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Instream Flow Legislation

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Introduction

In the west, state law historically considered water left in the stream to be wasted. Western states, which rely heavily on diversions to meet their water needs, have encouraged full appropriation of rivers and streams. In many cases, however, diversions have resulted in the depletion of stream flow reliant ecosystems and adversely affected fish, wildlife, recreation and river navigation.

Today, protective instream flow legislation has been implemented in many states across the nation.² Without protection, “[s]almon populations were crashing, riparian habitat was being lost, and . . . legendary rivers like the Rio Grande had become little more than concrete-lined conduits. People began to demand that the law protect the rivers they fished, rafted, and admired.”³

While the majority of western states have enacted some form of instream flow legislation, the parameters of the legislation and on-the-ground implementation vary widely from state to state. For example, since the passage of its instream flow legislation in 1984, only 247 miles (2%) of Nebraska’s 12,371 miles of streams and rivers have received some protection through instream flow appropriations (8 miles on Long Pine Creek and 239 miles on the Platte River).⁴

This memo provides a brief overview of Nebraska’s instream flow law and draws comparisons to the approaches taken in other western states. It analyzes the following issues: (1) the ecological and economic benefits of instream flow protection; (2) which water sources may be used for instream flow appropriations; (3) who may obtain instream flow rights; (4) the purposes for which instream rights may be appropriated; and (5) miscellaneous restrictions on instream flow appropriations. Although this memo focuses on state law, the reader should note that federal legislation, especially the Endangered Species Act and the Clean Water Act, often plays a major role in protecting instream flows.

I. The Benefits of Instream Flow Protection

Protection of instream flows benefits both ecological and economic interests. Adequate stream flows are the essence of what makes a stream or river. As such, they contribute to many ecosystem goods and services, including filtration, dilution of sewage and other effluents, livestock watering, increased land values, fish and wildlife needs, and recreational forms of all types, such as fishing, hunting, boating and aesthetics). Instream flows also supply cooling water for electrical generating plants, hydro-electric power, drinking water sources and groundwater recharge. Maintaining instream flows also benefits riparian wetlands, which in turn help absorb flood waters and polluted runoff, provide wildlife habitat, keep exotic species in check, and promote economic vitality for nearby communities.⁵ The State of Nebraska Policy Issue Study on Instream Flows lists fishery resources, recreation and aesthetics, compliance with interstate compacts and judicial decrees, hydroelectric power, aquifer recharge, subirrigation, navigation, wildlife, wild and scenic rivers, and water quality as instream water uses.⁶

A significant proportion of Nebraska’s future economic vitality could potentially revolve around its streams and rivers if instream flows are protected. Examples include ecotourism on the central Platte for birdwatching; ecotourism on the Niobrara for canoeing and tubing; and ecotourism on the Missouri from boating and other recreational uses.⁷ The 2001 U.S. Fish and Wildlife survey provides the following monetary values for recreational activities in Nebraska:

Fishing - \$306.6 million; Wildlife-Watching - \$210.7 million; Hunting - \$306.1 million.⁸ A 1996 study shows that expenditures related to wildlife-watching on the central Platte totaled between \$13-20 million, with over 75% originating from residents of other states.⁹

II. Water Sources for Instream Flow Appropriations

Almost every western state with an instream flow law addresses what source of water can be utilized for instream flow appropriations. In Nebraska, appropriations for instream flows can utilize unappropriated water or, if there is insufficient unappropriated water available, stored water.¹⁰ According to the Nebraska Supreme Court, the statutory term “available” means “fairly dependable and continuous.”¹¹ Arizona, Alaska, and Idaho share Nebraska’s requirement that the instream flow waters must come from unappropriated sources. The other western states either explicitly allow for additional sources or place no restriction upon the source of instream flow appropriations. Limiting instream appropriations to only unappropriated sources limits Nebraska’s ability to protect instream flows, and places Nebraska’s instream flow law among the most restrictive in the west.

The instream flow statute further restricts “available” water by requiring that there be “unappropriated water available to provide the approved instream flow rate at least twenty percent of the time during the period requested.”¹² The twenty percent limitation in Neb. Rev. Stat. § 46-2,115 stands alone among the other western states, none of which require that water appropriated for instream flow use be available for any particular amount of time. In 2005, the Nebraska legislature considered a bill that would have made the availability requirement even more stringent. LB 1226 proposed to change §46-2,115 to require that the unappropriated water be available eighty percent of the time.¹³ This change would have resulted in a drastic reduction of instream flow protections. The amount of unappropriated water in Nebraska is limited, and the existing requirement that instream flow rights be granted only for “unappropriated” water already inhibits the state’s ability to protect instream flows with water from sources like donations or purchases.¹⁴

III. Who Can Appropriate Instream Flows?

Nebraska also takes a restrictive approach with regard to the entities allowed to obtain instream flow appropriations. Where many states allow individual citizens to petition the state for instream flow rights or to change the purpose of their existing water rights to use it for stream flows, Nebraska Revised Statute § 46-2,108 allows only the Game and Parks Commission and the Natural Resource Districts to own an instream flow right. Out of 23 Natural Resource Districts (NRDs) in the state with authority to obtain instream flow appropriations, only one NRD has attempted to apply for an instream flow appropriation since 1984; the Central Platte NRD now holds instream flow appropriations on the Platte River for fish and wildlife purposes.¹⁵

Nebraska law does allow individuals to change the purpose of their water right to instream flows,¹⁶ but the consequences of such a change are unclear. Fear of losing one’s water right to the state may deter people from converting their current use to instream flow. This lingering question may be an appropriate subject for future legislation.

IV. For What Purpose may Instream Flows be Appropriated?

States can benefit in a number of ways by maintaining natural flow regimes in their streams, but state laws vary with respect to which benefits are deemed worth the cost of having less water to appropriate for other purposes. The most widely cited purpose for which an instream flow can be appropriated is to benefit fish and wildlife.¹⁷ Recreation is also a recognized purpose in most states.¹⁸ Fewer western states explicitly allow instream flows for navigation, water quality or aesthetics.¹⁹

In comparison with other western states, Nebraska recognizes relatively few allowable purposes. Nebraska law allows instream flows to be appropriated “to maintain the existing recreational uses or needs of existing fish and wildlife species.”²⁰ The Nebraska Supreme Court has upheld an instream flow appropriation to preserve Platte River wildlife species.²¹

It is not clear whether the legislature intended the word “existing” to serve as a limiting term. The issue has not been litigated, but arguably instream flows could not be appropriated to feed man-made recreational lakes created after the law’s effective date, or to protect any species of fish or wildlife that is discovered or introduced into an area after the law’s effective date. Nebraska is the only state that uses this particular limiting term.

The Nebraska statute also appears to restrict instream flow purposes to the maintenance (not enhancement) of existing recreational uses and fish and wildlife needs.²² Along with other areas described above, this makes Nebraska’s instream flow provision among the most restrictive western statutory schemes.

V. Other Restrictions

Nebraska’s instream flow legislation includes other miscellaneous substantive and procedural restrictions on instream flow appropriations. As in all western states, instream flows in Nebraska must not interfere with senior surface water appropriations.²³ Most instream flow programs are of recent vintage, with junior priority dates, so they can only safeguard the stream against diversions by subsequent new users.²⁴ Also, instream flow appropriations can only be applied to the segment of the stream indicated in the application, and once the water passes through that segment, all rights to it are relinquished.²⁵

In addition, Nebraska, like most states, imposes a “public interest” review on instream flow applications. However, a unique aspect of Nebraska law explicitly requires instream flow appropriations to be weighed against specified economic and social values.²⁶ In other words, although instream flows for recreation, fish, and wildlife have been statutorily recognized as beneficial uses in Nebraska, an application for one of these uses may only be granted if the balance tips in favor of the application over other economic and social considerations, such as induced recharge for municipal water systems and water quality maintenance.²⁷ The Department of Natural Resources is charged with making these determinations, and the Nebraska Supreme Court has upheld the DNR’s denial of trans-basin diversions under the public interest standard due to the potential for adverse effects on wildlife and endangered species in the basin of origin and the unavailability of a dependable flow.²⁸

Nebraska statutes also impose various procedural requirements on instream flow applications. First, before the Department Natural Resources proceeds with a hearing on a contested instream application, the applicant and opposing parties must attempt to resolve their differences through mediation or arbitration.²⁹ In addition, instream appropriations must be reviewed every 15 years to determine if they are still in the public interest.³⁰ Finally, instream appropriations may be amended by the DNR if they would interfere with certain types of applications, such as induced recharge for public water supply wells.³¹ These requirements are unique to instream flow appropriations, and are not imposed on other types of public or private surface water rights.

Conclusion

A comparison of Nebraska law to the water law of other western states demonstrates that Nebraska’s existing instream flow legislation is quite narrow. Nebraska statutes impose a variety

of restrictions on instream flow appropriations, many of which are unique and even unprecedented. Rather than restricting instream flow appropriations even further, it may be wise to expand instream flow protections to keep pace with contemporary norms by protecting and enhancing the value of ecosystem services such as pollution filtration, wildlife habitat and recreational activities.

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- 1 The author acknowledges the research assistance of Mick Connealy (JD 2006) and Michelle Weber (JD Candidate 2008).
 - 2 Cynthia F. Covell, A Survey of State Instream Flow Programs In the Western United States, 1 U. Denv. Water L. Rev. 177, 178 (1998).
 - 3 Jesse A. Boyd, Hip Deep: A Survey of State Instream Flow Law From the Rocky Mountains to the Pacific Ocean, 43 Nat. Resources J. 1151, 1152 (2003).
 - 4 Nebraska Game and Parks Commission (NGPC), Federal Aid in Sport Fish and Wildlife Restoration, Program Narrative, FW-19-T (2006). Current miles of select high priority streams and rivers that have *not* been protected with instream flows include but are not limited to the White River (70), lower Snake (14), Holt Creek (19), Niobrara River (487), North Platte River (164), Nine mile Creek (13), Elkhorn River (382), Cedar River (88), Big Nemaha (140), Missouri River (313) and Brazile Creek (42).
 - 5 B. Richter, A. Warner, J. Meyer and K. Lutz, A Collaborative and Adaptive Process for Developing Environmental Flow Recommendations, River Research Applications, 22: 297-318 (2006) (describing ecological benefits of instream base flows, high pulse flows and flood flows).
 - 6 Natural Resources Commission, Policy Issue Study on Instream Flows, State Water Planning and Review Process (1982).
 - 7 E. Nieimi and T. Raterman, Natural-Resource Amenities and Nebraska's Economy: Current Connections, Challenges, and Possibilities (ECONorthwest 2006).
 - 8 U.S. Department of Interior, Fish and Wildlife Service and U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau (2001).
 - 9 FERMATA, Inc., Platte River Nature Recreation Study (1996), http://www.fermatainc.com/eco_nebplatte.html.
 - 10 Neb. Rev. Stat. § 46-2,115 (2004); Neb. Rev. Stat. § 46-2,116.01 (2004).
 - 11 Central Platte Natural Resources Dist. v. Wyoming, 245 Neb. 439, 454, 513 N.W.2d 847, 859 (1994). See In re Application A-16642, 236 Neb. 671, 692, 463 N.W.2d 591, 606 (1990) (Long Pine Creek).
 - 12 Neb. Rev. Stat. § 46-2,115(1).
 - 13 Neb. Leg. Bill 1226, 99th Leg. 2nd Reg. Sess. (introduced Jan. 18, 2006).
 - 14 Neb. Rev. Stat. § 46-2,115.
 - 15 Interview with Gene Zuerlein, Game and Parks Commission, Sept. 13, 2006.
 - 16 Neb. Rev. Stat. § 46-290(3)(c).
 - 17 See Neb. Rev. Stat. § 46-2,115(2); Ariz. Rev. Stat. § 45-151A; Alaska Stat. § 46.15.145(a)(1-4); Cal. Water Code § 1707 (a)(1); Kan. Stat. Ann. § 82a-928 (i); Idaho Code § 42-1501; Mont. Cod Ann. § 85-2-316(2)(a); Or. Rev. Stat. § 537.336(1); Utah Code Ann. § 73-3-3(11)(a)(i-iii); Wash. Rev. Code § 90.22.010; Wyo. Stat. Ann. § 41-3-1002(d).
 - 18 See Neb. Rev. Stat. § 46-2,115(2); Ariz. Rev. Stat. § 45-151A; Alaska Stat. § 46.15.145(a)(1-4); Cal. Water Code § 1707 (a)(1); Kan. Stat. Ann. § 82a-928 (i); Idaho Code § 42-1501; Mont. Cod Ann. § 85-2-316(2)(a); Utah Code Ann. § 73-3-3(11)(a)(i-iii); Wash. Rev. Code § 90.22.010.
 - 19 See Alaska Stat. § 46.15.145(a)(1-4); Kan. Stat. Ann. § 82a-928 (i); Idaho Code § 42-1501; Mont. Cod Ann. § 85-2-316(2)(a); Or. Rev. Stat. § 537.336(1); Wash. Rev. Code § 90.22.010.
 - 20 Neb. Rev. Stat. § 46-2,115(2).
 - 21 *Central Platte Natural Resources Dist.*, 513 N.W.2d at 858-862.
 - 22 Neb. Rev. Stat. § 46-2,115(2).
 - 23 *Id.* § 46-2,115.
 - 24 Christine Klein, On Integrity: Some Considerations for Water Law, 56 Ala. L. Rev. 1009, 1047 (2005).
 - 25 *Id.* § 46-2,118.
 - 26 See Neb. Rev. Stat. § 46-2,116 ("In determining whether an application for an instream appropriation is in the public interest, the director shall consider the following factors: (1) The economic, social, and environmental value of the instream use or uses including, but not limited to, recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance; and (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.").
 - 27 *Id.*
 - 28 See In re Application A-15738 of the Hitchcock and Red Willow Irrigation Dist., 226 Neb. 146, 410 N.W.2d 101 (1987); In re Application A-16642, 463 N.W.2d 591 (Neb. 1990) (Long Pine Creek); In re Applications A-16027, et al., of the Upper Big Blue NRD, 495 N.W.2d 23 (Neb. 1993), motion for rehearing overruled and opinion modified, 499 N.W.2d 548 (Neb. 1993).
 - 29 Neb. Rev. Stat. § 46-2,117.
 - 30 Neb. Rev. Stat. § 46-2,112.
 - 31 Neb. Rev. Stat. § 46-2,113.