Obstacles and Opportunities in State Water Right Change Process

Laura Ziemer and Scott Yates
State-Specific Instream Flow Authority

**Montana**
- Permanent instream dedication recognized
- Instream flow recognized as beneficial use
- Individual landowners or nonprofit entities may hold instream rights
- Temporary instream leases authorized

**Transaction Costs**
- High
- Complete
- Remaining progress
- Low
• The Good: MT and ID have flexible statutory tools for instream flow rights.

• The Bad: In Montana, the agency change process takes between 1.5 to 3 yrs; Idaho has lower transaction costs.

• The Ugly: Idaho’s instream authorization works best in the Salmon and Lemhi basins; instream changes more difficult in other parts of the state.
Instream Water Use In Idaho

- Water is changed to an instream beneficial use through the Idaho Water Supply Bank.
- An irrigation right can be leased into the bank and then “rented” out for delivery to an existing IWRB minimum streamflow water right.
- The consumptive use portion of the irrigation right can be delivered past junior users according to the priority date of the rented right.
- From 2003 through 2011, there have been 60 instream leases in the Lemhi and Salmon River basins.
Authority for Instream Use In Idaho

- The IWRB can approve permanent and temporary “rentals” out of the Water Supply Bank.

- Lemhi River Basin’s local rental committee created to facilitate instream transfers. I.C. 42-1765A

- Instream water use must deliver to one of the state’s minimum instream flow water rights.

- Lemhi and Salmon River basins have more such points than other parts of the state; Lemhi “restoration” right created by I.C. 42-1506 (2001).
“But I ain’t got no minimum instream flow right!”

- Outside of Lemhi and Salmon River basins fewer min instream flow rights.
- To establish min instream flow right, there has to be enough flow to maintain the right. I.C. 42-1503.
- Can’t deliver peak flows to the min instream flow right.
- Designation of new min instream flow right requires legislative approval. I.C. 42-1503(e).
Montana Instream Changes: Flexible Tool, Time-Intensive Process

- Statutory Timelines = 18 mo’s min
- State, rancher, or non-profit entity can hold temporary instream water right
- Only 1 permanent instream water right change in Montana to date.
- Lease term from 10 to 30 years, with unlimited renewals.
- Can lease “conserved” water down to p.o.d. (formerly diverted but not consumed)
Montana’s Flexible Tool
Wasson Creek: Peak Flow Pulse with Split Season Water Lease

Fish Sampling on Wasson Creek
WESTSLOPE CUTTHROAT TROUT BELOW DIVERSION (Stream Mile 2.4)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CATCH / 100 FEET</th>
</tr>
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<tbody>
<tr>
<td>2003 1</td>
<td>20</td>
</tr>
<tr>
<td>2004 2</td>
<td>10</td>
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<tr>
<td>2005</td>
<td>5</td>
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<td>2006 3</td>
<td></td>
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<td>2007</td>
<td>20</td>
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</tbody>
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1 Pre-Project 2 First single-season diversion reduction, habitat restoration begins 3 Restoration completed
MT Change Application Process: What’s matter, can’t find the water?

- Applicant carries burden of proof “by a preponderance of evidence.” MCA 85-2-402(2).
- No concurrent water uses.
- Two central questions:
  - Prove historic beneficial use
  - Prove “no injury” to other water users
The Ugly in the Agency Application Process

1. Establish Historical Beneficial Use
   • how much evidence?
   • how far back in time?

2. No Injury To Other Water Users
   • Change in timing and magnitude of return flows?
   • Change in timing of water use? (for example, 3 days on, 4 days off for irrigation use, to 7 days/wk instream use)
   • Loss of ditch carriage water?
Wyoming’s Instream Flow History

• WY as a “small town with long streets”
• Early discussions were not collaborative
• Threat of ballot initiative
• Ag never forgets
Wyoming Instream Flow Law

- Passed into law after hot debate in 1986
- Typical limitations for late-priority, state-filed & held water rights
- Cumbersome process but state has been diligent
- Permanent transfer/acquisition provision
Turning a Water Right Over to the State to Protect Streamflow

*From hay fields to fish flows*

Pinedale irrigator first in Wyoming to convert water right for fish

By Anne MacKinnon
Wyoming Needs a Water Leasing Mechanism

- Pilot Water Leasing Bill
- Local Rental Pool/Instream Flow Districts
- Conserved Water
- Ballot Initiative
Proof Of Concept

• Non-Diversion Agreement (NDA) Program
  • East Fork Wind River
  • Trout Creek (Green River Basin)
  • Savery Creek (Little Snake)
  • Bighorn River Tributaries
• Working Closely with the Board of Control
Wyoming Funding Mechanisms

- WY Wildlife & Natural Resource Trust (WWNRT)
- State & Federal Resource Agencies
- Energy Industry
- Private Sources (Teton, Park, & Sheridan Counties)