

1986

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Recommended Citation

Reynolds, Matthew (1986) "Wyoming's New Instream Flow Act: An Administrative Quagmire," *Land & Water Law Review*: Vol. 21 : Iss. 2 , pp. 455 - 483.

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Wyoming's New Instream Flow Act: An Administrative Quagmire

In March of 1986 the State of Wyoming enacted an instream flow bill.¹ Before the Instream Flow Act² came into existence, it was presumed that an appropriator had to divert water before his use could be protected under the state's permit system.³ Now the State of Wyoming can appropriate water to keep fish alive in natural streams. This marks the first time in Wyoming's history⁴ that its water law has offered protection to an instream use.⁵

Environmentalists can claim that the Act represents a major victory for them, but in fact the Act reflects a long series of compromises between them and consumptive users. Although instream flow is now a beneficial use,⁶ the Act protects consumptive users against the new rights so much that the consumptive users can claim a draw, if not a victory.

This comment will first explain what protections exist for instream fisheries⁷ in Wyoming without the new Act. Next, it will examine the conflict between consumptive users⁸ and environmentalists⁹ and how they came to an uneasy compromise. The comment then will study the Act itself to see how it works. After the overview of the Act, the comment will evaluate Wyoming's Instream Flow Act in terms of how well it balances

This comment was funded by a grant from the Rocky Mountain Mineral Law Foundation.

1. The Wyoming legislature passed the bill on March 14, 1986. Casper Star-Tribune, March 15, 1986, at A1, col. 5. Governor Ed Herschler signed the bill into law a week later. *Id.* at B1, col. 5.

2. Instream Flow Act, 1986 Wyo. Sess. Laws (to be codified as WYO. STAT. §§ 41-3-1001 to -1014 (Supp. 1986)). For ease of reference, the Act will be cited to its anticipated codification.

3. Comment, *Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming*, 17 LAND & WATER L. REV. 139, 140-42 (1982). The state's permit system is based on the doctrine of prior appropriation, which traditionally has rejected instream, nonconsumptive uses in favor of offstream, consumptive uses of water. *Id.* at 139-43. See Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 UTAH L. REV. 871, 878-79.

4. Wyoming adopted the doctrine of prior appropriation in its constitution, which became effective on July 10, 1890. WYO. CONST. art. VIII, § 3.

5. Although navigation, waste dilution, and hydroelectric power are instream uses, the term as used in this comment only refers to fish, wildlife, aesthetic, and recreational uses.

6. WYO. STAT. § 41-3-1001 (Supp. 1986). The legislative declaration of instream flows as a beneficial use was a necessary step in protection of fisheries because only those uses which are called "beneficial" can be protected under the permit system. See Comment, *supra* note 3, at 142-43.

7. Instream fisheries should be distinguished from offstream fisheries. Wyoming's Game and Fish Commission has been allowed to divert water for fish hatcheries and stock ponds for some time. See WYO. STAT. § 23-1-302(a)(iii)(A) (Supp. 1985).

8. Irrigators have been the principal, but not sole, opponents to instream flow legislation in Wyoming. See WYOMING OUTDOOR COUNCIL, LEGISLATIVE ANALYSIS 16 (1983). Not all irrigators, however, opposed instream flows.

9. The term "environmentalists" is amorphous. In this comment, it represents anyone who promotes instream values of recreation, scenic beauty, and fish and wildlife preservation. Although environmental groups were the major proponents of instream flow legislation, not everyone who supported instream flow legislation was an environmentalist.

environmental concerns with the concerns of traditional appropriators. Finally, it will propose some changes to the Act.

ALTERNATIVE INSTREAM FLOW PROTECTION IN WYOMING

Many may wonder whether there was a need for instream flow legislation; nearly one-third of all Wyomingites fish¹⁰ and the fishing is usually good.¹¹ Even the supporters of instream flow legislation have admitted that Wyoming has one of the best trout fisheries in the country.¹² They claimed, however, that existing laws did not adequately protect the flow of fish-bearing streams. They predicted that within twenty years the fishing would deteriorate because of unchecked water development.¹³

The allegedly inadequate system of laws consisted of state, interstate, and federal protection of instream flows. When the first Wyoming law-makers established a state water law, they did not seek to protect natural streamflows. They sought, instead, to protect man-made diversions of the water for agricultural, mining, municipal, and industrial uses. With this goal in mind, the Wyoming Constitutional Convention adopted the doctrine of prior appropriation as the foundation for Wyoming water law.¹⁴ Under this doctrine, the sooner one diverts water from a stream for a beneficial use, such as irrigation, the higher priority that person has to the water when there is a shortage.¹⁵ Prior appropriation, in its traditional sense, rewards water development and does not provide for fish and wildlife needs.¹⁶

Yet Wyoming water law has not left fish and wildlife totally unprotected from vigorous water development. The Wyoming Water Development Act¹⁷ requires the Water Development Commission (the WDC) to consider instream flow needs as one of several beneficial uses which should be encouraged in any state-supported reservoir or dam project.¹⁸ As a result, several water development projects throughout Wyoming

10. Mike Stone, Wyoming Water Law Short Course for Wyoming Legislators 1 (January 4, 1985) (available from the Wyoming Game and Fish Department).

11. Interview with Robert Wiley, Area Fisheries Manager, Wyoming Game and Fish Department, in Laramie, Wyoming (Jan. 17, 1986).

12. Interview with John Ernst, President, Wyoming Wildlife Federation, in Cheyenne, Wyoming (Jan. 17, 1986).

13. *Id.* See Mike Stone, *supra* note 10.

Although the total surface area of lakes, reservoirs and ponds is in excess of five times that of streams, fifty-two percent of the fishing pressure occurs on streams. Potential adverse impacts to streams from development of Wyoming's land and water resources are greater than the threats to lakes and reservoirs.

Id.

14. WYO. CONST. art. VIII, § 3 reads: "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

15. See F. TRELEASE, CASES AND MATERIALS ON WATER LAW 11 (3d ed. 1979).

16. U.S. NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 63 (1973). The Commission criticized western states for disregarding instream values and urged them to set instream flows "where the action can be taken without impairing vested rights." *Id.* Within ten years the majority of western states changed their laws to protect instream flows. See Comment, *supra* note 3, at 139.

17. WYO. STAT. §§ 41-2-112 to -116 (Supp. 1985).

18. *Id.* § 41-2-112(a).

release enough water throughout the year to preserve fish habitat for several miles downstream of the projects.¹⁹ This method of instream flow protection is defective, however, because it requires only the owner of the reservoir to provide instream flows. It does not prevent other appropriators from diverting the water intended for the fishery.²⁰

Interstate compacts and a United States Supreme Court decision related to an interstate dispute over water provide other means through which water could remain in Wyoming's rivers. As a result of interstate agreements such as the Upper Colorado River Compact²¹ and the Supreme Court decision in *Nebraska v. Wyoming*,²² states downstream of Wyoming are assured of receiving the majority of the water which actually flows in Wyoming.²³ Fish are incidentally benefitted by these compacts and the decree because most water stays in the watercourses rather than being diverted.

The compacts and court decision do not mandate the manner in which Wyoming is to deliver the water to the downstream states, so it is possible that huge diversions could be built by Wyoming appropriators which would leave no water in the rivers and streams except at the state lines.²⁴ Right now, though, this situation does not exist.

The federal government provides greater protection for instream flows in Wyoming than either the Water Development Act's provision for instream flows or the interstate compacts and *Nebraska v. Wyoming*. The reserved rights doctrine is one way in which the government ensures minimum flows in some streams. The essence of this doctrine is that when the government reserves land for a special purpose, such as a national forest, it also reserves enough water to fulfill the purposes for which the land was reserved.²⁵ The reservation doctrine ensures that national parks and forests will not lose all the water flowing through them, regardless of what happens elsewhere in Wyoming.²⁶

The federal government uses a variety of other means to protect fisheries in some of Wyoming's watercourses. One method is through its

19. Interview with Robert Wiley, *supra* note 11.

20. The legislature has recently cured this deficiency in two cases. The Game and Fish Commission may, upon approval by the Water Development Commission, contract "with the Lower Clear Creek irrigation district for release of storage water to provide stream flows to maintain, enhance or create fish habitat on Piney Creek and Clear Creek in Johnson and Sheridan counties." Act of February 23, 1985, ch. 173, 1985 Wyo. Sess. Laws (codified at WYO. STAT. § 23-1-302(c)-(g) (Supp. 1985)). The releases agreed upon are to be considered beneficial uses. WYO. STAT. § 23-1-302(d) (Supp. 1985). Therefore, they are protected from diversions of other appropriators.

21. WYO. STAT. §§ 41-12-401 to -402 (1977 and Supp. 1985). All of Wyoming's interstate compacts are found in WYO. STAT. §§ 41-12-101 to -702 (1977 and Supp. 1985).

22. 325 U.S. 589 (1945).

23. Telephone interview with Gordon Fassett, Deputy State Engineer (April 15, 1986).

24. See WYO. STAT. § 41-12-801 (1977), which directs the state engineer to study ways to use all of Wyoming's allotted water, including transbasin diversions.

25. Comment, *Wyoming's Experience with Federal Non-Indian Reserved Rights: The Big Horn Adjudication*, 21 LAND & WATER L. REV. 433, 437-441 (1986).

26. This is a simplistic view of the instream flow issue in national parks and forests in Wyoming. For a detailed analysis of the issue, see *id. passim*.

purse strings. The Fish and Wildlife Coordination Act²⁷ requires that any federal water project must take into account fishery needs. Another method is through its general power over interstate waters. Congress can reauthorize dam projects to provide minimum flows for fisheries.²⁸ In 1971, Congress passed legislation to provide minimum flows below the Kortes Unit on the North Platte River.²⁹ Although it kept good fishing on the North Platte, a fully appropriated river, this method of instream flow protection is costly, cumbersome, and difficult to obtain.³⁰

The United States' control over its lands provides still another means of instream flow protection. The Federal Land Policy and Management Act of 1976³¹ authorizes federal agencies to require minimum streamflows as conditions for granting rights-of-way through federal land for water projects.³² The Forest Service used this strategy when it allowed the City of Cheyenne to go ahead with its Stage II project, a large-scale transbasin diversion through national forests. The Forest Service granted the right-of-way permit on the condition that the city provide minimum flows in several streams with flow too low to support fish, a situation caused by Cheyenne's Stage I project in the 1960's.³³

The present methods of instream flow protection allow some streams to support fish even without an instream flow act, especially those on federal lands. Many other streams, though, could go dry in the next decade or two as greater quantities of water are diverted for cities, industry, farms and ranches, and mining. The prospect of dry streams was enough to spur environmentalists into concerted action to save what was still left of Wyoming's unappropriated waters.

THE MAKING OF THE INSTREAM FLOW ACT

The instream flow issue hit Wyoming in 1972. At that time, the League of Women Voters hosted a seminar to focus citizen awareness on the question of whether Wyoming should "pass some form of legislation to protect its free-flowing rivers and streams."³⁴ The next year, the legislature created a committee to study the issue.³⁵ The committee proposed an instream flow bill, but the bill was never enacted because there was strong sentiment against it.³⁶

27. 16 U.S.C. §§ 661 to -667(e) (1982).

28. *Id.* § 663(a).

29. Act of October 29, 1971, Pub. L. No. 92-146, 85 Stat. 414 (1971).

30. W. NELSON, G. HORAK & J. SOLOMON, *INSTREAM FLOW STRATEGIES FOR WYOMING* 21-23 (FWS/OBS-78/47 May 1978) [hereinafter cited as *INSTREAM FLOW STRATEGIES*].

31. 43 U.S.C. §§ 1701-84 (1982).

32. *See id.* § 1765.

33. *See* UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, *CHEYENNE STAGE II WATER DIVERSION PROPOSAL: FINAL ENVIRONMENTAL IMPACT STATEMENT* 8-10, 129 (1980).

34. Final Report of the Stream Preservation Feasibility Committee, October 1, 1974, quoted in C. Lummis, *Legislative History of Wyoming's Instream Flow Act 1* (July 1985) (unpublished manuscript sent to legislators before 1986 session).

35. Stream Preservation Feasibility Study Act, ch. 29, 1973 Wyo. Sess. Laws § 1 (codified at WYO. STAT. §§ 41-2-101 to -106 (1977)).

36. C. Lummis, *supra* note 34, at 1-3.

Opposition to the bill came from both the state engineer and the Wyoming Farm Bureau.³⁷ The state engineer stated that granting permits for instream uses would waste scarce water resources.³⁸ The Farm Bureau argued that the proposed legislation would prevent economic development of the protected stretches of rivers.³⁹

In the face of such powerful opposition, instream flow supporters pursued the goal of getting some form of stream protection law passed. Starting in 1979, legislators responded to the cry for an instream flow law by regularly introducing instream flow bills both houses of the legislature. For one reason or another, though, each of the nineteen bills introduced from 1979 to 1985 failed.⁴⁰

The failure of the bills helped shape the present Instream Flow Act. A 1982 bill introduced in the House of Representatives may be regarded as the first draft of the Instream Flow Act.⁴¹ The bill's purpose was to fit instream flow appropriations into the existing system of prior appropriation, while at the same time protecting other appropriators from any of the perceived harms of instream flows.

The bill first stated that instream flows from storage releases were beneficial uses⁴² and that direct stream flows could be considered beneficial uses with the approval of the state engineer and the legislature.⁴³ According to the bill, flows from storage releases were to be preferred over direct flows if building storage facilities was practical.⁴⁴ The state could also buy water rights and convert them into instream flows as long as no other appropriators were harmed.⁴⁵

Other provisions of the bill were meant to protect consumptive water users. These provisions stated that only five streams or stream segments could be recommended for permits annually⁴⁶ and that the state could not condemn any water rights, file for abandonment for instream flows, or have any rights-of-way through private property as a result of their instream flow permits. Further, any appropriator who could prove damages in court would be reimbursed for his litigation costs. Finally, the bill provided that nothing in the bill should be construed to impair Wyoming's rights to its full portion of water for consumptive beneficial use under interstate compact or United States Supreme Court decree.⁴⁷

The House overwhelmingly passed the bill, with many amendments, and sent it to the Senate. The Senate also passed the bill, with amendments. By the time the bill went back to the House for concurrence,

37. *Id.* at 3.

38. *Id.*

39. *Id.*

40. For a listing of the nineteen bills, see *id.* n.2.

41. H.B. 103, 46th Wyo. Legis. (1982).

42. *Id.* § 41-3-1001(a).

43. *Id.* § 41-3-1001(b).

44. *Id.* § 41-3-1006.

45. *Id.* § 41-3-1010.

46. *Id.* § 41-3-1003.

47. *Id.* §§ 41-3-1011 to -1015.

however, Rep. Dean Prosser, original sponsor of the bill and then Vice-President of the Wyoming Stockgrowers Association, had withdrawn his support. In addition, the Wyoming Association of Municipalities lobbied heavily against the bill, and the bill died in the House.⁴⁸

In 1983, the bill,⁴⁹ incorporating both houses' amendments, was introduced in the Senate along with three other instream flow bills. After further amending the bill, the Senate passed it. The House Agriculture Committee, however, recommended against passage of the bill, and it died again.⁵⁰

Realizing that the Wyoming legislature had reached a stalemate, a citizens' group began an initiative drive to get the defeated bill with its 1983 Senate amendments on the ballot.⁵¹ By the time the 1985 legislature met, the group had collected 32,000 signatures from Wyoming voters, more than enough to put the initiative bill on the 1986 ballot.⁵² If the legislature enacted a bill substantially similar to the ballot initiative, then the initiative would be dropped from the ballot.⁵³

In the 1985 session, the initiative bill was introduced in and passed by the Senate, but it failed in the House of Representatives.⁵⁴ The two houses seemed entrenched. The opponents of the instream flow initiative bill and bills similar to it strongly objected to any instream flows not tied to storage and to any purchase of senior rights for instream flows.⁵⁵ In general, many farmers and other appropriators were concerned that direct flow appropriations would somehow damage their water rights. Sublette

48. C. Lummis, *supra* note 34, at 4. See WYOMING OUTDOOR COUNCIL, LEGISLATIVE ANALYSIS 11 (1982).

It is not clear that HB103A would have done either the harm or the good claimed for it. While another year's delay further compromises our fish and wildlife habitat, and while delay plays into industry's hands, delay may also produce better legislation. This will happen if environmental and agriculture people can learn to compromise with each other.

Id.

49. S. 73, 47th Wyo. Legis. (1983).

50. WYOMING OUTDOOR COUNCIL, LEGISLATIVE ANALYSIS 6 (1985).

51. Citizens Committee for Instream Flow, sponsored by the Wyoming Wildlife Federation, undertook the initiative drive. The committee did not alter the bill because it believed that the bill was similar to other states' instream flow acts and had been carefully drafted in the legislature. Interview with John Ernst, President, Wyoming Wildlife Federation, in Cheyenne, Wyoming (Jan. 17, 1986).

52. WYOMING OUTDOOR COUNCIL, *supra* note 50. For the rules governing initiatives, see Wyo. Const. art. III, § 52(c).

53. According to Wyoming's constitution, an initiative petition is void "if, before the election, substantially the same measure has been enacted." Wyo. CONST. art. III, § 52(d). The Wyoming Attorney General has decided that the Instream Flow Act is substantially similar to the initiative bill and that the initiative is therefore void. Casper Star-Tribune, April 8, 1986, at A1, col. 2.

54. WYOMING OUTDOOR COUNCIL, *supra* note 50, at 8.

55. Opponents to "liberal" instream flow bills, as represented by the initiative bill, recognized that they were fighting a losing battle to keep out any instream flow law in Wyoming. Therefore, they presented their own bill in the 1985 session of the Wyoming legislature which tied instream flows to storage only. See H.B. 230, 48th Wyo. Legis. (1985). They also began their own initiative drive to compete with the one sponsored by the Wyoming Wildlife Federation. Their drive failed, however, to get enough signatures before the 1986 legislative session. Laramie Daily Boomerang, Feb. 14, 1986, at 10, col. 1.

County Rep. Dan Budd expressed his concerns dramatically. "Water is the lifeblood of Wyoming. If you restrict water, you restrict economic development. Tying up water for instream flows stagnates Wyoming!"⁵⁶ In contrast, instream flow supporters in the legislature contended that farmers and ranchers would not be hurt by an instream flow law and that "(i)nstream flow means business and jobs. It is important to our quality of life!"⁵⁷

At the end of the 1985 session, it seemed impossible for the legislature to agree on any instream flow bill substantially similar to the initiative. This forecast, however, did not prevent legislators from working during the interim on an instream flow bill palatable to both sides of the issue. Laramie County Rep. Cynthia Lummis, a co-sponsor of the 1982 precursor to the initiative bill, wrote a legislative history of the instream flow dispute in the summer of 1985.⁵⁸ She sent copies of her study and compromise proposal to every legislator and interest group in the state. When the legislature convened, lobbying groups on both sides of the issue surprisingly pushed for, or at least did not lobby against, the compromise legislation.⁵⁹ This compromise bill, as amended, became Wyoming's Instream Flow Act.⁶⁰

AN OVERVIEW OF WYOMING'S INSTREAM FLOW ACT

Wyoming's Instream Flow Act reflects the many compromises which took place in the legislature. The Act contains fourteen sections, many of which contain several subsections, making Wyoming's Act one of the more complex state instream flow laws.⁶¹ Because of its complexities, one must study it thoroughly before evaluating its utility. One must understand how the Act really works before deciding whether it is worthwhile legislation. Therefore, the following hypothetical example serves as an overview of the Act's many parts.

Suppose the existence of a Wyoming stream named Trout Creek, which has several stretches of good fishing, but no state or federal law prevents any person from diverting all its water for a beneficial use and thereby destroying the stream's fisheries. How can the new Instream Flow Act keep the fish alive in Trout Creek?

Applying for a Permit

First, the Game and Fish Commission (Game & Fish) must decide that the fisheries on Trout Creek are more important than the fisheries on a number of other streams. Game & Fish must make such a decision because

56. WYOMING OUTDOOR COUNCIL, *supra* note 50, at 5.

57. *Id.* at 7 (statement by Sen. John Turner). See Mike Stone, *supra* note 10. "[F]ishing related expenditures generated over \$100,000,000 to the state's economy in 1986." *Id.*

58. C. Lummis, *supra* note 34.

59. See Casper Star-Tribune, March 15, 1986, at 1, col. 5.

60. WYO. STAT. §§ 41-3-1001 to -1014 (Supp. 1986).

61. Cf. COLO. REV. STAT. §§ 37-92-102-103 (1973 and Supp. 1985); KAN. STAT. ANN. §§ 82a-703a-703c (1984 and Supp. 1985).

the new law allows it to seek protection only for those stream segments⁶² with the most critical need for instream flows. Once a year, Game & Fish may present a list of the critical stream segments to the Water Development Commission (the WDC).⁶³ Conceivably, Game & Fish could put any number of stream segments on its annual list, but for each stream segment Game & Fish must "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."⁶⁴

Game & Fish has completed some of that identification already. In 1981, Game & Fish prepared a list of watercourses for which it would seek instream flow protection if a new instream flow law were enacted.⁶⁵ In 1983, it compiled a list of thousands of stream segments, with initial estimates of their instream flow needs.⁶⁶ Game & Fish must still do on-site studies on the critical stream segments to decide precisely how much water is needed for the fishery on each segment.⁶⁷

For the sake of illustration, let us suppose that Game & Fish compiles its first annual "critical needs" list, consisting of ten stream segments⁶⁸ with all the necessary information, and that Game & Fish presents the list to the WDC in September 1986. Let us also assume that three of Trout Creek's stream segments make that list.

Once the WDC receives the list from Game & Fish, it gives a copy to the Division of Water Development within the Economic Development and Stabilization Board. The Division of Water Development then must file a permit application with the state engineer's office for every stream segment on that list.⁶⁹ Up to this point in the permit process, Game & Fish controls which streams may be protected. After the applications are filed, though, the power shifts from that department's hands to other branches of the government.

Granting the Permit: The Roles of the WDC and the Legislature

Immediately after the Division of Water Development applies for the permits, the WDC must begin its own studies for the legislature on how

62. There is no definition of "stream segment" in the Act, but the Act does require that all stream segments be defined specifically. WYO. STAT. § 41-3-1002(a) (Supp. 1986). The Game and Fish Department will vary the length of the stream segment depending on the type of fish sought to be protected and the contour of the stream. Telephone interview with Joe White, Chief of Fisheries, Game and Fish Department (April 15, 1986).

63. WYO. STAT. § 41-3-1003(b) (Supp. 1986).

64. *Id.*

65. Letter from W. Donald Dexter, Assistant Director, Game and Fish Department, to Laney Hicks (Oct. 16, 1981).

66. Interview with Chief of Fisheries, *supra* note 62.

67. Letter from W. Donald Dexter, *supra* note 65.

68. The Game and Fish Department feels that it may seek instream flow protection for five to six stream segments per year. It intends to move cautiously, at least for the first few years of the Act's existence. Interview with Chief of Fisheries, *supra* note 62.

69. WYO. STAT. § 41-3-1003(c) (Supp. 1986).

to provide for the instream flows if the state engineer decides to grant the permits. To this end, the WDC prepares a feasibility study for each of the ten stream segments to determine whether the water for instream flows should come from existing or new dams or reservoirs or from unappropriated direct flows.⁷⁰ Its feasibility study for each stream segment must include the availability and estimated costs of storage. In addition, the feasibility study must include "a determination of water necessary to maintain or improve . . . or provide fisheries."⁷¹

Depending upon the particular stream segments chosen for protection, it could take the WDC much more than a year to complete all of the feasibility studies.⁷² The WDC will have difficulty in quantifying the instream flow needs of each stream regardless of the time it takes to complete the feasibility study. Quantifying the necessary flows for fishery maintenance is a difficult process.⁷³ The kinds and quantities of fish on the stream segment must be studied. The way the stream flows throughout the year must also be studied. Further, there is not just one scientific way of determining minimum flows. Several different methods exist, each with its own analytical flaws and benefits.⁷⁴ The WDC has to hire experts to study the different stream segments,⁷⁵ and these experts have to be different than the ones who quantified the minimum flows for Game & Fish; otherwise, there would be no reason for the duplicative study. Game & Fish, meanwhile, is busy conducting its own fresh studies on its proposals for instream flows.⁷⁶ One can see even at this point that Wyoming's Instream Flow Act requires an enormous amount of paperwork and interagency checks.

Continuing with the hypothetical example, let us suppose that the WDC finished its feasibility studies for Trout Creek's three "critical needs" segments by March 1988. The studies concluded that the release of stored

70. *Id.* § 41-3-1004.

71. *Id.* § 41-3-1004(a).

72. Interview with Chief of Fisheries, *supra* note 62.

73. T. WESCHE, *PARAMETRIC DETERMINATION OF MINIMUM STREAM FLOW FOR TROUT* 70 (Wyoming Water Resources Series No. 37, 1973).

74. See Palmer & Snyder, *Effects of Instream Flow Requirements on Water Supply Reliability*, 21 *WATER RESOURCES RESEARCH* 439, 439-440 (1985). Instream flow requirement (IFR) methods may be categorized as statistical methods, stream-oriented methods and hydraulic model methods.

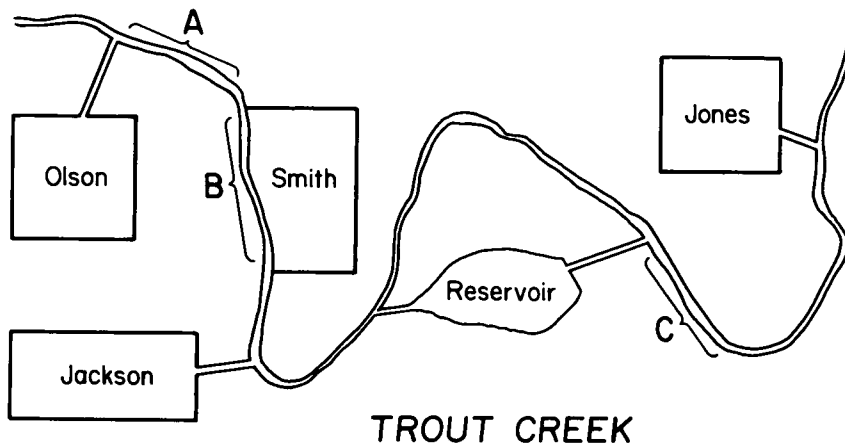
The procedures . . . present a wide diversity of conceptual approaches and expense. While statistical methods may be adequate for general evaluations, in environmentally stressed areas or areas under litigative pressure, stream-oriented investigations are necessary to develop data bases to be used in more intensive methods. . . . Despite efforts to model various species and life stages of fish, none of the models reviewed consider water quality impacts, food limitations, or changes in channel morphology. At their best, current IFR methods attempt, through the use of surrogate measures, to establish relationships between streamflow and fish habitat. . . . [But] they can be criticized as being conceptually and cuasatively [sic] naive.

Id.

75. See letter from George L. Christopoulos, Wyoming State Engineer to Sen. Tom Stroock 2 (Feb. 14, 1985). "The Water Development Commission certainly has the expertise with respect to the hydrologic aspects of stream systems . . . however, I am sure they do not have the fisheries expertise at this time." *Id.*

76. WYO. STAT. § 41-3-1006(c) (Supp. 1986).

water could maintain flows for two of its segments (Trout Creek B and C) but that storage releases could not practically maintain flows for the third segment (Trout Creek A), which lies high in the mountains upstream from the other two segments.



When it completes the feasibility studies, the WDC presents its findings and recommendations to the legislature and to the Game and Fish Commission.⁷⁷ Since the WDC only completed its studies for Trout Creek in March 1988, it must wait to make its presentation to the legislature until the general session in January 1989. What happens in the legislature depends in part upon whether the WDC decides that storage is feasible for instream flows on a stream segment. For example, Trout Creek A needs direct appropriations of water to maintain its flow. The WDC does nothing further with this finding than to report it to the legislature. Even the legislature does nothing with the finding, other than read it. Instead, the state engineer is authorized to act on the application for Trout Creek A, either to grant or deny it.⁷⁸

The WDC and the legislature have a great deal to say, however, when a new storage facility must be built to provide instream flows. In our example, the WDC decided that storage releases were feasible for Trout Creek segments B and C. Let us suppose that only one reservoir exists on Trout Creek and that it lies downstream from Trout Creek B and upstream from Trout Creek C. Therefore, a new reservoir must be built from Trout Creek B before Trout Creek B's application for a permit means anything. The WDC has some power to nip this application in the bud.

For every stream segment which requires building a storage facility, the WDC requests authority from the legislature to build the project, but only if the WDC wants to build. The WDC can kill the application of Trout Creek B if it decides that the storage for instream flow would not be "in

77. *Id.* § 41-3-1004(b).

78. *Id.* § 41-3-1006(b).

the interest of the state of Wyoming.”⁷⁹ The WDC would then refuse to request the authority from the legislature to proceed with building the project. No statutory guidelines are given to the WDC to help it decide what criteria should be used in determining the state’s interest other than the vague directives of the Water Development Act,⁸⁰ so the WDC could give any number of reasons for killing the project and still not exceed its authority.

Although it is unlikely that the WDC will often use its power to quell applications, it is very likely that the legislature will use its financial power to put a stop to many proposed instream flow storage projects, even if other users could divert some of the storage water for agriculture or some other need. Let us say that the WDC requests authority from the legislature to build a storage facility for Trout Creek B. The legislature, however, rejects the request because of its already over-extended water development budget.⁸¹ Therefore, Trout Creek B’s permit application is now pointless, even if the state engineer approves it. Trout Creek B must be supplied with its instream flow waters from a storage facility, and since one will not be built, the fishery on this part of the stream will not be protected from subsequent diversions.

The Instream Flow Act does not clearly provide for situations like that of Trout Creek C, a stream segment which can feasibly have its flows maintained by an existing reservoir. It is unclear whether the WDC and the legislature have discretion to halt Trout Creek C’s application like they could Trout Creek B’s, or whether they must let the state engineer decide without their input, as they did with Trout Creek A’s application. A possible solution to this “unprovided-for case” may lie in another section of the Wyoming Statutes. Section 23-1-302(a)(iii)(A) gives Game & Fish the authority to acquire stored waters for fisheries. So far, Game & Fish has only used this authority to divert storage water for offstream fisheries because it understands Wyoming water law to preclude instream uses.⁸² Since the new Instream Flow Act recognizes instream flows from storage releases as a beneficial use,⁸³ Game & Fish can now acquire storage waters for instream flows by the authority of this statute. Therefore, the WDC’s report to the legislature about Trout Creek C would only be informative, just as it was about Trout Creek A. Game & Fish then uses funds from its budget to appropriate the storage water for Trout Creek C.

Granting the Permit: The State Engineer’s Role

The legislature and the WDC have the power to prevent some instream flows, but only the state engineer has the power to grant water use permits for instream flows; these permits actually create the instream flow rights. Since the Instream Flow Act is designed to incorporate the ap-

79. *Id.* § 41-3-1005.

80. *Id.* § 41-2-112(a) (1977).

81. See Dana, *Water Projects Are Drying Up*, Denver Post, Oct. 22, 1985, at 13A, col. 2.

82. INSTREAM FLOW STRATEGIES, *supra* note 30, at 44.

83. WYO. STAT. § 41-3-1001(a) (Supp. 1986).

appropriation of instream flows into the rest of Wyoming's water law, the state must apply for a permit with the state engineer just like every other water appropriator. The state engineer must grant a permit for a beneficial use unless it is against the public interest.⁸⁴

Under the Act, any release of storage water for instream flows is automatically a beneficial use of water.⁸⁵ Therefore, the state engineer can deny the Trout Creek C application only by using the same standard that he employs in denying other beneficial use applications: if it is in the public interest to deny the application. A denial on the ground of public interest is such a rarity⁸⁶ that the state engineer's decisions on storage releases should pose no difficulty for him, especially since the WDC has previously done an independent study of the instream flow applications and the legislature has accepted its recommendations. But Wyoming's Instream Flow Act does not work according to such logic.

To ensure that the state engineer decides correctly on whether the permit is in the public interest, the Act requires several lengthy, difficult, and triplicative procedures. Before the state engineer grants or denies any instream flow application, his office must conduct studies in order "to evaluate the proposed instream flow and the necessary amount of water to maintain existing fisheries and fisheries habitat. . . ."⁸⁷ These studies are apparently meant to act as an independent check on Game & Fish's declaration of needs and the WDC's evaluation of that declaration.

One may argue that the state engineer's duty to evaluate an instream flow from storage releases goes beyond the ordinary public interest inquiry. This duty may require him to weigh the benefits of the instream flow against possible offstream uses.⁸⁸ In effect, what the state engineer may be doing when he evaluates an application for a storage release instream flow is deciding whether it is actually a beneficial use of water. It is true that the Act declares all instream flows from storage releases to be beneficial uses.⁸⁹ This declaration, however, only forecloses the argument that the use is per se non-beneficial, for "[u]nder modern thinking

84. WYO. CONST. art. VIII, § 3.

85. WYO. STAT. § 41-3-1001(a) (Supp. 1986).

86. See INSTREAM FLOW STRATEGIES, *supra* note 30, at 18. See also Robie, *Modernizing State Water Rights Laws: Some Suggestions for New Directions*, 1974 UTAH L. REV. 760, 765 and n.48.

87. WYO. STAT. § 41-3-1006(e) (Supp. 1986). Although different interpretations could be given to the statute, the state engineer understands the statute to require every instream flow application to undergo the same evaluative study. Telephone interview with Gordon Fassett, Deputy State Engineer (Mar. 12, 1986).

88. In Nebraska, the Director of Water Resources is given a list of factors to help him determine whether an instream flow application is in the public interest:

- (1) the economic, social, and environmental value of the instream use . . . ;
- (2) the economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted;
- (3) whether the application is consistent with applicable state goals for water resource use. . . .

NEB. REV. STAT. § 46-2,116 (Supp. 1985).

89. WYO. STAT. § 41-3-1001(a) (Supp. 1986).

the determination of whether a use is reasonable can be made only on the basis of comparison with other potential uses for the water.”⁹⁰ It would be impossible for the state engineer to balance fairly the real benefits of a non-economic use (protecting fish) against the potential benefits of economic uses (such as industrial development) of the water.

The state engineer will have just as much, if not more, difficulty in evaluating “the necessary amount of water to protect fisheries and fisheries habitat.” Quantification of instream flow needs is quite foreign to the usual way in which water quantities are determined for permits. For example, permits for irrigation are limited by statute to one cubic foot per second (c.f.s.) of water for every seventy acres of land irrigated.⁹¹ All the state engineer must do to determine the quantity for these permits is divide the number of acres to be irrigated by seventy, and that number is how many c.f.s. the irrigators may divert from the streams. No easy formula exists for determining how much water is necessary for fisheries. There are several ways to determine how much water a particular kind of fish needs in a particular stream segment, and all require great time and expense.⁹² The state engineer might decide to use a method different from Game & Fish’s method or from the WDC’s method and come up with a different calculation of the water needed for the fishery. By the time the state engineer makes his decision, he will have had before him at least three on-site studies.

Once the state engineer completes his evaluative studies, he must hold a public hearing for each instream flow application.⁹³ The Division of Water Development within the Economic Development and Stabilization Board is required to “publish a notice of the application and hearing in a newspaper of general circulation in the area near the proposed reservoir site.”⁹⁴ At the public hearing the Game and Fish Commission must present its studies and other interested parties present their views on the instream flow application. Let us suppose that no one objects to the minimum flow proposed for Trout Creek C because an already existing multi-use reservoir has an abundance of storage water to supply the fishery and other users. The state engineer therefore grants the permit for Trout Creek C.

The state engineer has an extra decision to make in the case of Trout Creek A. Recall that Trout Creek A requires direct flows for its fishery since storage releases are not feasible. Before deciding the public interest question, the state engineer must decide whether an instream flow on Trout Creek A would be a beneficial use of the water. Although the Act does not authorize the state engineer to reject all direct flow appropriations as a general policy, neither does it require him to be predisposed in favor of direct flow appropriations. Instead, the Act authorizes the state

90. Tarlock, *supra* note 3, at 883.

91. WYO. STAT. § 41-4-317 (1977).

92. See Palmer & Snyder, *supra* note 74.

93. WYO. STAT. § 41-3-1006(e) (Supp. 1986).

94. *Id.* § 41-3-1006(d).

engineer to decide the stormy issue of direct flow appropriations in a case-by-case fashion.⁹⁵

The state engineer follows the same procedures for direct flow applications as he does for flows released from storage. He conducts an evaluative study and holds a public hearing. Although duplicative of the Game & Fish's study, the state engineer's evaluative study does not duplicate any effort on the part of the WDC because the WDC does not evaluate direct flow applications. Further, his study and hearing serves a more understandable purpose than merely deciding the public interest question. The state engineer must decide in the case of direct flow applications whether the appropriation would be a beneficial use.

Public participation in direct flow application hearings will probably be great because it has always been the direct flows which other appropriators fought in the years of the instream flow debate.⁹⁶ In such a hearing, an instream flow opponent can always question how the state engineer's quantitative studies compared to the method used by Game & Fish. If they used the same method, a knowledgeable opponent can criticize the state engineer's study as being a parrot of the Game & Fish studies and not an evaluation at all because the same biases and limitations exist in both studies. By doing a bit of homework, an opponent to the instream flow application can attack the validity of any quantification of the streamflow right.

At this stage, the instream flow opponents cannot stop the state engineer from granting a permit, but they can raise enough questions about the application that the state engineer might place a condition on the permit. The condition would require "a review of the continuation of the permit as an instream flow appropriation."⁹⁷ Although not a victory for the opponents, such a condition prevents the instream flow right from having the same indefinite duration as other water permits.

Let us say that the state engineer has conducted studies and held hearings for the Trout Creek A application. Having heard all the testimony and having read all the studies, he must now decide whether to grant the permit. He decides to grant the permit, but not for as much water as Game & Fish requested because his own study indicates that less water is needed for the fish's survival. He also places a condition of review on the permit because of opposition from other appropriators.

Getting a Water Right Through Gift or Purchase

The state of Wyoming now has water use permits for Trout Creek A and C, but not for Trout Creek B because the legislature refused to finance that stream segment's proposed storage project. Even so, the fishery on Trout Creek B is not hopelessly unprotected. The Instream Flow Act provides an additional way to protect the fishery on Trout Creek B, or any

95. *Id.* § 41-3-1001(b).

96. *See supra* note 55.

97. WYO. STAT. § 41-3-1006(e) (Supp. 1986).

other fishery for that matter: a water user can sell or give his permit to the state to be used for instream flows.⁹⁸

Under Wyoming water law, a person who owns a water right can sell or give his right to any other person. The new owner, though, can change the use of the water through a petition to the Board of Control.⁹⁹ The Board may require the petitioner to pay for a public hearing on his petition. Then the Board decides on the petition, usually granting it unless the change in use would harm other appropriators.¹⁰⁰

Generally, a change in use petition is coupled with a change in place of use petition. A city which buys an agricultural water right in order to enhance its water supply wants to use the water in the city, not in the fields where the farmer watered his crops. The same rules that apply for a change in use petition apply for a change in place of use petition.¹⁰¹

The Instream Flow Act grants the state the right to acquire permits from other water appropriators and the right to change the use of the water permits.¹⁰² The Act does not, however, expressly allow the state to petition for a change in place of use. This omission in the Act may mean that if a Wyoming farmer with a senior water right wishes to give his right to the state for instream flows, the state can only use the water near the farmer's irrigated lands or near his point of diversion.

Suppose a farmer named Jones wants to preserve the fishing on Trout Creek B, a stretch of water he has fished for many years. Jones owns a water permit on Trout Creek and decides to give the permit to the state.¹⁰³ His fields and diversion works lie downstream of Trout Creek B and C. If the new Act is read literally, the state can apply to change the use to instream flows at Jones's place of use or at his point of diversion but cannot apply the instream flow right to Trout Creek B. Jones's well-intentioned gift may help some fish on Trout Creek, but not the upstream fishery he intended to help.

Instream flow supporters could argue that the Act does give the state the right to petition the Board of Control for a change in place of use. They could contend that "change in use" encompasses "change in place of use." This interpretation falters for the reason that "change in use"

98. *Id.* § 41-3-1007(a).

99. *Id.* § 41-3-104 (1977). One issue left unresolved by the Instream Flow Act is whether the state can change its offstream permits to instream uses. In Utah, this right is explicitly given to the Division of Wildlife Resources. UTAH CODE ANN. § 73-3-3(7) (Supp. 1986).

100. *Id.* See generally Comment, *Changing Manner and Place of Use of Water Rights in Wyoming*, 10 LAND & WATER L. REV. 455 (1975).

101. WYO. STAT. § 41-3-104 (1977).

102. *Id.* § 41-3-1007(a) (Supp. 1986).

103. The examples in the text relate to gifts to the state rather than sales to the state. In reality, gifts will be quite rare because senior water rights often represent the most valuable asset an irrigator owns. Sales will be rare for the same reason. The high costs of the senior water permits may prove to be prohibitive. For the first seven years of Colorado's Instream Flow Act, which allows the state to buy water rights, the state did not purchase any water rights. WATER AND AGRICULTURE IN THE WESTERN U.S.: CONSERVATION, REALLOCATION, AND MARKETS 235 (G. Weatherford ed. 1982).

and "change in place of use" possess distinct meanings in Wyoming water law; one phrase never includes the other. If the drafters of the Instream Flow Act intended to grant the state power to change the place of use of an acquired water right, they should have spelled it out in the statute.¹⁰⁴

Instream flow proponents could argue convincingly, however, that the state has an inherent power to apply for a change in place of use. That power arises from the new status of instream flow as a beneficial use. Because instream flow is now a beneficial use, the state should have the same rights as other water users, unless the Instream Flow Act specifically denies a particular right. This argument has some merit, but the final interpretation of this section of the Instream Flow Act will lie with the Wyoming Supreme Court. The court will have the responsibility of deciding whether instream flow rights exist only insofar as the Act specifies them, or whether they possess the same attributes as other water rights except where the Act explicitly restricts them.

In order to avoid this statutory construction problem, let us suppose that Smith, a fellow farmer and fishing buddy of Jones, hears about the lack of streamflow protection for Trout Creek B and decides to give his water right to the state. Unlike Jones's water right, Smith's water right pertains to lands which lie along the ten-mile stretch called Trout Creek B. Because Smith's lands are riparian to that portion of the stream needing the instream flow, Game & Fish has no difficulty with the change in place of use problem. Game & Fish can therefore petition the Board of Control for a change from an agricultural to an instream use.

Game and Fish, the petitioner seeking the change in use from the Board of Control, pays for a public hearing on its petition. At the hearing, Jackson, an appropriator downstream from Smith's farm and Trout Creek B, complains about the change in use. He contends that the change in use will impair his use of Smith's return flows.

Game and Fish replies that Jackson will be better off with an instream flow because now all of Smith's allotted water will flow down to Jackson; when Smith was using the water for irrigation, Jackson only received water which seeped into the stream from Smith's lands. Jackson retorts that he is not so much interested in the amount of water he will be getting as when he will get it. He gets plenty of water in the spring runoff but really needs water in late August and early September to put the finishing touches on his crop. Jackson says that Smith's irrigation lands produce water when Jackson needs it most: the lands absorb irrigation water in late spring and early summer and slowly put it back in Trout Creek so that Jackson can use the water downstream in late summer.¹⁰⁵ Game & Fish questions Jackson's premise that return flows take so long

104. Perhaps the legislature could amend the words "change in use" to read "change of water right." See COLO. REV. STAT. § 37-92-103(5) (1973).

105. An opponent to the instream flow initiative bill even argued that transferring a water right from an agricultural to an instream use could hurt the fish because of the loss of return flows. L. Bourret, *Instream Flow: What Is It Really About?* Wyoming Agriculture 4 (Jan. 1985).

to replenish the stream; they calculate that return flows take just a few days to return to the stream. The conflict stays unresolved, and the public hearing ends.

The Board of Control looks over the transcript of the public hearing before making a decision on Game & Fish's petition for change in use. The Board takes Jackson's views about the timing of the return flows seriously but is not swayed by his reasoning. The Board likens the instream flow petition to other petitions for change in use. No change in use would provide the same rate of return flows for Jackson that Smith's irrigation does; if Smith had sold his water right to a city, it would not provide any more timely return flow than the instream flow use.¹⁰⁶ The statute governing changes in use protects downstream appropriators by limiting the new use only to that amount of water consumed through the old use.¹⁰⁷ This limitation ensures that downstream appropriators will have as much water available to them as before the change in use, but it does not guarantee them that they will have the water at the same time as they used to get it.¹⁰⁸ Seeing no other problems with the Trout Creek B petition for change in use, the Board grants the petition.

Using the Permit

The state now has water permits for all three stream segments on Trout Creek that Game & Fish wished to protect. Recall that the state engineer granted a conditional direct flow appropriation right for Trout Creek A, that Farmer Smith gave his irrigation right to Game & Fish for Trout Creek B, and that Game & Fish appropriated storage water from an existing upstream reservoir for Trout Creek C. Of course, permits do not keep fish alive, water does. The question in this section is how do the permits keep water in the streams.

These permits actually have no effect as long as there is plenty of water running through the stream, but they become very important when water gets scarce. Suppose that a drought hits Wyoming in the summer of 1995. The waters of Trout Creek are running at an all-time low. Game & Fish is concerned for the three protected fisheries on the stream, while farmers and other appropriators using the waters of the stream are worried about getting enough water for their needs.

In such a tense situation Wyoming's permit system shines. Under the system, every permit has a priority date, that is, the date when the per-

106. A reader of Mr. Bourret's article, *id.*, responded to his "timely return flow" argument in this way:

I agree that conversion of irrigation rights to instream flow rights in some instances could have an adverse impact on downstream flows later in the season. What you fail to note in your article is that the same impact would occur with conversion of irrigation rights to municipal or industrial rights. The same result would occur with a change in point of diversion of an irrigation right.

Letter from Clynn Phillips, Professor of Economics, University of Wyoming, to Larry J. Bourret, Executive Vice-President of Wyoming Farm Bureau 3 (February 1, 1985) (emphasis in original).

107. WYO. STAT. § 41-3-104 (1977).

108. See Comment, *supra* note 100, at 471-72.

mittee filed his application with the state engineer's office.¹⁰⁹ The person who holds the oldest permit has the greatest right to the water.¹¹⁰ He is called a senior appropriator. The person with the next oldest permit has the next greatest right to the water. He is a junior appropriator in regard to the holder of the oldest permit but is a senior appropriator in relation to everyone else. When a senior appropriator does not get all the water to which his permit entitles him, he may "put a call on the river." This means that he gets in touch with the commissioner in his water district, who checks how much water each person on the stream is getting. If the commissioner decides that an upstream junior appropriator is using water which could be used by the downstream appropriator, he orders the junior appropriator to close his headgate and let the water stay in the stream for the senior appropriator.¹¹¹

Well in advance of the drought of 1995, Game & Fish, along with other appropriators, knew how its permits ranked in seniority compared to all the other appropriative rights on Trout Creek. Its permits for instream flows on Trout Creek A and C have a priority date of September 15, 1987, the date the applications were filed in the state engineer's office. Trout Creek B, on the other hand, has a priority date of March 12, 1900. Game & Fish knows that all but one permit on Trout Creek have priority dates earlier than the Trout Creek A and C permits. They also know that Trout Creek B's permit priority date of 1900 is earlier than most permits on the stream.

Game & Fish is not as concerned about Trout Creek C as it is about the other two stream segments because a reservoir maintains Trout Creek C's flows. Although the reservoir is lower than normal, it has enough water stored to protect Trout Creek C's fishery. But Game & Fish greatly fears that the fish on Trout Creek A and B will die unless more water comes downstream.

Game & Fish reports to the Division of Water Development within the Economic Development and Stabilization Board the need to regulate Trout Creek. On the next working day, the Division of Water Development puts a call on the stream to protect the endangered fisheries on Trout Creek A and B.¹¹² Only one junior appropriator diverts water upstream of Trout Creek A, a man named Olson who bought a hundred acres of land without water rights in 1992. Olson began diverting water for his crops that year and received a water use permit a short time later.

The commissioner makes Olson close his headgate to let the water flow downstream for Trout Creek A. Olson's crops burn, and most of the fish die anyway because there still is not enough water to keep them all alive. Besides the drought conditions, there is not enough water because several senior appropriators divert Trout Creek's water just upstream of

109. WYO. STAT. § 41-4-512 (1977).

110. WYO. CONST. art. VIII, § 3.

111. Interview with Deputy State Engineer, *supra* note 23.

112. WYO. STAT. § 41-3-1008 (Supp. 1986).

Trout Creek A. As a junior appropriator, Game & Fish cannot make them shut their headgates.

Game & Fish can more successfully protect the fish on Trout Creek B because the water permit for Trout Creek B's instream flow has the early priority date of 1900. Several appropriators with permit priority dates from 1910 to 1920 have to close their headgates partially to let sufficient water go to Trout Creek B to maintain the fishery. Jackson, the irrigator downstream of Trout Creek B who opposed the change in use petition, only has a 1945 priority date for his permit and is delighted with the extra water flowing through Trout Creek. If Smith, the donor of the permit for the instream flow, still were irrigating, Smith would have received the lion's share of the water produced through a call on the stream. Jackson's only water would have come from Smith's return flows, a minimal amount in a drought year.

Even when there is no water crisis, the state can use its permits to protect fisheries. Like other permittees, the state can challenge petitions to change an appropriator's use, place of use, or point of diversion. Suppose Jackson, the instream flow opponent, no longer wishes to have his diversion works below Trout Creek B. Instead, he wants to begin his diversion of Trout Creek's waters above Trout Creek A. The Board of Control allows such changes unless another appropriator will be injured by the change in the point of diversion.¹¹³

The state, most likely through Game & Fish,¹¹⁴ complains about the proposed change on the ground that Jackson's permit, with a 1945 priority date, would ensure him water to the detriment of Trout Creek A, which only has a priority date of 1986 for its permit. The Board agrees with Game & Fish and denies Jackson's petition.

Finally, the state can use its permits by selling surplus water or the permit itself to other appropriators for different uses. The state can apply for a change in use on its own behalf as well.¹¹⁵ This right to change or transfer the use only applies, however, to storage water rights and to water rights converted to instream uses. The statute empowering the state to sell or change the rights does not mention direct flow appropriations.¹¹⁶

113. *Id.* § 41-3-114(d) (Supp. 1985).

114. The Instream Flow Act does not specifically give the state the standing to complain about changes of water rights. The Act does make the state an appropriator of water for a beneficial use. As such, the state has the same standing that any other appropriator would have. Since Section 41-3-1007(a) makes Game and Fish the petitioner for a change in use, Game and Fish will probably also be the state agency opposing water rights changes.

115. WYO. STAT. § 41-3-1002(c) (Supp. 1986) provides:

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 section 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.

116. *See id.*

Therefore, the state does not have the power to change those rights to other uses.¹¹⁷

Limits on the Permit

The Instream Flow Act limits instream flow permits in several significant ways. First, only the state can own an instream flow permit.¹¹⁸ Second, the state cannot change the place of use for the instream flow permit.¹¹⁹ Third, the state cannot file for abandonment of another's water right.¹²⁰ Fourth, the Act does not grant the state any rights-of-way through private property to get to the stream segment protected by the permit.¹²¹ Fifth, to underscore the fact that the state acts as a market participant rather than as sovereign when it uses its instream flow permits, the Act denies the state power to condemn any water right.¹²² This simply means that the state cannot force any water user to sell his water rights to the state for instream flows.

Finally, the Act proscribes appropriations for instream flows when they "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."¹²³ This provision of the Act was meant to pacify opponents of instream flows who feared that downstream states would unjustly benefit from Wyoming's new law by getting more water than they are entitled to receive.¹²⁴

Rights of Other Appropriators

Having examined the attributes of instream flow permits, let us look at the rights other appropriators have in relation to these permits. Rights of other appropriators can be divided into two categories: rights granted through the Instream Flow Act and rights granted through traditional water law. The Act grants other appropriators the right to sue the state for the diminished value of their water rights resulting from an instream flow, the right to divert all the water along certain stretches of water, and the right, for some appropriators, to condemn an instream flow.

Traditional water law grants senior appropriators the right to take as much water as they are entitled to even if it destroys a fishery with a junior right, the right to bring an abandonment action if they can prove

117. State Engineer George Christopoulos opposed the original language of H.B. 209, which allowed the state to sell its direct flow waters. He proposed the present language of Section 41-3-1002(c). He reasoned that the state "should not have windfall because they've appropriated water that they no longer need." *Laramie Boomerang*, Mar. 11, 1986, at 12, col. 5.

118. WYO. STAT. § 41-3-1002(e) (Supp. 1986).

119. *Id.* § 41-3-1002(a) provides in part: "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."

120. *Id.* § 41-3-1011.

121. *Id.* § 41-3-1012.

122. *Id.* § 41-3-1009.

123. *Id.* § 41-3-1006(h).

124. C. Lummis, *supra* note 34, at 25.

that the permit for the instream flow is not being used, and the right to bring an action for waste in which they must prove that more water is flowing in the stream than necessary for the fish.

Let us first look at the rights afforded other appropriators by the Act. Throughout the Instream Flow Act, one theme predominates: instream flow rights are not meant to and cannot "be so construed as to impair or diminish the value of or divest existing water rights."¹²⁵ The question that this and similar phrases in the Act raise is whether the "impair or diminish" language actually gives other appropriators greater rights against instream flow uses than they have against other uses.

Let us return to the conflict between Jackson and Game & Fish to answer this question. Recall that Jackson tried to halt Game & Fish's change in use petition on the ground that he would not be getting the return flows at the time he needed them most.¹²⁶ Also recall that Jackson tried to change his point of diversion from below Trout Creek B to above Trout Creek A and that Game & Fish successfully blocked his petition.¹²⁷ Jackson believes that the instream flow permits for Trout Creek A and B have impaired the value of his water right and decides to sue Game & Fish.

Jackson goes through all the proper steps with his complaint,¹²⁸ and the case finally reaches the Wyoming Supreme Court. The question on appeal is whether the language in the Instream Flow Act stating that an instream flow use must not "impair or diminish the value of or divest existing water rights" suggests a greater standard than the no injury rule under traditional water law. The no injury rule simply means that an appropriator cannot change his use, place of use, or point of diversion if the change threatens another user's existing right to the water.¹²⁹

If the Wyoming Supreme Court holds that the "no impairment" provision in the Act restrains Game & Fish in the use of their permits more than the rest of Wyoming's water law restrains other appropriators, then a plaintiff only has to prove that the instream flow permit somehow controlled him in the use of his water right. For example, Jackson can successfully argue that his water right's value diminished when he could not change his point of diversion and when he could not get the return flows at the same time as he used to get them. If the instream flow right had not been exercised in those two instances, Jackson could have received more benefit from his permit. Therefore, the instream flow permits for Trout Creek A and B interfered with the exercise of his permit thereby

125. WYO. STAT. § 41-3-1009 (Supp. 1986).

126. See *supra* text accompanying note 105.

127. See *supra* text accompanying notes 113-14.

128. The plaintiff appropriator must first bring his case to the state district court. Wyo. STAT. § 41-3-1010 (Supp. 1986). Apparently, the plaintiff does not have to exhaust his administrative remedies through the Board of Control. Interview with Deputy State Engineer, *supra* note 23.

129. See Comment, *supra* note 100, at 474.

diminishing its value.¹³⁰ This interpretation of the Act would severely limit the effectiveness of the instream flow permits. Game & Fish could put a call on the river if they have senior rights, but that is about all. Any other exercise of the instream flow right could conceivably impair the value of another appropriator's permit.

If, on the other hand, the Supreme Court decides that the "no impairment" provision restrains the state in its use of instream flow permits no more than the no injury rule does, then Game & Fish can act the same as other appropriators by opposing petitions for changes in water rights and seeking petitions for changes in use. In that case, the language of the Instream Flow Act is a mere placebo for water appropriators and gives them nothing more than they already had under traditional law. Although this interpretation rides roughshod over the actual language of the statute, Wyoming case law supports it.¹³¹

The Act also gives other appropriators the right, in certain cases, to divert water from stretches of streams protected by instream flow permits. They may divert water at any point within a mile upstream from where the instream flows enter Big Horn Lake, Flaming Gorge or Palisades Reservoirs, or the main stem of the North Platte River, or where the flows cross the Wyoming state line into another state.¹³² The Instream Flow Act grants appropriators this right over instream flows in order to give them a last chance to consumptively use the water before the state loses control over it to other states.¹³³

Another right the Act gives certain appropriators over instream flow uses is the right to condemn the instream use. Cities can condemn instream flow rights for the purpose of providing a municipal water supply. The Instream Flow Act makes this condemnation right explicit.¹³⁴

Suppose, for example, that the population of Gillette grows to over 50,000 by the year 2000. The city needs more water and begins its search for senior water rights so that it can be more assured of a steady flow. Gillette decides that the water right for Trout Creek B, having a priority date of 1900, would satisfy the city's needs. Gillette pays the state the

130. Encouragemet to bring this kind of suit comes from the Instream Flow Act itself, which provides that the state must pay the plaintiff's costs of litigation, including attorney's fees, if he wins. WYO. STAT. § 41-3-1010 (Supp. 1986).

131. See *Associated Enterprises v. Toltec Watershed Improvement Dist.*, 656 P.2d 1144 (Wyo. 1983). *Toltec* involved the construction of another "no impairment" provision in the water code. The court held that the provision was not to be construed literally. See also Note, *Impairment of Existing Water Rights Under the Wyoming Watershed Act*, 19 LAND & WATER L. REV. 83 (1984).

132. WYO. STAT. § 41-3-1002(d) (Supp. 1986).

133. Also in regard to interstate demands for Wyoming's water, WYO. STAT. § 41-3-1014 (Supp. 1986) declares that nothing in the Instream Flow Act can "be construed to . . . impair . . . the right of the state of Wyoming to fully utilize and appropriate to consumptive beneficial use, those quantities of water allocated to the state of Wyoming by interstate compact or United States supreme court decree." This section of the Act ensures that instream flows will not count as part of Wyoming's share of the interstate waters flowing through the state.

134. WYO. STAT. § 41-3-1013 (Supp. 1986).

value of the permit and diverts the water for its own supply. Thus, after all the effort to protect a fishery on that stretch of Trout Creek, protection no longer exists and the fish have to fend for themselves.

In addition to the rights provided by the Instream Flow Act, consumptive users have rights under traditional Wyoming water law as against instream flow uses. For instance, senior appropriators can divert water even if it means that the instream use will suffer. Because of the nature of the instream use, however, other appropriators cannot put a call on the river to shut down instream uses because the very thing a call does is keep water in the watercourse for downstream appropriators.

Likewise, other appropriators cannot normally bring an abandonment action against an instream flow use because such actions can only be brought when a permittee does not use his water right. Unlike irrigation, an instream flow use does not require human aid to operate. But perhaps an abandonment action could be brought if all the fish died in a stream segment and Game & Fish did not replenish the stock. Akin to the abandonment action would be a review of a conditional instream flow permit, which could result in the discontinuance of the permit.¹³⁵

Finally, Wyoming water law grants to any affected appropriator the right to sue another appropriator for waste.¹³⁶ When an appropriator wastes the water of a stream he no longer is applying the water to a beneficial use. Since he is not beneficially using the water he has no right to it.¹³⁷

An opponent to an instream flow could argue that the flow permit grants more water than is necessary for the maintenance of the protected fishery. This extra water is wasted, he could say, and should be made available to other appropriators.¹³⁸ The opponent to the instream flow would have to prove through a scientific study that too much water is flowing for the fish. If he is willing to pay the costs, the opponent could probably make a good case since so many ways are available to determine the necessary instream flow. Especially vulnerable to this waste attack are instream flows which have been converted from existing water rights. The Instream Flow Act does not require studies to measure the minimum amount of stream flows necessary for fisheries for these acquired rights, so these acquired flow rights may be more than the fisheries need.

In summary, other appropriators have a variety of protections from intrusions by instream flows. The Instream Flow Act supplements the existing safeguards of the prior appropriation system and even encourages

135. See *supra* text accompanying note 97.

136. Interview with Deputy State Engineer, *supra* note 23.

137. WYO. STAT. § 41-4-317 (1977) provides in part that no "appropriator shall . . . be entitled to the use of more water than he can make a beneficial application of on lands, for the benefit of which the appropriation may have been secured." See *Quinn v. John Whitaker Ranch Co.*, 54 Wyo. 367, 370, 92 P.2d 568, 570-571 (1939).

138. See Tarlock, *supra* note 3, at 883. "Legislative attempts to protect intream values are . . . vulnerable to judicial invalidation on the ground that the use is wasteful." *Id.* See also *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913).

appropriators to sue the state for damages through the attorney fees reimbursement provision.

Recall the question at the beginning of this hypothetical: How can the new Instream Flow Act protect the fisheries on Trout Creek? As a short answer, it can be said that the Instream Flow Act, after several years of studies, hearings and decisions, does in some fashion protect the fisheries on those imaginary stream segments. The Act does more than protect fisheries, though. It also protects and advances the rights of Wyoming's consumptive water users. The next section of this comment explores the question of how well the Act does what it was meant to do.

EVALUATING WYOMING'S INSTREAM FLOW ACT

The Wyoming legislature meant to balance the needs of other beneficial uses against the needs of fisheries when it passed the Instream Flow Act.¹³⁹ The legislature had a choice among several ways of effecting that balance.¹⁴⁰ It chose to balance the two interests by fitting instream flows into the existing system of prior appropriation, with a few changes.

How the Act Affects Consumptive Appropriators

It is safe to say that many water users in Wyoming are not happy that there is an instream flow law in the state. They view any new water use as a threat to their existing rights because only so much water flows in the streams. It is especially aggravating to some that the new use does not have an immediate economic value. Galling as any instream flow law may be to many consumptive users, the question here is who, if anyone, is adversely affected by the Act.

The enactment of an instream flow bill potentially could have harmed Wyoming water users in two basic ways. The first way an instream flow law could have hurt them was by decreasing the amount of water which they diverted. The second way the law could have hurt them was by limiting their future uses of Wyoming's water. As will be seen, Wyoming's Instream Flow Act does not harm water users significantly in either respect, and the harms that the Act does cause consumptive users are outweighed by the benefits the Act brings to them.

The Instream Flow Act in no way diminishes the amount of water that other water users can legally divert. The law of prior appropriation still assures them of as much water as they were entitled to before the passage of the Act. The Act itself states that none of its provisions can be construed to diminish the rights of existing water users.¹⁴¹

The Act, however, potentially restricts the amount of water which other appropriators actually divert. Many water users divert more than their legal share, sometimes during the flood season when it does not mat-

139. C. Lummis, *supra* note 34, at 5.

140. State legislatures have protected instream flows through three different methods: legislative withdrawals, administrative denial of permits, and state agency appropriations. Comment, *supra* note 3, at 143.

141. WYO. STAT. § 41-3-1009 (Supp. 1986).

ter and sometimes during the dry season when it does matter.¹⁴² Once the state engineer grants an instream flow permit in a drainage, he can regulate the stream if there is any danger to the fishery, and if the call is not futile.¹⁴³ When a call is put on the river, all headgates are checked to make sure that no one, even a senior appropriator, is taking more than his share.¹⁴⁴

Yet, any new water use would increase the possibility of regulation in a drainage simply because of the increased numbers of people wanting to use the same water. The Act's potential restriction of diversions to only that amount granted by law does not seem to be burdensome. An instream flow use has the added benefit of keeping its entitlement of water in the stream, so the water which keeps the fish alive is available to downstream consumptive users as well.¹⁴⁵

Of greater concern to irrigators and other water users than interference with their present uses of water was the possibility that an instream flow law would restrict their future or potential uses of water. It is true that the Instream Flow Act does allow instream flows to compete with other uses of water under the prior appropriation system. Therefore, an instream flow permit which has an earlier permit date than another water use permit limits that other use when there is not enough water for both of them.¹⁴⁶ This situation will not happen very often, though, and certainly will not affect new irrigators. Anyone wishing to start a new farm in Wyoming would want to buy someone else's water rights, for without senior water rights the land is almost worthless.

One situation which may occur more often is that the state will oppose a change in use, place of use, or point of diversion petition by another appropriator. In these petition hearings, a junior permit holder has the only chance of defeating the petition because, unlike a senior appropriator, he can be harmed by the change. Many petitions for water rights changes in Colorado, which has an instream flow act similar to Wyoming's in that it allows the state to appropriate water for instream flows,¹⁴⁷ have met with opposition from the state, which holds numerous junior instream flow permits in the affected drainages.¹⁴⁸

142. See WYOMING OUTDOOR COUNCIL, *supra* note 8, at 18. "[A]ny regulation would hurt the direct diverters who use more than they are entitled to. In a court of law, I'm afraid they would cut us all back to one cubic foot per second per seventy acres." *Id.* (Statement of Converse County Rep. Rory Cross). See also L. TECLAFF, *WATER LAW IN HISTORICAL PERSPECTIVE* 190-91 (1985).

143. WYO. STAT. § 41-3-1008 (Supp. 1986).

144. Interview with Deputy State Engineer, *supra* note 23.

145. WYO. STAT. 41-3-1002(b) (Supp. 1986) reads: "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."

146. S. Shupe, *Legal Implications of Instream Flows and Other Nonconsumptive Uses* 8-9 (an outline for a lecture given in a short course sponsored by the Natural Resources Law Center, University of Colorado School of Law, June 3-5, 1985).

147. COLO. REV. STAT. § 37-92-102 (Supp. 1985).

148. *WATER AND AGRICULTURE IN THE WESTERN U.S.: CONSERVATION, REALLOCATION, AND MARKETS* 235 (G. Weatherford ed. 1982).

Consumptive water users correctly perceived instream flow permits as threats to any changes in their uses of water. Granted, instream flow supporters have rightly pointed out that instream flows represent no danger different from other new uses of water because any junior appropriator has the same chance as the instream flow user to block a change in a water right. These supporters, however, have failed to mention one component of consumptive users' fears: although qualitatively the same as other junior rights, instream flows could hamper water use flexibility if hundreds of permits were rapidly granted.¹⁴⁹

Wyoming appropriators do not have to worry about an excessive quantity of instream flow permits. It is unlikely that many instream flow permits will be granted before 1991; only a few more per year will probably be granted after that. Remember the complexity of the procedure for obtaining a permit. To begin with, Game & Fish must do an extensive on-site study and present its report to the WDC. The WDC does its own on-site study of how much water is necessary for the fish, as well as a storage feasibility study. The WDC presents its report to the legislature, which decides whether to finance the proposed storage facilities. Only then does the state engineer begin his work. He must do an independent on-site study of the proposed instream flow. Then he must hold a hearing, and only then does he have the power to grant the permit. All of these studies and hearings require time and money. Instream flows will not be popping up everywhere in Wyoming.

Even where fisheries are granted instream flows, it is very likely that their water will come from storage facilities, which will benefit other appropriators. In order to tie instream flows to storage the WDC must merely find that building a reservoir to provide instream flows is physically possible, not that it is inexpensive. The WDC will probably find that the majority of instream flow applications can feasibly be provided through storage rather than through direct appropriation. The WDC is, after all, commissioned to develop the waters of Wyoming. This means that the WDC is supposed to promote multi-use water storage projects.

Overall, Wyoming appropriators will benefit from the Instream Flow Act. The only threat to their uses of water comes from the possibility that too many flow permits will be granted. The Act's requirement of several levels of scrutiny before a permit is granted ensures that this threat will not be realized. As an added benefit of the Act, instream flows will regularly be accompanied by storage projects to supply the flows. For a change, irrigators who desire more water projects will not have to contend with environmentalists' objections to their proposals. Instead, the environmentalists will be in the new position of pushing for water development, albeit for fisheries rather than for irrigation.

149. Wyoming opponents to instream flows pointed to the amount of instream flows granted in Colorado (over 2500 miles of streams as of 1982, *id.*) and feared that the same amount of flows in Wyoming would occur with the passage of the instream flow bill. See Wyoming Outdoor Council, *supra* note 50, at 3.

How the Act Affects Environmentalists

The Instream Flow Act would never have come about without the active push of environmentalists. For over a decade, environmentalists in Wyoming have called for protection of the state's scenic and recreational resources. Through their initiative bill, they were going to bring the issue of instream flows to the voters to settle. As it turned out, their initiative bill acted as the necessary catalyst to force the legislature to compromise in the closing days of the 1986 session.

The compromise was made mostly on the part of agricultural interests, though, because the Instream Flow Act had to be substantially similar to the initiative bill before the attorney general could strike it from the ballot.¹⁵⁰ Thus, environmentalists got what they wanted: there is an instream flow law in Wyoming. The question that remains is whether that law accomplishes what they hoped it would accomplish.

Wyoming environmentalists had a very limited goal in their push for an instream flow law. They sought only to protect fisheries, not wildlife or scenery which are also traditional values for environmentalists. Even their own instream flow initiative bill tied instream flows only to fisheries. No room was made for the water needs of the other values.

It can be argued that wildlife and scenic beauty benefit incidentally from a steady source of water for fish. This argument holds water only for direct flow appropriations. The favored method of providing instream flows, however, is through storage releases. The Instream Flow Act encourages the building of reservoirs, which always causes some destruction to an area's scenic beauty and some encroachment on the wildlife inhabiting that area.

Environmentalists may have gotten more than they bargained for with the passage of the Instream Flow Act. They have effectively placed themselves in the uncomfortable position of standing on the side of water development for the benefit of one environmental and recreational value, while at the same time standing against water development where it threatens two other environmental values: wildlife and natural scenery.

Supporters of instream flows may not even find satisfaction in saving one value at the expense of other environmental values. The Instream Flow Act will probably not save a large quantity of stream segments within the next decade or two. Besides the snail's pace of the permit process which in itself limits the yearly number of instream flows allowed, each permit application faces a good chance of termination at several stages of the process. The WDC can decide that an application is not in the state's interest,¹⁵¹ the legislature can decide that it does not want to finance a storage project for instream flows,¹⁵² and the state engineer can decide that a direct flow appropriation application is not a beneficial use.¹⁵³

150. See *supra* text accompanying note 53.

151. See *supra* text accompanying notes 79-80.

152. See *supra* text accompanying note 81.

153. See *supra* text accompanying note 95.

Incredible as it may seem, environmentalists spent countless hours getting 32,000 Wyoming voters to support such a pro-development bill, which gives so little to environmental values except the recognition that indeed fisheries may be beneficial uses of water. If the environmentalists had worked on their own bill rather than just promoting a bill which had been hashed out in the legislature, Wyoming might have ended up with a stronger means of protecting its streams, with all its fish and wildlife and natural beauty. But Wyomingites interested in those values must content themselves, on the whole, with what they got in the Instream Flow Act because they asked for it.

A MODEST PROPOSAL FOR CHANGING THE INSTREAM FLOW ACT

As it now stands, Wyoming's Instream Flow Act is an administrative quagmire. The Act has placed a great number of extra burdens on instream flow applications that will cost the state's agencies, legislature, and citizens a great deal of money, time, and frustration. The only people who will actually benefit from all the extra studies involved in instream flow applications are instream flow analysts.

The legislature will surely amend a few sections of the Act. Some of those amendments will be aimed at more smoothly administering the permit process. If the legislature will take a new look at what it set out to accomplish, it might be able to achieve some solution to the administrative problems raised by the Instream Flow Act.

The legislature sought to fit instream flows into the existing system of prior appropriation. Under that system, though, a beneficial use cannot usually be denied. If the legislature did not put some limits on instream flow applications through the Act itself, any number of permits could be granted through the prior appropriation system. This multitude of permits, besides affecting the flexibility of other water uses, could be seen as taking unfair advantage of the permit process.

Many Wyoming legislators feared that the Game and Fish Commission, if left unchecked, would follow the Colorado example and apply for and get permits for thousands of miles of stream segments. The 1982 bill, the precursor to the Instream Flow Act, therefore provided that Game & Fish could apply for only five streams or stream segments each year.¹⁵⁴ That limit of five stream segments was quickly stricken and was never revived.

It is proposed here that the legislature revive the limit of five stream segments per year for direct flow appropriations. If Game & Fish were so limited, then the fears of consumptive users that all of Wyoming's water would be tied up could be laid to rest. With those fears eliminated, then maybe the legislators could leave the prior appropriation system alone and let Game & Fish apply for their permits directly to the state engineer.

154. H.B. 103, § 41-3-1003, 46th Legis. (1982).

The state engineer could examine Game & Fish's proposal, listen to comments of concerned citizens at a hearing, and decide whether to grant a permit for the direct flow application.

Storage releases for instream flows could still be handled as the Act suggests. It would probably be simpler and more cost-effective, however, to allow the WDC and the state engineer to provide for instream flows in these situations as they have in the past.¹⁵⁵ Storage releases for instream flows have never presented the difficulties to consumptive water users that direct flows have and should not require all the administrative checks that are imposed on them by the Act.

Environmentalists should not be too upset with the limit of five stream segments a year, since the Act essentially limits the permits even more with the lengthy and difficult permit process. Also, this amendment would help environmentalists down from the fence they must now straddle with the water development issue. State legislators should be especially pleased with this proposal. It is a much cheaper and simpler alternative to what presently exists. The proposal may look even better when legislators see how much time and money the various agencies spend in their efforts to save a few fish.

CONCLUSION

The passage of Wyoming's Instream Flow Act marked the end of an era. No longer will the state's water law recognize only consumptive off-stream uses of water as beneficial. The Instream Flow Act creates a new right in the state to appropriate and acquire water for the instream use of fisheries.

The passage of the Act, however, came at a high cost to environmentalists, the major force behind the drive for instream flows. The Act only protects fisheries and makes no room for other environmental values such as aesthetics and wildlife. In fact, fulfillment of the Act's purposes might even impinge upon those values because of the preference in the Act for storage releases rather than for direct instream flows.

The price of compromise might have been worthwhile had the Act fulfilled environmentalists' hopes of a workable instream flow law. However, the Act is so laden with "study after study, hurdle after hurdle" that the prophecy of one legislator is being fulfilled: "[Y]ou won't have instream flow; you'll have instream trickle."¹⁵⁶

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155. See *supra* text accompanying notes 17-18, 82-83.

156. WYOMING OUTDOOR COUNCIL, *supra* note 8 (statement of Sen. Tom Stroock).