the amount necessary to maintain the natural environment of the donation area was between 2.5 and 6.6 cfs. *Id.* at 381. Prior to the 2002 law, the statute required CWCB to reject the water right above the calculated level. *Id.* at 381–82. The 2002 law passed before the donation was finalized, and CWCB accepted the entire fifteen cfs donation. *Id.*

⁷⁰ Reed Benson, *Protecting River Flows for Fun and Profit: Colorado's Unique Water Rights for Whitewater Parks*, 42 ECO. L.Q. 753, 754 (2015).

⁷¹ *Id.* at 769–70.

⁷² *Id.* at 783.

⁷³ *Id.* at 754. For a full description and analysis of RICDs, and to learn about “playboating,” which is unfortunately outside of the scope of this Comment, see Benson, *supra* note 70, at 754.

⁷⁴ MacDonnell, *Environmental Flows*, *supra* note 12, at 354; see also *supra* notes 64–73 and accompanying text; *infra* notes 75–87 and accompanying text.

⁷⁵ IDAHO CODE § 42-1501 (2018).

⁷⁶ *Id.*; see also *supra* notes 64–75 and accompanying text; *infra* notes 77–87 and accompanying text.

Montana law currently allows any political division to reserve water for instream, as well as off-stream, beneficial uses.⁷⁷ Montana law defines “beneficial use” as any use for the benefit of the appropriator or the public, including recreation,⁷⁸ fish and wildlife, protection, maintenance, or enhancement of fisheries,⁷⁹ and maintenance of a minimum flow, level, or quality of water.⁸⁰ Montana law also protects twelve “blue ribbon” trout streams “for the preservation of fish and wildlife habitat.”⁸¹ These twelve designations, termed “Murphy rights” after the principal bill’s sponsor, were created during the brief period between 1969 and 1973.⁸² The statute authorizing these rights was repealed in 1973, but the appropriations remain valid and have not yet been challenged.⁸³

Utah also recognizes more purposes for instream flow designations than Wyoming.⁸⁴ In Utah, the State can seek a water right for the propagation of fish, public recreation, and reasonable preservation or enhancement of the natural stream environment.⁸⁵ While the State of Utah can hold an instream flow right for a variety of purposes, fishing groups are more restricted under the innovative 2008 law discussed above.⁸⁶ Qualifying fishing groups may only change an existing consumptive water right to an instream flow right to protect or restore habitat for three native trout species: Bonneville cutthroat, Colorado River cutthroat, and Yellowstone cutthroat.⁸⁷

Overall, the Mountain West states recognize a wide range of uses for instream flows.⁸⁸ Idaho identifies the most purposes for which flows may be kept in streams, and stands alone as the only state to consider aesthetic beauty to be a sufficient purpose for instream flows.⁸⁹ Colorado applies instream flow for

⁷⁷ MONT. CODE ANN. § 85-2-316(1) (2018); Matthew J. McKinney, *Instream Flow Policy in Montana: A History and Blueprint for the Future*, 11 PUB. LAND L. REV. 81, 87 (1990) (discussing how Montana law uses the term “reserve,” but the effect is to keep water inside a river or stream, essentially, an instream flow).

⁷⁸ McKinney, *supra* note 77, at 87.

⁷⁹ MONT. CODE ANN. § 85-2-102(4) (2018).

⁸⁰ MONT. CODE ANN. § 85-2-316.

⁸¹ McKinney, *supra*, note 77, at 86.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *supra* notes 64–66, and accompanying text; *infra* notes 85–87 and accompanying text.

⁸⁵ UTAH CODE ANN. § 73-3-30(2)(a) (2018).

⁸⁶ UTAH CODE ANN. § 73-3-30(2)(a), (3)(a) (2018); see also *supra* notes 58–61 and accompanying text.

⁸⁷ UTAH CODE ANN. § 73-3-30(3)(a).

⁸⁸ See *supra* notes 64–87 and accompanying text.

⁸⁹ See *supra* notes 74–76 and accompanying text.

general environmental purposes and recreation, though under a different name.⁹⁰ Montana and Utah both recognize recreation, fisheries, and natural environment or water quality as beneficial uses.⁹¹ All of these states go well beyond Wyoming's exclusive focus on fisheries.⁹²

C. *How is the Right Acquired?*

As discussed in Part II of this Comment, in order to create an instream flow right in Wyoming, the WWDC may file a claim on unappropriated water, or acquire existing water rights by a transfer or gift and file for a change in use, just like any other appropriator.⁹³ Similarly, Colorado law allows the CWCB to obtain an instream flow right by appropriating available (unappropriated) water, or by receiving existing water rights through purchase or donation.⁹⁴ But, in addition to these methods, the CWCB can lease or contract for existing rights, and accept temporary loans of agricultural water rights in order to respond to droughts.⁹⁵ Importantly, Colorado law protects parties who lease, contract, or temporarily loan their water right to the CWCB from losing that right under the abandonment doctrine.⁹⁶ In Colorado, a water right is abandoned only if the appropriator fails to apply the water to a beneficial use for ten or more years and intends to abandon the right.⁹⁷ Leasing a water right to the CWCB precludes a finding of intent to abandon the right, thereby protecting right-holders despite the nonconsumptive use of their water.⁹⁸

Idaho law allows the IWRB to file for unappropriated water to be used for instream flows, and includes a provision for any person to petition the IWRB to file for a minimum flow right.⁹⁹ In addition to this straightforward method of acquiring instream flow rights, the Idaho Legislature has established specific instream flows through statute or general stream adjudication.¹⁰⁰ Voluntary leases and agreements not to divert through the Columbia Basin Water Transactions

⁹⁰ See *supra* notes 67–73 and accompanying text.

⁹¹ See *supra* notes 77–87 and accompanying text.

⁹² See *supra* notes 89–91 and accompanying text.

⁹³ WYO. STAT. ANN. §§ 41-3-1001(b) to -1007 (2018).

⁹⁴ See MacDonnell, *Environmental Flows*, *supra* note 12, at 347, 350.

⁹⁵ *Id.* at 350.

⁹⁶ *Id.*

⁹⁷ COLO. REV. STAT. ANN. § 37-92-402(11) (2018); *E. Twin Lakes Ditches & Water Works, Inc. v. Bd. of Cty. Comm'rs*, 76 P.3d 918, 921 (2003).

⁹⁸ See COLO. REV. STAT. ANN. § 37-92-103(2)(b).

⁹⁹ IDAHO CODE § 42-1504 (2018).

¹⁰⁰ See MacDonnell, *Environmental Flows*, *supra* note 12, at 354–55, 358.

Program also keep water in streams.¹⁰¹ This program is unique among the Mountain West states because it is a multi-state effort in the Columbia River Basin to help restore threatened anadromous fisheries.¹⁰² Idaho also uses “water banks” to supply water for instream flows.¹⁰³ Water banks allow right holders to lease water to the Water Supply Bank, protecting their right from forfeiture.¹⁰⁴ Banked water then becomes available for lease to the IWRB or Bureau of Reclamation, and can be used to enhance stream flows (but only where the State has already established minimum flows).¹⁰⁵

In addition to allowing governmental agencies to file for a minimum flow reservation just like any other appropriation, Montana cautiously began a leasing program in 1989.¹⁰⁶ Originally limited to four streams, the leasing program has since expanded to more streams.¹⁰⁷ The program also grew to allow private parties to lease water for instream use.¹⁰⁸ Instream flows can be acquired through a temporary or permanent change of use, though only the DFWP and the Forest Service are authorized to permanently change a right to instream flow use.¹⁰⁹

Utah stands alone in its failure to allow for appropriation of unappropriated water to create a new right for instream flow use.¹¹⁰ Instream flows can only be acquired through a temporary or permanent change in use of appropriated water.¹¹¹ The two state agencies, UDWR and UDPR, are allowed to either change a donated right to instream use, or to purchase existing rights with specifically appropriated funds and then change the use.¹¹² Fishing groups are

¹⁰¹ See *id.* at 356.

¹⁰² *Id.*

¹⁰³ *Id.* at 357–58.

¹⁰⁴ Dylan Lawrence, *Idaho's Water Supply Bank: More Than Just a Marketplace for Water*, 54 *ADVOCATE* 22, 22 (2011).

¹⁰⁵ LEON F. SZEPTYCKI ET AL., *ENVIRONMENTAL WATER RIGHTS TRANSFERS: A REVIEW OF STATE LAWS* 30–31 (2015).

¹⁰⁶ MacDonnell, *Environmental Flows*, *supra* note 12, at 362.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The leasing program allows consumptive-use rights-holders to lease their water to a private entity for the purpose of instream flows. *Id.* In the first ten years of the program, twenty private leases were approved. Press Release, Trout Unlimited, Report: Montana's Private Water Leasing Program Has Benefited Fisheries and Agriculture Alike (Dec. 13, 2004) [hereinafter Trout Unlimited Report], https://www.tu.org/press_releases/2004/report-montanas-private-water-leasing-program-has-benefited-fisheries-and-agricu. For more details on the benefits of Montana's private leasing law, see *id.*

¹⁰⁹ MacDonnell, *Environmental Flows*, *supra* note 12, at 362.

¹¹⁰ See *id.* at 371; see *supra* notes 93–109 and accompanying text.

¹¹¹ See UTAH CODE ANN. § 73-3-30 (2018).

¹¹² See *id.*; MacDonnell, *Environmental Flows*, *supra* note 12, at 371–72.

limited to changing an existing water right to instream flow, and may not acquire unappropriated water for instream flows.¹¹³

From the flexible methods of Colorado, Idaho, and Montana, to Utah's severely restricted actions, instream flow designation processes vary widely among these Mountain West states.¹¹⁴ Wyoming presently sits much closer to the constrained position of Utah.¹¹⁵

D. When Does the Right Expire?

Wyoming's laws presently contain no time limit or sunset clause for instream flow rights.¹¹⁶ But, just like any consumptive right-holder in Wyoming, the State can choose to sell, transfer, or otherwise convey the right for any purpose.¹¹⁷ Wyoming's neighbors have taken different approaches when it comes to limiting the duration of instream flow designations.¹¹⁸ Colorado laws provide multiple temporal options for instream flows.¹¹⁹ Instream rights acquired by the CWCB are permanent, just like traditional, consumptive rights.¹²⁰ Leases entered into by the CWCB, though not permanent, can be made for short- or long-terms.¹²¹ The State can also enter into short-term loans that specifically facilitate instream flows capable of responding to drought.¹²²

Idaho mirrors portions of both Wyoming and Colorado law.¹²³ IWRB instream flow rights are equivalent to the consumptive rights of other appropriators, as in Wyoming, but the State can also enter into leases that have previously ranged from seasonal to ten years.¹²⁴ When using agreements not to

¹¹³ See UTAH CODE ANN. § 73-3-30(1)(a), (2); MacDonnell, *Environmental Flows*, *supra* note 12, at 372 n.187.

¹¹⁴ See *supra* notes 93–113 and accompanying text.

¹¹⁵ See *supra* notes 93, 110–12 and accompanying text.

¹¹⁶ See *supra* note 42 and accompanying text.

¹¹⁷ WYO. STAT. ANN. § 41-3-1002(c) (2018).

¹¹⁸ See *infra* notes 119–35 and accompanying text.

¹¹⁹ See Smith, *supra* note 67, at 372.

¹²⁰ DAN MERRIMAN & ANNE M. JANICKI, COLO. WATER CONSERVATION BD., COLORADO'S INSTREAM FLOW PROGRAM: HOW IT WORKS AND WHY IT'S GOOD FOR COLORADO 5 (2005), http://hermes.cde.state.co.us/drupal/islandora/object/co%3A3559/datastream/OBJ/download/Colorado_s_Instream_Flow_Program___how_it_works_and_why_it_s_good_for_Colorado.pdf.

¹²¹ See Smith, *supra* note 67, at 372.

¹²² MacDonnell, *Environmental Flows*, *supra* note 12, at 350.

¹²³ See *supra* notes 118–22 and accompanying text.

¹²⁴ See MacDonnell, *Environmental Flows*, *supra* note 12, at 356.

divert water out of the stream to achieve minimum instream flows, Idaho allows durations to vary from one year to thirty years.¹²⁵ When the Idaho Department of Water Resources leases out water from a water bank, the lease term can only be temporary, and is usually for less than five years to avoid the formal change-in-use review process.¹²⁶

In contrast, Montana's minimum flow reservations must be reviewed every ten years to determine if the designation meets objectives.¹²⁷ Upon a determination, the Board of Natural Resource and Conservation can extend, revoke, or modify the reservation.¹²⁸ Private leases by individuals for instream flow rights are limited to ten-year terms, and may be renewed without limitation.¹²⁹ Utah similarly limits its fishing groups to ten-year temporary leases.¹³⁰ The State of Utah faces no such limitation, however, and may file for temporary or permanent changes of use for instream flows.¹³¹

Among the states under consideration, Montana is distinctive for its review of designated instream flow rights.¹³² All other states treat these rights the same as consumptive rights, which are not subject to time limitations.¹³³ Both Montana and Utah allow a temporary change in use to instream flow.¹³⁴ Colorado, Idaho, and Montana have codified leasing programs, which give authorized entities broad flexibility to temporarily apply water that would otherwise be used consumptively to instream flow uses.¹³⁵ Wyoming simply treats instream flow designations like any other right, and does not have a mechanism for review or allow designation of temporary instream flow use.¹³⁶

The chart on the next page briefly summarizes the four features of instream flow laws in Mountain West states.

¹²⁵ *Id.*

¹²⁶ SZEPTYCKI ET AL., *supra* note 105, at 31.

¹²⁷ MONT. CODE ANN. § 85-2-316(10) (2018).

¹²⁸ McKinney, *supra* note 77, at 88.

¹²⁹ John J. Ferguson et al., *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1, 6 (2006).

¹³⁰ MacDonnell, *Environmental Flows*, *supra* note 12, at 372.

¹³¹ UTAH CODE ANN. § 73-3-30; MacDonnell, *Environmental Flows*, *supra* note 12, at 371.

¹³² *See supra* notes 116–31 and accompanying text.

¹³³ *Id.*

¹³⁴ *See supra* notes 126–30 and accompanying text.

¹³⁵ *See supra* notes 119–24 and accompanying text.

¹³⁶ *See supra* notes 116–17 and accompanying text.

State	Who Can Hold an Instream Flow Right	What Purposes Instream Flow Rights Serve	How Instream Flow Rights are Acquired	When or If Instream Flow Rights Expire
Colorado	Colorado Water Resource Board; counties, municipalities, and water districts can hold RICDs. ¹³⁷	Preservation and improvement of the natural environment; recreation (through RICDs). ¹³⁸	Appropriation of unappropriated water; purchase or donation of existing water right; lease of existing water right. ¹³⁹	No limit on appropriated or acquired rights; temporary leases of varying lengths. ¹⁴⁰
Idaho	Idaho Water Resource Board. ¹⁴¹	Protection of fish & wildlife habitat; aquatic life; aesthetic beauty; transportation & navigation; water quality. ¹⁴²	Appropriation of unappropriated water; legislative designation; general stream adjudication; lease of existing water right. ¹⁴³	No limit on appropriated or acquired rights; temporary leases of varying lengths. ¹⁴⁴
Montana	State of Montana, any political division or agency of the state; any federal agency. ¹⁴⁵	Recreation, protection of fish and wildlife and their habitat; maintenance or enhancement of fisheries; minimum flow, level, or quality of water. ¹⁴⁶	Appropriation of unappropriated water; lease of existing water right; change in use of existing water right. ¹⁴⁷	Review of instream flow rights every ten years. ¹⁴⁸
Utah	Division of Water Resources; Division of Parks and Recreation; fishing groups. ¹⁴⁹	Propagation of fish; public recreation; preservation or enhancement of natural stream environment. ¹⁵⁰	Change in use of existing water right. ¹⁵¹	Permanent or temporary changes in use; fishing groups limited to ten-year leases. ¹⁵²
Wyoming	Wyoming Water Development Commission. ¹⁵³	Establishment or maintenance of new and existing fisheries; maintenance or improvement of existing fisheries. ¹⁵⁴	Appropriation of unappropriated water; purchase or transfer of existing water right; change in use of existing water right. ¹⁵⁵	No limit on appropriated or acquired rights. ¹⁵⁶

IV. WHAT WYOMING SHOULD BORROW FROM ITS NEIGHBORS

Wyoming's neighboring Mountain West states have adopted a broad array of instream flow law features.¹⁵⁷ While its neighbors experimented with expansions and changes to their instream flow laws, Wyoming has continued under laws that have changed little since their inception.¹⁵⁸ This Comment recommends changes to Wyoming's instream flow laws for two reasons. First, economic studies have shown that instream flows can be quite valuable.¹⁵⁹ Americans spend over \$175 billion on fishing and water sports annually.¹⁶⁰ Idaho, Montana, Utah, and Wyoming all earn millions of dollars in tax revenue from outdoor recreation that relies on healthy public lands and waterways.¹⁶¹ Colorado alone receives \$2 billion in state and local tax revenue from outdoor recreation.¹⁶² Second, keeping water flowing in streams can protect and enrich aquatic life and riparian

¹³⁷ See *supra* notes 51, 71–72 and accompanying text.

¹³⁸ See *supra* notes 67–73 and accompanying text.

¹³⁹ See *supra* notes 94–98 and accompanying text.

¹⁴⁰ See *supra* notes 119–22 and accompanying text.

¹⁴¹ See *supra* note 52 and accompanying text.

¹⁴² See *supra* notes 74–76 and accompanying text.

¹⁴³ See *supra* notes 99–105 and accompanying text.

¹⁴⁴ See *supra* notes 123–26 and accompanying text.

¹⁴⁵ See *supra* notes 55–56 and accompanying text.

¹⁴⁶ See *supra* notes 77–83 and accompanying text.

¹⁴⁷ See *supra* notes 106–09 and accompanying text.

¹⁴⁸ See *supra* notes 127–29 and accompanying text.

¹⁴⁹ See *supra* notes 57–61 and accompanying text.

¹⁵⁰ See *supra* notes 84–87 and accompanying text.

¹⁵¹ See *supra* notes 110–13 and accompanying text.

¹⁵² See *supra* notes 130–31 and accompanying text.

¹⁵³ See *supra* note 50 and accompanying text.

¹⁵⁴ See *supra* notes 32, 64–66 and accompanying text.

¹⁵⁵ See *supra* notes 93 and accompanying text.

¹⁵⁶ See *supra* notes 116–17 and accompanying text.

¹⁵⁷ See *supra* notes 48–135 and accompanying text.

¹⁵⁸ See Covell, *supra* note 13, at 363.

¹⁵⁹ JONATHAN PLATT, U.S. DEP'T OF INTERIOR & BUREAU OF RECLAMATION, ECONOMIC NONMARKET VALUATION OF INSTREAM FLOWS 43 (2001), <https://www.usbr.gov/tsc/techreferences/economics/Flowpaper1.pdf>.

¹⁶⁰ THE OUTDOOR RECREATION ECONOMY, *supra* note 8.

¹⁶¹ See *Outdoor Recreation Economy Map*, OUTDOOR INDUS. ASS'N (2017), <https://outdoor-industry.org/advocacy/> (last visited Dec. 1, 2018) (state information viewable after selecting the state on the map).

¹⁶² *Id.*

environments.¹⁶³ Instream flows help to maintain populations of endangered fish species, create vital habitat for animals, and are essential for wetlands.¹⁶⁴ Flowing water also facilitates sediment transport, protecting against and mitigating flooding, erosion, and vegetation encroachment.¹⁶⁵ Wyoming should support, protect, and enhance its waterways—an unparalleled source of tourism, revenue, and environmental protection.

Furthermore, Wyoming should ease restrictions on which entities may hold an instream flow right,¹⁶⁶ expand the purposes for which such a right may be used,¹⁶⁷ allow more methods of acquiring an instream flow right,¹⁶⁸ and implement time limitations on those rights.¹⁶⁹ The following recommendations reflect these notions, and provide a variety of legislative options for Wyoming to update its instream flow laws.¹⁷⁰ The following proposed statutory language gives legislators several choices: to support and adopt individual recommendations, to combine several of the recommendations, or to adopt all of the recommendations together. The descriptions of Colorado, Idaho, Montana, and Utah laws discussed in Part III provide the basis for these recommendations, and draft legislative language accompanies each proposal so that supporters and legislators have a variety of options.¹⁷¹ In the draft language, the underlined text indicates words and sections to be added to the current statute, and the stricken text indicates portions of the current statutory language that should be deleted.

A. Ease Restrictions on Who Can Hold an Instream Flow Right

1. Allow Individuals and Other Entities to Petition the Game and Fish

Wyoming should allow individuals to petition the Game and Fish to consider specific segment designations, similar to Idaho. Currently, the Wyoming Game and Fish focuses instream flow designations only on popular sport fisheries and streams on public land.¹⁷² Allowing individuals to recommend particular stream segments for instream flow rights could increase these designations beyond the boundaries of sport fisheries and public lands, expanding the economic and environmental benefits of such rights.

¹⁶³ See *INSTREAM FLOW PROTECTION IN THE WEST*, *supra* note 7, at 1-3 to 1-4.

¹⁶⁴ *Id.* at 1-3.

¹⁶⁵ *Id.* at 1-3 to 1-4.

¹⁶⁶ See *infra* notes 173–86 and accompanying text.

¹⁶⁷ See *infra* notes 187–97 and accompanying text.

¹⁶⁸ See *infra* notes 198–202 and accompanying text.

¹⁶⁹ See *infra* notes 203–09 and accompanying text.

¹⁷⁰ See *infra* notes 173–212 and accompanying text.

¹⁷¹ See *supra* notes 45–156 and accompanying text.

¹⁷² MacDonnell, *Environmental Flows*, *supra* note 12, at 374.

Draft statutory language to allow individuals to petition the Game and Fish:

§ 41-3-1003. Game and fish commission; construction of measuring devices; recommendations; permits; fees and costs¹⁷³

(a) The game and fish commission shall construct any measuring device the state engineer considers necessary for the administration of an instream flow right.

(b) The state game and fish commission may report to the water development commission annually those specific segments of stream which the game and fish commission considers to have the most critical need for instream flows. Any person, association, municipality, county, state or federal agency may, in writing, request the game and fish to consider the appropriation of an instream flow right of the unappropriated waters of any stream.

(c) The entity seeking an instream flow appropriation game and fish commission shall identify the points on the stream at which the need for instream flows begins and ends, the time of year when the flows are most critical and a detailed description of the minimum amount of water necessary to provide adequate instream flows.

(d)(e) The water development commission shall file applications in the name of the state of Wyoming for permits to appropriate water for instream flows in those segments of stream recommended by the game and fish commission. The state engineer shall not grant any permits to appropriate or store water for instream flows prior to the completion of the study provided by W.S. 41-3-1004 or prior to the hearing required by W.S. 41-3-1006. Fees and costs of the commission associated with permit applications and adjudication of water rights shall be borne by the game and fish commission.

2. *Allow Fishing Groups to Acquire Instream Flow Rights*

Utah's program that allows non-profits to acquire instream flow rights is unique, and focuses on native trout.¹⁷⁴ Wyoming already focuses its instream designations on popular fisheries.¹⁷⁵ In segments of streams with instream flow

¹⁷³ IDAHO CODE § 42-1504 serves as the model for the suggested changes.

¹⁷⁴ See MacDonnell, *Environmental Flows*, *supra* note 12, at 372.

¹⁷⁵ *Id.* at 374.

protections, brown and rainbow trout populations increased tremendously.¹⁷⁶ Knowing that instream flows boost fish populations, Wyoming should allow groups with vested interests in sport fish to acquire instream flow rights.¹⁷⁷

While allowing entities other than the State to hold instream flow rights might stoke fears of all unappropriated water being appropriated for instream flows, these concerns are unfounded.¹⁷⁸ Barriers exist to prevent all available water from being used for instream flows, including an administrative application procedure that must consider public comment, and the cost of the application processes.¹⁷⁹ In fact, easing the restrictions on who may hold instream flows is unlikely to harm existing users.¹⁸⁰ Senior right-holders and junior downstream appropriators would not be affected by an instream flow right.¹⁸¹ Junior upstream appropriators may be required to refrain from diverting water until the senior instream flow right was fulfilled, just as they would be required to do if the senior right was a traditional off-stream use.¹⁸² In fact, permitting groups like Trout Unlimited to hold instream flow rights could benefit many users—instream flows benefit boaters and recreationists, as well as the 41% of Wyoming residents who fish annually.¹⁸³

Draft statutory language to allow fishing groups to acquire an instream flow right:

§ 41-3-1002. Instream flows to be by stream segment; waters for instream flows may be sold, transferred or otherwise conveyed under certain restrictions; ownership restricted¹⁸⁴

(a) As used in this section: “fishing group” means an organization that:

(i) is exempt from taxation under Section 501(c)(3), Internal Revenue Code; and

(ii) promotes fishing opportunities in the state.

¹⁷⁶ Tom Annear, *X-Stream Fishing. . . on Pine Creek*, WYO. WILDLIFE NEWS, https://wgfd.wyo.gov/WGFD/media/content/PDF/Fishing/XSA/XSA_PINECRKPINEDALE.pdf (last visited Nov. 24, 2018) (describing how, on Pine Creek, the brown trout population more than tripled, and rainbow trout populations “increased even more dramatically” after the instream flow designation).

¹⁷⁷ For instance, Trout Unlimited has been working in Wyoming to identify fisheries for improvement. See MACDONNELL REPORT, *supra* note 9, at 7.

¹⁷⁸ GILLILAN & BROWN, *supra* note 2, at 123–24.

¹⁷⁹ MacDonnell, *Environmental Flows*, *supra* note 12, at 339–40.

¹⁸⁰ GILLILAN & BROWN, *supra* note 2, at 166 tbl. 7.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *Instream Flow Filings*, *supra* note 9.

¹⁸⁴ UTAH CODE ANN. § 73-3-30 (2018) serves as the model for the suggested changes.

(b) ~~(a)~~ All waters used for the purpose of providing instream flows shall be applied only to that segment of the stream for which they are granted. The stream segment and the determination of a minimum amount of water required for instream flow purposes shall be defined specifically.

(c) ~~(b)~~ After waters allowed for instream flows have passed through the specific stream segment, all rights to those instream flow waters are relinquished, and the water shall be available for reappropriation, diversion and beneficial use.

(d) ~~(c)~~ Storage water appropriated for the purpose of providing instream flows in specified stream segments or existing water rights which are converted to instream flow under provisions of W.S. 41-3-1007 of this act may later be sold, transferred or otherwise conveyed to any other purpose pursuant to the requirements of W.S. 41-3-104, except that the board of control shall require that an advertised public hearing be held.

(e) ~~(d)~~ Any person may divert and appropriate, as provided by law, instream flow waters for any beneficial use other than for instream flows at the following places:

(i) Within one (1) mile upstream from any point where the instream flows cross the Wyoming state line;

(ii) Within one (1) mile upstream from any point where the instream flows enter the main stem of the North Platte River;

(iii) Within one (1) mile upstream from any point where the instream flows enter the Big Horn Lake;

(iv) Within one (1) mile upstream from any point where the instream flows enter the Flaming Gorge Reservoir;

(v) Within one (1) mile upstream from any point where the instream flows enter the Palisades Reservoir;

(f) ~~(e)~~ No person entity other than the state of Wyoming or a fishing group shall own any instream flow water right.

§ 41-3-1003. Game and fish commission; construction of measuring devices; recommendations; permits; fees and costs¹⁸⁵

(a) The game and fish commission shall construct any measuring device the state engineer considers necessary for the administration of an instream flow right.

(b) The state game and fish commission may report to the water development commission annually those specific segments of stream which the game and fish commission considers to have the most critical need for instream flows.

~~(c) The entity seeking an instream flow appropriation game and fish commission shall identify the points on the stream at which the need for instream flows begins and ends, the time of year when the flows are most critical and a detailed description of the minimum amount of water necessary to provide adequate instream flows.~~

~~(d)(c) If the game and fish seeks instream flow appropriations,~~
~~the water development commission shall file applications in the name of the state of Wyoming for permits to appropriate water for instream flows in those segments of stream recommended by the game and fish commission. The state engineer shall not grant any permits to appropriate or store water for instream flows prior to the completion of the study provided by W.S. 41-3-1004 or prior to the hearing required by W.S. 41-3-1006. Fees and costs of the commission associated with permit applications and adjudication of water rights shall be borne by the game and fish commission.~~

~~(e) If a fishing group seeks instream flow appropriations, the fishing group shall file applications in its name for permits to appropriate water for instream flow. The state engineer shall not grant any permits to appropriate or store water for instream flows prior to the completion of the study provided by W.S. 41-3-1004 or prior to the hearing required by W.S. 41-3-1006. Fees and costs of the commission associated with permit applications and adjudication of water rights shall be borne by the fishing group.~~

¹⁸⁵ IDAHO CODE § 42-1504 (2018) serves as the model for the suggested changes.

§ 41-3-1004. Water development commission to determine storage feasibility; report to the game and fish commission and the legislature

(a) Immediately after permits have been applied for under W.S. 41-3-1003~~(c)~~(d) or (e), the water development commission shall determine the feasibility of providing instream flows for the recommended segments of streams from unappropriated direct flows or from existing storage facilities or from new facilities. The feasibility study shall include a determination of water necessary to maintain or improve existing fisheries for water rights under W.S. 41-3-1001(a) or (b). or of water necessary to provide fisheries for water rights under W.S. 41-3-1001(a). The feasibility study shall also include the availability of storage sites, the estimated cost of providing any required storage and such other findings and conclusions as the water development commission deems appropriate. The cost of any consultant and any associated costs that the water development commission determines are necessary to complete a feasibility study under this section shall be borne by the game and fish commission if the permit was applied for under W.S. 41-3-1003(d), and by the fishing group if the permit was applied for under W.S. 41-3-1003(e). The water development commission shall consult with the relevant entity under W.S. 41-3-1003(d) or (e) ~~game and fish commission~~ prior to entering into any contract related to a feasibility study under this section.

(b) The water development commission shall make a report to the relevant entity under W.S. 41-3-1003(d) or (e) ~~game and fish commission~~ and the legislature outlining the commission's findings.

(c) Repealed by Laws 1987, ch. 50, § 2.

§ 41-3-1006. Appropriation of unappropriated waters for direct instream flows

(a) Any application for a permit to appropriate direct flow waters for the purpose of providing instream flows shall be by stream segment, as defined in W.S. 41-3-1002.

(b) If the water development commission, under W.S. 41-3-1004, determines that storage of water for the purpose of providing instream flows is not feasible but that appropriation

of direct flow water appears feasible, the state engineer shall act on applications for permits to appropriate water filed under W.S. 41-3-1003(c)(d) in the name of the state of Wyoming, and for permits to appropriate water filed under W.S. 41-3-1003(e) in the name of the fishing group.

(c) Subsequent to submission of an application for an instream flow appropriation, the game and fish commission or fishing group shall conduct relevant studies on the proposal.

(d) The applicant for an instream flow water right shall publish a notice of the application and hearing in a newspaper of general circulation in the area near the proposed reservoir site or stream segment, once each week for at least two (2) consecutive weeks prior to the hearing provided by subsection (e) of this section which notice shall briefly describe the application.

(e) Prior to granting or denying the application, the state engineer shall conduct any studies as are deemed necessary to evaluate the proposed instream flow and the necessary amount of water to maintain existing fisheries and shall hold a public hearing. At the public hearing, the game and fish commission or fishing group shall present its studies and any other interested parties shall present views on the proposed instream flow appropriation. ~~The state engineer may place a condition on the permit, if one is granted, requiring a review of the continuation of the permit as an instream flow appropriation.~~

(f) If an application for an instream flow appropriation is approved by the state engineer, the state engineer shall, at least once every ten (10) years, review the existing instream flow appropriation to ensure the objectives of the instream flow appropriation are being met.

(g) Following a review pursuant to subsection (f), when the objectives of an instream flow appropriation are not being met, the state engineer may:

(i) modify the instream flow appropriation; or

(ii) revoke the instream flow appropriation.

(h) Any unappropriated water made available as a result of a modification or revocation under subsection (g) is available for appropriation by others.¹⁸⁶

~~(i)(f)~~ If an application for an instream flow appropriation is approved by the state engineer, it shall be deemed that work has been commenced and completed and beneficial use made thirty (30) days after the date of approval for purposes of W.S. 41-4-506 and proof of appropriation shall not be submitted until three (3) years thereafter.

~~(j)(g)~~ The state engineer shall not issue an instream flow permit where the instream flow right would be included as a portion of the consumptive share of water allocated to the state of Wyoming under any interstate compact or United States supreme court decree.

~~(k)(h)~~ The amount of water appropriated for instream flow in each river basin in Wyoming shall not result in more water leaving the state than the amount of water that is allocated by interstate compact or United States supreme court decree for downstream uses outside of Wyoming.

§ 41-3-1007. Acquisition of existing rights for instream flow purposes

(a) The state of Wyoming or a fishing group may acquire any existing water rights in streams of Wyoming by transfer or gift for the purpose of providing instream flows, provided that a change in use of the right acquired shall be in accordance with W.S. 41-3-104. ~~Any right acquired and changed shall be in the name of the state of Wyoming and shall be administered by the state engineer and the board of control, who shall insure that the use of water for instream flows shall not interfere with existing water rights or impair the value of such rights or related property. The game and fish commission shall act as a petitioner in a petition for change in use under this section.~~

(b) Any right acquired and changed by the state of Wyoming under subsection (a) shall be in the name of the state of Wyoming and shall be administered by the state engineer and the board of control, who shall insure that the use of water for instream flows

¹⁸⁶ MONT. CODE ANN. §85-2-316(1) (2017) serves as the model for the suggested language in § 41-3-1006(f)–(h).

shall not interfere with existing water rights or impair the value of such rights or related property. The game and fish commission shall act as a petitioner in a petition for change in use under this subsection (a).

(c) Any right acquired and changed by a fishing group under subsection (a) shall be in the name of the fishing group, and shall be administered by the fishing group, who shall insure that the use of water for instream flows shall not interfere with existing water rights or impair the value of such rights or related property. The fishing group shall act as a petitioner in a petition for a change in use under this subsection (a).

(d)(b) Any such water rights acquired and changed shall be limited to a specified stream segment by the board of control with priority date intact.

B. Expand the Purposes for Which an Instream Flow Right May Be Used

1. Designate Recreation as a Beneficial Use

Montana allows instream flows to be designated for recreation.¹⁸⁷ A study in Montana found that recreation values increased as much as \$25.00 per acre-foot as a result of instream flows.¹⁸⁸ In Wyoming, outdoor recreation is supported by healthy rivers, and brings millions of dollars in state and local tax revenue.¹⁸⁹ Wyoming increasingly recognizes the value of this industry, and is enacting policies to capitalize upon its growth.¹⁹⁰ For example, Governor Matt Mead created the Office of Outdoor Recreation within the State Parks and Cultural Resources Department.¹⁹¹ The University of Wyoming, the only state-funded, four-year institution, launched a new degree program in Outdoor Recreation and Tourism in the fall of 2018 designed to capitalize on and grow this industry

¹⁸⁷ See *supra* note 78 and accompanying text.

¹⁸⁸ See JOHN W. DUFFIELD ET AL., U.S. DEP'T OF AGRIC. & U.S. FOREST SERV., ECONOMIC VALUE OF INSTREAM FLOW IN MONTANA'S BIG HOLE AND BITTERROOT RIVERS 42 (1994).

¹⁸⁹ See *Instream Flow Filings*, *supra* note 9; see also *Outdoor Recreation Economy Map*, *supra* note 161.

¹⁹⁰ See WYO. OUTDOOR RECREATION OFFICE, <http://wyoparks.state.wy.us/WYOutdoorRecreation/index.php/about> (click on "How We Got Here" tab) (noting how Governor Matt Mead created the Outdoor Recreation Task Force as an initiative to promote the outdoor recreation industry in Wyoming) (last visited Dec. 1, 2018).

¹⁹¹ *Id.*

within the state.¹⁹² Wyoming's economy would benefit greatly if instream flow rights were allowed to be appropriated or acquired for recreational purposes.¹⁹³

Draft statutory language to designate recreation as a beneficial use for instream flows:

§ 41-3-1001. Waters stored for instream flows a beneficial use of water; natural stream flows allowed for instream flows

(a) The storage of water in any drainage in Wyoming for the purpose of providing a recreational pool or the release of water for instream flows is a beneficial use of water subject to normal loss when it is used to establish or maintain new or existing fisheries, or enhance or facilitate recreation. ~~is a beneficial use of water subject to normal stream loss.~~

(b) Unappropriated water flowing in any stream or drainage in Wyoming may be appropriated for instream flows and declared a beneficial use of water on a case by case basis by the state engineer when it is used to maintain or improve existing fisheries, or enhance or facilitate recreation ~~and declared a beneficial use of water on a case by case basis by the state engineer if so long as~~ such use does not impair or diminish the rights of any other appropriator in Wyoming.

(c) Waters used for the purpose of providing instream flows under subsection (a) of this section shall be the minimum flow necessary to ~~establish or maintain fisheries~~ satisfy the intended use.

(d) Waters used for the purpose of providing instream flows under subsection (b) of this section shall be the minimum flow necessary to ~~maintain or improve existing fisheries~~ satisfy the intended use.

¹⁹² *UW to Launch Outdoor Recreation and Tourism Management Degree in Fall 2018*, UNIV. OF WYO. NEWS, (Mar. 23, 2018), <http://www.uwyo.edu/uw/news/2018/03/uw-to-launch-outdoor-recreation-and-tourism-management-degree-in-fall-2018.html>; *see also Outdoor Recreation and Tourism Management (OTRM)*, UNIV. OF WYO. UNDERGRADUATE PROGRAMS, <http://www.uwyo.edu/haub/academics/undergraduate-students/bs-in-ortm.html> (last visited Nov. 24, 2018).

¹⁹³ *See supra* notes 159–62, 188–89 and accompanying text.

2. *Include Environmental Protection as a Beneficial Use*

Many people value maintaining healthy rivers, both for the sake of the environment and for aesthetic enjoyment.¹⁹⁴ Streamflow-dependent riparian areas produce some of the best wildlife- and bird-watching habitats.¹⁹⁵ Rivers enhance scenic vistas, enrich hiking, camping, and backpacking, and provide enjoyment for visitors and residents alike.¹⁹⁶ All four of Wyoming's neighbors recognize protection of the natural environment as a motivation for instream flow designations.¹⁹⁷ If Wyoming were to do the same, both the outdoor recreation economy and riparian environments could reap the rewards.

Draft statutory language to include environmental protection as a beneficial use:

§ 41-3-1001. Waters stored for instream flows a beneficial use of water; natural stream flows allowed for instream flows

(a) The storage of water in any drainage in Wyoming for the purpose of providing a recreational pool or the release of water for instream flows is a beneficial use of water subject to normal loss when it is used to establish or maintain new or existing fisheries, protect fish and wildlife habitat, or protect or enhance the natural environment. ~~is a beneficial use of water subject to normal stream loss.~~

(b) Unappropriated water flowing in any stream or drainage in Wyoming may be appropriated for instream flows and declared a beneficial use of water on a case by case basis by the state engineer when it is used to maintain or improve existing fisheries, protect fish and wildlife habitat, or protect or enhance the natural environment ~~and declared a beneficial use of water on a case by case basis by the state engineer if so long as such use does not impair or diminish the rights of any other appropriator in Wyoming.~~

(c) Waters used for the purpose of providing instream flows under subsection (a) of this section shall be the minimum flow necessary to ~~establish or maintain fisheries~~ satisfy the intended use.

¹⁹⁴ See GILLILAN & BROWN, *supra* note 2, at 61–62.

¹⁹⁵ See *id.* at 58.

¹⁹⁶ See *id.* at 58–59.

¹⁹⁷ See *supra* notes 67–87 and accompanying text.

(d) Waters used for the purpose of providing instream flows under subsection (a) of this section shall be the minimum flow necessary to ~~establish or maintain fisheries~~ satisfy the intended use.

C. Create a Leasing Program for Instream Flow Rights

Leasing water for ecological and economic benefits has become more widespread in recent years.¹⁹⁸ Wyoming should authorize the WWDC to enter into leases with existing right-holders. Some water right holders around the state have already expressed interest in using portions of their rights to enhance stream flows for a variety of reasons, such as to improve fisheries and aquatic habitat.¹⁹⁹ Interested parties could choose from several options: short- or long-term leases, split-season leases, and dry-year options.²⁰⁰ Leases allow a party that wants to create an instream flow to lease such a right, and provides the right-owner with compensation in the form of money, technical assistance, or irrigation improvements.²⁰¹

However, failure to divert water can lead to abandonment of an appropriator's water rights because right-holders lack statutory protection, such as the type that exists under Colorado law.²⁰² In order to incentivize participation in leasing programs, the Wyoming State Legislature should ensure that lessors' water rights leased for instream flow uses are protected from abandonment proceedings.

Draft statutory language to allow leasing for instream flows and protect against abandonment:

§ 41-3-1007. Acquisition of existing rights for instream low purposes

(a) The state of Wyoming may acquire any existing water rights in streams of Wyoming by transfer, ~~or gift, or lease~~ for the purpose of providing instream flows, provided that a change in use of the right acquired shall be in accordance with W.S. 41-3-104.

¹⁹⁸ See Ferguson et al., *supra* note 129, at 2.

¹⁹⁹ MACDONNELL REPORT, *supra* note 9, at 7.

²⁰⁰ Ferguson et al., *supra* note 129, at 9 (explaining that short-term leases convert water for one or two years, long-term leases last three or more years, split-season leases allow some water to be used for irrigation early in the year, and the remainder becomes available for instream uses later in summer, and dry-year options create access to water during drought).

²⁰¹ *Id.* at 8.

²⁰² See WYO. STAT. ANN. § 41-3-1011 (2018); COLO. REV. STAT. ANN. § 37-92-103(2)(b); *see supra* notes 96–98 and accompanying text.

(b) Any water right acquired by transfer or gift and changed shall be in the name of the state of Wyoming and shall be administered by the state engineer and the board of control, who shall insure that the use of water for instream flows shall not interfere with existing water rights or impair the value of such rights or related property. The game and fish commission shall act as a petitioner in a petition for change in use under this section.

(c) ~~(b)~~ Any such water rights acquired by transfer or gift and changed shall be limited to a specified stream segment by the board of control with priority date intact.

§ 41-3-1011. Abandonment

(a) No right to water for the purposes of providing instream flow may be acquired through the process of abandonment nor shall any beneficiary of instream flow rights granted under this act [§§ 41-3-1001 through 41-3-1014] be qualified under W.S. 41-3-401 and 41-3-402 to file for abandonment.

(b) A water right leased to the State of Wyoming under W.S. 41-3-1007 shall be considered to be beneficially used for the duration of the lease, and therefore not subject to abandonment under W.S. 41-3-104 through the duration of the lease.

D. Implement Time Limitations

1. Require Review of Instream Flow Rights

Montana's regular review of instream flows enables the state to determine whether designations are fulfilling their purposes, and, if not, whether to eliminate the instream flow or adjust the amount of water to better serve the purpose.²⁰³ Such a provision allows for systematic reviews of instream flow designations, allows the consideration of emerging needs and changing priorities, and ensures that the instream flow properly accomplishes its objective.²⁰⁴

Draft statutory language to require review of instream flow rights, including draft language allowing fishing groups to hold instream flow rights:

²⁰³ MacDonnell, *Environmental Flows*, *supra* note 12, at 360–61.

²⁰⁴ See McKinney, *supra* note 77, at 113.

§ 41-3-1006. Appropriation of unappropriated waters for direct instream flows

(a) Any application for a permit to appropriate direct flow waters for the purpose of providing instream flows shall be by stream segment, as defined in W.S. 41-3-1002.

(b) If the water development commission, under W.S. 41-3-1004, determines that storage of water for the purpose of providing instream flows is not feasible but that appropriation of direct flow water appears feasible, the state engineer shall act on applications for permits to appropriate water filed under W.S. 41-3-1003(e)(d) in the name of the state of Wyoming, and for permits to appropriate water filed under W.S. 41-3-1003(e) in the name of the fishing group.

(c) Subsequent to submission of an application for an instream flow appropriation, the game and fish commission or fishing group shall conduct relevant studies on the proposal.

(d) The applicant for an instream flow water right shall publish a notice of the application and hearing in a newspaper of general circulation in the area near the proposed reservoir site or stream segment, once each week for at least two (2) consecutive weeks prior to the hearing provided by subsection (e) of this section which notice shall briefly describe the application.

(e) Prior to granting or denying the application, the state engineer shall conduct any studies as are deemed necessary to evaluate the proposed instream flow and the necessary amount of water to maintain existing fisheries and shall hold a public hearing. At the public hearing, the game and fish commission or fishing group shall present its studies and any other interested parties shall present views on the proposed instream flow appropriation. The state engineer may place a condition on the permit, if one is granted, requiring a review of the continuation of the permit as an instream flow appropriation.

(f) If an application for an instream flow appropriation is approved by the state engineer, the state engineer shall, at least once every ten (10) years, review the existing instream flow appropriation to ensure the objectives of the instream flow appropriation are being met.

(g) Following a review pursuant to subsection (f), when the objectives of an instream flow appropriation are not being met, the state engineer may:

(i) modify the instream flow appropriation; or

(ii) revoke the instream flow appropriation.

(h) Any unappropriated water made available as a result of a modification or revocation under subsection (g) is available for appropriation by others.²⁰⁵

(i)(f) If an application for an instream flow appropriation is approved by the state engineer, it shall be deemed that work has been commenced and completed and beneficial use made thirty (30) days after the date of approval for purposes of W.S. 41-4-506 and proof of appropriation shall not be submitted until three (3) years thereafter.

(j)(g) The state engineer shall not issue an instream flow permit where the instream flow right would be included as a portion of the consumptive share of water allocated to the state of Wyoming under any interstate compact or United States supreme court decree.

(k)(h) The amount of water appropriated for instream flow in each river basin in Wyoming shall not result in more water leaving the state than the amount of water that is allocated by interstate compact or United States supreme court decree for downstream uses outside of Wyoming.

2. *Require Review of Instream Flow Leases*

If Wyoming adopts a leasing program, it should statutorily limit the duration of such agreements. Leases allow right-holders to see the effects of the lease, and gives the State time to evaluate the effectiveness of the instream flow.²⁰⁶ Split-season leases permit instream flows to be available at specific times throughout the year.²⁰⁷ Wyoming should allow for renewals in order to create regular opportunities for public comment on and review of the instream flow use.²⁰⁸

²⁰⁵ MONT. CODE ANN. §85-2-316(1) (2017) serves as the model for the suggested language in § 41-3-1006(f)–(h).

²⁰⁶ See Ferguson et al., *supra* note 129, at 9.

²⁰⁷ *Id.*

²⁰⁸ See *supra* notes 203–04 and accompanying text.

Draft statutory language to implement time limits on leases for instream flows:

§ 41-3-1007. Acquisition of existing rights for instream flow purposes; limitations on leases

(a) The state of Wyoming may acquire any existing water rights in streams of Wyoming by transfer, ~~or gift, or lease~~ for the purpose of providing instream flows, provided that a change in use of the right acquired shall be in accordance with W.S. 41-3-104.

(b) Any water right acquired by transfer or gift and changed shall be in the name of the state of Wyoming and shall be administered by the state engineer and the board of control, who shall insure that the use of water for instream flows shall not interfere with existing water rights or impair the value of such rights or related property. The game and fish commission shall act as a petitioner in a petition for change in use under this section.

(c) ~~(b)~~ Any such water rights acquired by transfer or gift and changed shall be limited to a specified stream segment by the board of control with priority date intact.

(d) A lease of a water right for the purpose of providing instream flows shall be for a term no longer than 5 years, and may be renewed according to subsection (e).²⁰⁹

(e) A lease renewal shall be reviewed by the State Engineer to ensure the objectives of the instream flow appropriation are being met.

(g) Following a review pursuant to subsection (e), when the objectives of an instream flow appropriation are not being met, the state engineer may:

(i) modify the instream flow appropriation; or

(ii) revoke the instream flow appropriation.

²⁰⁹ In practice, Idaho limits leases from water banks to less than five years. *See supra* note 126 and accompanying text.

V. CONCLUSION

Wyoming entered this Union a bold innovator of water law that integrated laws that worked well, avoided those that did not, and created new policy that emphasized the concept that water belongs to the public.²¹⁰ Now, however, Wyoming's neighbors have surpassed it by expanding the availability and variability of implementing instream flow rights.²¹¹ Rivers and streams throughout the state support a growing outdoor recreation industry and sustain a healthy environment.²¹² As the public increasingly acknowledges the value associated with environmental and recreational uses of water, Wyoming should once more find its innovative spirit and adopt these statutory changes that will encourage a growing industry while protecting an enriching environment.

²¹⁰ See *supra* notes 19–26 and accompanying text.

²¹¹ See *supra* notes 62–63, 88–92, 114–15, 132–36 and accompanying text.

²¹² See *supra* notes 7–12, 159–65 and accompanying text.