

# [***ARTICLE:LEASING WATER RIGHTS FOR INSTREAM FLOW PROTECTION: THE OPPORTUNITIES AND IMPEDIMENTS TO IMPROVED PUBLIC INTEREST INVOLVEMENT IN COLORADO'S INSTREAM FLOW PROTECTION REGIME+, + The author would like to express his sincere gratitude to the following for their guidance, insight and patience in assisting with the completion of this article: John Carney, Executive Director, Colorado Water Trust; Lawrence J. MacDonnell and Michael F. Browning, Porzak, Browning & Bushong; Anne Janicki, Colorado Water Conservation Board; Melinda Kassen, Colorado Trout Unlimited; Laura Zeimer, Montana Trout Unlimited, John Ferguson, Montana Water Trust; Fritz Paulus, Oregon Water Trust; Drs. Lloyd Burton and Robert Gage, University of Colorado Denver Graduate School of Public Affairs; and the staff and Editorial Board of the Water Law Review. Each of these individuals was instrumental, in their varying capacities, to establishing and maintaining the scope of this paper, fleshing out the principal issues, and focusing the author's approach to an oftentimes overwhelming subject area.***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:4F7W-P550-00SW-5054-00000-00&context=1516831)

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**Text**

**[\*310]**

[*I*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831). INTRODUCTION

As a policy problem, the struggle to equitably apportion water resources among competing interests has received mounting attention throughout the arid West in recent years. The prior appropriation system underscores the importance of distributing water resources. The system, which governs water allocation in ***Colorado***, was one of the first legal doctrines adopted in many western states. Even among these states, however, ***Colorado*** finds itself in a unique position because its mountains serve as the headwaters to several interstate ***river*** systems including the Missouri, Arkansas, Rio Grande, and ***Colorado***. ***Colorado*** is contractually obligated to assure the delivery of set quantities of water to numerous adjacent and non-contiguous states, leaving Coloradans with limited quantities of usable water. Rapid population growth has strained and continues to pressure already over-appropriated ***river*** systems. Drought conditions are common in the summer months, and agricultural interests often find themselves in conflict with municipalities in struggles over water use.

The competition for finite water supplies has hampered efforts to maintain adequate flow levels in ***Colorado***'s ***rivers*** and streams. Although the State developed a system nearly thirty years ago to address the public's concern over dwindling instream flows ("ISFs"), many argue room for improvement exists in the system that has failed to accomplish its goals. Others believe the existing system threatens individual water rights. Thus, questions of policy implementation often give rise to disputes between environmental and agricultural interests, while municipalities vie for water rights against both competing interests. These disputes have created a public discourse infused with rhetoric and intense emotion.

Across the West, competing stakeholders have waged a continual debate over the most beneficial course of policy formulation. While agricultural interests have formed community alliances in opposition to environmental interests, their conservationist counterparts have developed coalitions to advance agendas sometimes overtly hostile to agrarian interests. Luckily, however, some concerned, forward-looking organizations have undertaken the arduous chore of devising mutually **[\*311]** acceptable solutions in arid regions facing pending water crises. In some cases, members of these two seemingly divergent factions have negotiated successfully. This article evaluates several instances in which concession and compromise created policies both groundbreaking and effective. Specifically, the article examines water right leasing as one of many alternative approaches to instream flow ("ISF") protection currently employed by other states.

Most western states still operate under the principle that charging a sole state agency with guardianship over the public's interest in protecting the state's water resources is preferable to allowing the private acquisition of instream rights. However, Oregon and Montana have implemented progressive programs through which private entities may lawfully possess or facilitate the acquisition of ISF rights under lease agreements. In most cases, conservation organizations acquire these leases from agricultural users who, for one reason or another, prefer to forgo their full appropriative use rights by leasing them either to the organizations themselves or to state entities, which, in turn, leave the water instream.

As a relatively new organization dedicated to acquiring and using water rights for conservation purposes, the ***Colorado*** Water Trust ("CWT") has sought to determine the feasibility of and impediments to ***Colorado***'s adoption of legal leasing mechanisms similar to those Oregon and Montana have implemented. The ability to lease water in a free market, CWT believes, significantly expands its ability to protect and restore ***Colorado***'s vital free-flowing water resources. Thus, through the work of water attorneys, concerned water users, and organizations in lease-friendly states, CWT is working to develop a coherent blueprint for the expansion of allowable ISF acquisitions, particularly those based on lease transactions.

In assessing the feasibility of ISF leasing in ***Colorado***, this article asserts that despite the rigidity of its body of water law, ***Colorado*** is poised for a more progressive approach to streamflow protection. The article first presents a history of ***Colorado*** law pertaining to ISF acquisition and then details the legal caveats that have prevented the adoption of a more dynamic flow preservation scheme. Section II identifies the primary stakeholders a new mode of right transaction would affect. Section III introduces the leasing models, contrasting the relatively restrictive ***Colorado*** framework with those of Oregon and Montana whose laws are more accommodating to the private acquisition of ISF rights. Accordingly, this section offers a background of the grassroots, political, and legislative histories of these states' acquisition laws, while paying particular attention to what has worked and what has not. Section IV presents a number of limitations associated with ISF right leasing. Section V recounts some of the recent developments in ***Colorado*** water law that reflect the growing pressure across the West to loosen restraints on free market ISF exchanges. Finally, Section VI presents a feasibility analysis of ***Colorado***'s prospective adoption of instream leasing statutes in light of the existing legal framework and political environment.

**[\*312]**

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). A BRIEF HISTORY OF ***COLORADO***'S INSTREAM FLOW PROTECTION REGIME

In ***Colorado***, where the sun shines over three hundred days a year and leaves the land dry and thirsty in most months, water is increasingly becoming the state's most threatened natural resource. Average precipitation in ***Colorado*** totals a mere sixteen and a half inches per year. [[1]](#footnote-2)1 As evidenced by the numerous water use restrictions imposed statewide in 2002 and into 2003, the limited amount of surface water produced by this relatively scant rain and snowfall barely serves the current use practices of ***Colorado***'s burgeoning population. Those wishing to preserve water in the state's ***rivers*** and streams have experienced increasing frustration both with the lack of water after senior agricultural and municipal users fulfill their rights and with the rigidity and limited scope of the preservation programs. The problem, as many see it, is that "***Colorado*** … has had in-stream flow protection to keep bare minimum flows trickling … during dry times. But the provision is essentially useless. It protects a tiny percentage of streams and is unenforceable, collapsing when senior water-rights holders call for more water." [[2]](#footnote-3)2 Others expressed their disfavor in more provincial terms. As a recent comment in the Rocky Mountain News griped: "***Colorado***'s water allocation system is older than outhouses" and needs substantial reform. [[3]](#footnote-4)3

The policy problems related to water use today can be traced to the water development policies of the past. In 1902, Congress passed the Reclamation Act. [[4]](#footnote-5)4 The Bureau of Reclamation, created shortly after passage of the Act, "embarked upon a program of huge taxpayer-subsidized dam and diversion projects to irrigate croplands and attract more people to the region." [[5]](#footnote-6)5 The plan worked, attracting many potential farmers to the state who fervently applied their early-acquired water rights to inefficient processes of cropland irrigation. [[6]](#footnote-7)6 In terms of acre-feet of water used to achieve a given result, irrigation is a costly endeavor, particularly when wasteful practices are employed. One acre-foot of water ordinarily suffices to irrigate just one-half acre of typical ***Colorado*** cropland each season. [[7]](#footnote-8)7 This same amount of water, which covers an acre of land to a depth of one foot, equals **[\*313]** roughly 326,000 gallons "or enough water to supply an urban family of four for a year." [[8]](#footnote-9)8

While prior appropriation has demonstrated overwhelming success over the years in apportioning water for consumptive uses, its efficiency in doing so has in many ways stymied development of an effective means to reserve water for non-consumptive, environmental purposes. One fundamental premise of the prior appropriation doctrine is "first in time is first in right." [[9]](#footnote-10)9 This legal adage means that in times of low stream flow those who "appropriated" water rights - and were granted a legal right to a certain quantity of use - may divert their decreed amounts of water to the detriment of "junior" users who perfected a water right at a later time. Thus, the farmer with the earliest appropriation on a ***river*** may divert the decreed amount, even if that amount represents the entirety of the ***river***'s carriage at the time.

Most ***rivers*** in ***Colorado*** are over-appropriated [[10]](#footnote-11)10 because the municipal and agricultural users who hold the majority of water rights in the state sought, early on, to apply as much water as possible to offstream uses in order to establish large senior rights. The unforeseen and unfortunate consequence of the prior appropriation doctrine is that it "promoted the very depletion of the West's ***rivers*** that is now a source of serious environmental concern." [[11]](#footnote-12)11 Consequently, there is virtually no water within the state's ***rivers*** and streams available for environmental organizations to claim.

The prior appropriation doctrine exacerbates this problem by intrinsically favoring the practice of diverting water out of a ***river*** rather than leaving it instream. The traditional "use it or loose it" principle demands that a user not only remove water from its course to perfect a right but also apply the water removed to a beneficial use. [[12]](#footnote-13)12 Historically, courts have not considered it a beneficial use to leave water instream for environmental purposes. [[13]](#footnote-14)13 As such, virtually all senior water rights in the state historically have been applied to irrigation or other uses that require a user to remove water from its natural course rather than leaving the water instream. Under present **[\*314]** law, therefore, some senior users are weary of temporarily converting their rights to instream uses under lease agreements, even when they would otherwise be so inclined, because they fear that such conversions might deprive them of their historical use allotment. [[14]](#footnote-15)14

Despite this hostility toward environmental concerns, the state legislature implemented some degree of statutory override to appease environmentalists and recreational water users. By 1973, popular support for guardianship over minimum stream flows reached sufficient heights to induce state legislation. [[15]](#footnote-16)15 That year, with the threat of a citizen referendum hanging over its head, the ***Colorado*** General Assembly enacted Senate Bill 97, codified as the ***Colorado*** Water Right Determination Act ("WRDA"). [[16]](#footnote-17)16 The bill's sponsor, Senator Fred Anderson of Loveland, touted the legislation as a tool that could "open the door to the state, as well as private individuals, to begin buying up water rights for recreational and wildlife preservation purposes, which [could not] be done under present law." [[17]](#footnote-18)17

Under the WRDA, the ***Colorado*** Water Conservation Board ("CWCB"), a public entity, possesses the sole capacity to acquire and hold instream rights. [[18]](#footnote-19)18 In granting this authority to CWCB, the legislature redefined "beneficial use" to include "the appropriation by the state of ***Colorado*** in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree." [[19]](#footnote-20)19 Thus, CWCB may accept existing water **[\*315]** rights or appropriate new rights for conversion to instream use.

While this legislation can be credited for some measure of preemptive and restorative success, many feel that the law is too restrictive regarding the acquisition of ISF rights. In 1999, CWCB failed to file for a single ISF right; in 2000, CWCB filed for eight; and, in 2001, CWCB filed for just one. [[20]](#footnote-21)20 Would-be legal revisionists have therefore argued that loosening traditional prescribed obstructions and opening up instream water right transfers to the market economy represents the best way to meet the "rapidly emerging market for environmentalists, agency officials, ranchers, farmers, and others" interested in leasing or acquiring ISF rights. [[21]](#footnote-22)21

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). THE COMPETING USES

A. Agriculture

The agricultural stake in sustaining the state's water resources rests on its ability to apply those resources to agrarian needs. These needs are substantial. "In ***Colorado***, irrigation water use (measured as withdrawals and deliveries) accounts for more than 90% of total used for all purposes on a state-wide basis." [[22]](#footnote-23)22 This vast percentage of resource allocation cannot be summarily dismissed as a wasteful use of a public good because agriculture is one of the state's most vital economic sectors. Each year, ***Colorado***'s agricultural industry accounts for approximately $ 4.4 billion of the state's GDP. [[23]](#footnote-24)23

With the above considerations in mind, offstream users should top the list of non-political actors involved in the policy formation process. As Irving L. Janis has suggested, effective policy will often remain elusive in the absence of qualified experts working in conjunction with traditional political actors. [[24]](#footnote-25)24 This premise is strongly supported by the fact that rural ranchers support and have participated in the **[\*316]** progressive approaches to ISF protection detailed below. [[25]](#footnote-26)25

B. Urban Expansion

Presupposing that input from agricultural water users is essential to the formation of sound conservation policy, both politics and practicality demand that decisions regarding future ISF protection incorporate a diverse array of concerns. As romantic as the rural landscape and tradition may be, those practices pose very real threats to the vitality of the state's watercourses. Fresh water is a limited commodity; sooner or later, ***rivers*** and streams will simply go dry, or flow so scantily that all possibilities of continued aquatic and riparian life are foreclosed. This scenario, which is already occurring in some areas, [[26]](#footnote-27)26 would be catastrophic to agricultural and environmental interests alike. Continued adversity between the two camps is mutually unconstructive.

In recent years, issues related to ***Colorado***'s urban sprawl, particularly the accompanying need for water, have moved to the forefront of the state policy agenda. The conflict that results when residential and commercial developments collide - sometimes quite literally - with rural needs is one reason growth has become such a huge issue. As the urban infringes upon the rural, impassioned tensions surrounding water rights commonly emerge. [[27]](#footnote-28)27 One company in the business of selling water rights to agrarian users noted: "As development has moved into agricultural areas, problems have developed concerning irrigation water. Some landowners are at odds with ditch companies over the maintenance of ditches running through their property." [[28]](#footnote-29)28 The frustrations associated with population growth also extend to efforts to preserve the natural condition of the state's watersheds. As one recent study concluded, the expansion of instream rights can "impair the ability of headwater communities to meet growing demands for resorts and recreational industries." [[29]](#footnote-30)29

The problem became particularly intense within the metropolitan area on the Front Range, most of which is encompassed by the South Platte ***River*** Basin. Substantial population growth throughout the South Platte Basin has made the area one of the fastest-growing regions in the country. [[30]](#footnote-31)30 Home to Denver, as well as Douglas County, **[\*317]** one of the fastest-growing counties in the United States, [[31]](#footnote-32)31 the Basin contains two-thirds of ***Colorado***'s population. [[32]](#footnote-33)32 The rapid expansion of the metropolitan region into the Eastern Plains resulted in the conversion, between 1987 and 1997, of 1.4 million acres of agricultural land to other uses. [[33]](#footnote-34)33 Nevertheless, the vast majority of the Basin's over-appropriated water is still applied to agricultural uses. [[34]](#footnote-35)34 The agricultural users, however, no longer have the run of the land as they once did, as competing concerns have created a political and hydrological time bomb. Without effective communication among those who represent developmental, agricultural, and environmental concerns, all stand to lose.

C. Conservation

Often lost in the strife between development and agriculture is the dedicated voice of the conservationists. Because wildlife and waterway protection offers fewer opportunities for economic gain than development or agriculture, such environmental interests are often dismissed as "fringe" concerns of little importance. Nevertheless, the conservationists are not going away and will likely strengthen their resolve as the problem escalates. As ***Colorado*** Attorney General Ken Salazar observed: "environmental demands for water are now a part of the radar screen for predicting the future … . These environmental realities are now part of the legal and political landscape. Twenty-five years ago these environmental demands were nonexistent." [[35]](#footnote-36)35

According to free market proponents, the creation of a market system enables the State to both avoid impacts beyond harms to aesthetic and ecological values and avoid fiscal downfall. ***Colorado*** Trout Unlimited ("CTU") points out that continued reductions in stream flows inevitably will wreak havoc upon two of the state's primary **[\*318]** sources of recreational income: the $ 1.3 billion fishing industry and the $ 122 million rafting industry. [[36]](#footnote-37)36 Instream flows are necessary to protect riparian ecosystems, wildlife habitat, and, in some cases, sectors of the state's economy. At present, however, the sole mechanism for assuring such flows is for CWCB to unilaterally decide to exercise its authority.

As a public agency, CWCB must remain politically responsive to many competing interests. Additionally, budgetary constraints and legal limitations hamper CWCB's ability to acquire ISF rights. Moreover, the prior appropriation doctrine demands that CWCB acquire no junior rights that would interfere with a senior right. Because so many of ***Colorado***'s major ***rivers*** and tributaries are over-appropriated, there are few, if any, surplus flows available for appropriation. With these factors in mind, many believe the law should be revised to enable private entities, such as CWT, to play a more effective and meaningful role in the conservation process - in particular, by directly utilizing funds to establish temporary ISFs through lease agreements. [[37]](#footnote-38)37

Pigeonholing each of these interests is somewhat misleading, however. In the quest to preserve water resources, the distinction between agricultural and environmental interests has, in some cases, become somewhat blurred. Across the state, agricultural associations have begun to develop amiable, productive relationships with environmental groups, consulting on best available irrigation practices and technologies. At events such as the February 2003 Agricultural Outlook Forum, for instance, "many in [the agriculture] industry are finding creative ways to adapt to changing conditions. [[38]](#footnote-39)38 As a result, ***Colorado***'s lead agricultural organizations and agencies are emphasizing traditional water efficiency methods as well as exploring new and innovative ways to manage water quantity." [[39]](#footnote-40)39

One should also note that the "competing" interests involved appear more divergent than they actually are. The conservation community is intrinsically comprised of individuals from the very communities that continue to demand more water for municipal use. In those instances where the interests actually diverge, the will for cooperation exists - the law of the state need only catch up with the aspirations of the state's water users.

**[\*319]**

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). A POTENTIAL SOLUTION: A GUIDE TO SUCCESSFUL SPLIT-SEASON AND DRY YEAR LEASING PROGRAMS

The private acquisition concept still represents the exception to the majority rule among the western states. As it stands, "most [ISF protection] programs currently in place provide primarily for State ownership of instream rights." [[40]](#footnote-41)40 In many cases, private parties cannot even facilitate offstream to in-stream use transactions. "Instream flow rights held by private individuals or organizations are often perceived as constraints to future water development. As a consequence … most western state legislatures have authorized only governmental agencies to hold in-place water rights under programs that balance competing instream and consumptive uses." [[41]](#footnote-42)41

***Colorado*** is not alone in its continued adherence to this principle; neighboring states also have shown a comparable dedication to maintaining unabashed state guardianship over ISFs. Nebraska and Wyoming follow a protocol most similar to ***Colorado*** - state agencies retain the exclusive authority to both identify and apply for instream use rights. [[42]](#footnote-43)42 In Utah, two distinct agencies may apply for such rights, the perfection of which is contingent on approval from the state legislature. [[43]](#footnote-44)43 In Kansas, the legislature possesses the sole authority to designate ISFs. [[44]](#footnote-45)44

While the above models remain the norm, some western states nonetheless carved out statutory exceptions to the traditional legal doctrines that otherwise prevent private sector involvement in the establishment of ISFs. Particularly in the Pacific Northwest, "buying water for instream flows … is no longer a novel concept," [[45]](#footnote-46)45 the region has been cited as the "leader in the free-market approach to increasing stream flows." [[46]](#footnote-47)46 Unlikely is it a mere coincidence that those states that have chosen to embrace water markets are geographically clustered in the Northwest. The sweeping introduction of private instream flow transfers to the region's market economy is often attributed to the need to protect decreasing salmon runs, particularly in the Columbia **[\*320]** ***River*** Basin. [[47]](#footnote-48)47 In addition, states in the Northern Pacific typically experience greater precipitation than the High and Central Plains states. As such, farmers and ranchers are more likely to hold expendable stream flows then their neighbors to the south. [[48]](#footnote-49)48

Although ***Colorado***'s climate is both significantly more arid than the Northwest and devoid of salmon stocks, a water leasing scheme is not necessarily unsuitable for ***Colorado***. Any such program, however, needs to address the particulars of the state's economy, geography, and most importantly, its existing legal framework. Leases to instream rights in the Northwest are often funded through the economic benefits garnered from improved salmon populations. [[49]](#footnote-50)49 Similarly, the approximately $ 8.5 billion [[50]](#footnote-51)50 brought into ***Colorado***'s economy each year from recreational expenditures could conceivably subsidize broader acquisition rates.

Of course, the imposition of an instream right leasing system would inevitably displace a certain degree of agricultural production in the state. By definition, water left instream is not applied to cropland, livestock needs, or other offstream uses. Increasing the value of water for municipal and non-agricultural uses, however, already has this effect, since water districts in more populous areas routinely outbid farmers and ranchers. [[51]](#footnote-52)51 A leasing system allows farmers and ranchers to cut their losses while maintaining their permanent rights to the water they cannot or decide not to use. A former ***Colorado*** governor noted the economic benefits of instream flows almost twenty years ago.

In a 1985 water policy speech by then-governor Richard Lamm of ***Colorado***, the wisdom of perpetuating historic water uses at the expense of instream values was questioned. To emphasize this point, the governor stated that alfalfa, which consumes 27 percent of ***Colorado***'s water, injected only $ 156 million/year into the state's economy, while recreation and tourism accounted for more than $ 4 billion in annual statewide benefit. [[52]](#footnote-53)52

As the governor suggested, the state holds a vested interest - beyond catering to special interest groups - in preserving natural flows in its streams and ***rivers***. Leaving water instream not only enables the preservation of ecologically vital resources, but also serves an invaluable fiscal purpose. By granting current users the ability to lease their rights to those users who would apply the rights to instream use, the state would be taking a step toward insuring a financially sound future. As the state witnessed in the months following the devastating **[\*321]** 2002 forest fires, the condition of ***Colorado***'s natural environment is inexorably tied to its economy. Moreover, private ISF leasing would allow financially strapped agricultural users to apply their rights in the manner they see fit and to their greatest benefit.

A. Split-Season and Dry-Year Leases

Within the broader context of instream right leasing, two innovative techniques - split-season and dry-year leasing - have arisen. The two practices are similar, yet distinct in a number of ways: "A "split-season' lease allows a portion of a water right to be used for irrigation during mid-summer," while the remaining portion is left instream "during critical periods when fish are migrating and spawning." [[53]](#footnote-54)53 A "dry-year" lease, on the other hand, provides an occasional water transfer from offstream to instream use depending on weather patterns and local flow conditions. [[54]](#footnote-55)54 Both approaches have been cited as valuable tools not only for those users who would prefer a direct return on their right but also for water users who are at risk of forfeiting their water rights due to non-use. [[55]](#footnote-56)55

1. Split-Season Leases

Structurally, split-season water leases are generally similar to the commonplace lease contract. If an owner decides to temporarily forgo a possessive right during a specified part of the year, the owner conveys that right to a willing lessee whose use of the right is more valuable than the conveyors. In this sense, split-season rights are built not only upon a free-market mentality, but also on notions of practicality. For instance, the first private lease executed in Montana established a ten-year split-season agreement through which eight landowners agreed to let 1.3 cubic feet per second ("cfs") flow past a diversion dam for six months of each year. [[56]](#footnote-57)56 In return for the seasonal conversion to instream use, Montana Trout Unlimited ("MTU") paid for the removal of an unwanted diversion dam on the creek. [[57]](#footnote-58)57 This agreement, as many others like it, demonstrates the possibilities for innovation and coexistence of divergent interests when free-market acquisition techniques are made possible.

Absent the strongly established tenets of prior appropriation, split- **[\*322]** season leases would probably occur routinely and without much fanfare. Prior appropriation controls western water law, however, and presents obstacles to these otherwise appealing transactional arrangements. The first problem is that water rights in a prior appropriation system are not akin to personal property rights. In ***Colorado***, the state constitution clearly states that the waters of the state are the property of the public. [[58]](#footnote-59)58 Thus, the State must ensure that one individual's exercise of a use right does not infringe upon another's similar right. In the context of prior appropriation, split-season rights give rise to some interesting problems. These issues are addressed in Section IV.

2. Dry Year Leases

The attractiveness of dry-season leases is the ease of acquiring agricultural water on a short term, emergency basis. [[59]](#footnote-60)59 In a state such as ***Colorado***, where free-market acquisitions remain relatively untested, agricultural users generally feel weary of transactions that may impair a permanent use right. The dry-season alternative thus has great appeal. [[60]](#footnote-61)60 While generally long-term and predictable, the terms of dry-year leases nonetheless call for intermittent, rather than permanent transfers. [[61]](#footnote-62)61 The State of Washington - which has taken progressive measures, in law if not in practice, toward more permissible private acquisitions - recognizes three distinct types of dry-year lease arrangements:

Under an "insurance" dry-year lease, a water-right holder or lessor is paid a yearly amount as insurance against the possibility that a dry year will occur. In a dry year, lessors agree not to use the water and receive a yearly insurance payment whether there is a dry year or not. Some versions use one-time rather than yearly payments against the occurrence of a dry year. A trigger event such as stream flow levels, precipitation, snowpack, runoff or storage must be identified to provide an objective basis for determining when the lease is exercised.

Under the "option" dry-year lease, a contract agreement provides an option where a lessee has first call of the water in a dry year and the water-right holder receives a payment, regardless of whether there is a dry year or not. An option payment is made either at the initiation of the contract or annually to ensure that a valid contract exists. An additional payment is made, however, when the lessee exercises the dry-year option, usually at a predetermined price. With an option lease, the trigger is less important because the lease will be **[\*323]** paid only when use of the water by the lessee is necessary.

Another version, the "predictive" dry-year lease, was developed by the Oregon Water Trust for a dry-land irrigator to run over a 10-year period. The trust and farmer determined that on average irrigation was needed three out of 10 years. A contract between the trust and the irrigator included an up-front payment for forgoing irrigation when it would have been needed (three out of the 10 years) and water was donated for the other seven years. As a result, the contract essentially required the irrigator not to irrigate for 10 years. [[62]](#footnote-63)62

The diversity represented among the split-and dry-season approaches demonstrates the creativity possible when water users with varying objectives have the opportunity to craft their own solutions to water management issues without legal hindrances. At times, the entirety of a right may be leased for the duration of lease with the right holder diverting no water during the lease period. These types of arrangements are less common than the split-or dry-season alternatives. Most instream lease rights are conveyed under split-season agreements. [[63]](#footnote-64)63 However, when permitted, the dry-year-option approach is most common, and, in addition to its use in ISF protection, is "increasingly used to enhance municipal supplies." [[64]](#footnote-65)64

Aside from the split-season/dry-season distinction, instream leases may provide for either a long-or short-term transfer of rights. For instance, during a severe drought, a water user may enter a one-season lease to head-off the permanent destruction of a fishery. As discussed in Section V. below, ***Colorado*** recently passed legislation that allows state acquisition of ISFs in a manner reminiscent of dry-year leasing. [[65]](#footnote-66)65 As the legislation is written, such leases are not meant to provide permanent benefit to habitually low-flowing ***rivers*** and streams, but are meant as a stop-gap measure in times of severe drought. In Oregon, recent legislation providing for short-term leases was intended to complement the existent program that allowed long-term leases. In most cases, ISF leases - split-season, dry-season, or constant - are renewable for given periods, but not indefinitely. [[66]](#footnote-67)66

B. How Lease Acquisitions Are Facilitated: Two Progressive State Models

The Oregon and Montana models illustrate similarities and differences in ISF programs. The marked similarities begin with the fact that both Montana and Oregon have long overcome prior appropriation's traditional prohibition against recognizing ISFs as a beneficial use. Second, each state has taken measures to secure senior **[\*324]** priority dates of such rights when conveyed through lease agreements. [[67]](#footnote-68)67 The two programs are distinguishable by their receptiveness to private sector involvement in the offstream-to-instream water right conversion process. [[68]](#footnote-69)68 This is particularly true insofar as such conversions are accomplished through lease agreements. Finally, each state has received extensive praise for both implementing and expanding pioneering ISF protection frameworks. [[69]](#footnote-70)69 The fact that the two programs are commonly viewed as successes by both agricultural water users and environmentalists ensures that both may aptly contribute to an adaptable blueprint for agenda setting in states such as ***Colorado***.

While either the Montana or Oregon framework alone would provide a strong argument in favor of expanding ISF leasing opportunities, an appraisal of the two different approaches offers further benefits. First, a comparison of the programs demonstrates the flexibility possible in the policy development and legal evolution processes - even when only one relatively specific strategy is employed. Second, the values protected - and the needs served - vary somewhat between the two subject states. By examining these contrasting purposes, however, a better case can be made that leasing approaches may feasibly incorporate any number of values the ISF proponent seeks to protect. Finally, the histories, procedures, and limitations of the two programs differ in many respects. There is value purely in examining these differences, as they serve as an indication of the best means of policy formulation and implementation.

1. Montana: The Journey Toward Private Acquisition

a. History and Statutory Construction

The Montana Supreme Court developed an "activist approach" towards interpreting environmental provisions within its constitution in the late twentieth century. [[70]](#footnote-71)70 The elements defining this movement represent a profound departure from the traditional environmental activism that spurned the promulgation of limitless state and federally-imposed regulation over the last three decades. Whereas regulatory initiatives generally seek constraint and sacrifice among competing interests, Montana's "new activism," and its embracing freely transferable rights tends toward cooperation, non-conflict, and mutual **[\*325]** benefit. [[71]](#footnote-72)71 Assuming such political leanings and considering Montana's vast reaches of pristine - yet threatened - ***river*** and stream flows, the state was the quintessential breeding ground for a conservation strategy that rejects traditional command and control approaches to environmental protection, and has embraced free-market principles.

Montana's ISF program embodies a unique appeal, attributable to its collaborative roots. Nevertheless, the Montana model warrants a closer look for reasons beyond the fact that it represents a product of divergent interests forging a common solution. Today, the Montana model stands as "one of the most progressive sets of instream flow protection laws in the Western United States," and "among the arid Rocky Mountain states, Montana has the most extensive and flexible instream flow protection regime." [[72]](#footnote-73)72 The Montana experiment provides a useful starting point not only for evaluating strategies of cooperative effort, but also in discerning what principles and approaches ***Colorado*** water users, conservationists, and legislators might rely upon in creating a more legally and politically receptive atmosphere for water leasing.

State efforts aimed at protecting ISFs in Montana began in 1969, when the state legislature enacted laws allowing the state Fish and Game Commission to file for "Murphy Rights" on the unappropriated waters of twelve "blue ribbon" trout streams. [[73]](#footnote-74)73 The legislature defined these rights simply: those streamflows necessary for the preservation of fish and wildlife habitat. [[74]](#footnote-75)74 In 1973, the State passed the more aggressive Montana Water Use Act, through which the state or federal government may acquire a water reservation in order to maintain a minimum flow, level, or quality of water. [[75]](#footnote-76)75 The act only applied to certain enumerated basins and for determinate durations. [[76]](#footnote-77)76 Thus, at the time, only the State, or some political subdivision of the state (interpreted to include the federal government), could apply to the Board of Natural Resources to reserve water for instream uses. [[77]](#footnote-78)77 No state law allowed for the conversion of an out-of-stream right to an instream use.

Over the next fourteen years, the state achieved incremental progress in the development of its ISF protection program. In 1987, for example, the Montana Department of Natural Resources and Conservation ("DNRC") instituted a new policy whereby potentially affected water users were offered more involvement in departmental **[\*326]** decisions concerning changes of use. [[78]](#footnote-79)78 With the passage of this legislation, universal involvement in the policy and managerial process became a central and long-standing theme to Montana's water management approach, as it remains today. [[79]](#footnote-80)79 The passage of Senate Bill 447 in 1988 marked another important development in Montana's ISF program. [[80]](#footnote-81)80 Senate Bill 447 struck a compromise between conflicting conservation and agricultural users by assigning a priority date for state-held instream rights upon the submission of a qualified agency's notice to convert rights to instream use. [[81]](#footnote-82)81

While the preceding developments did ensure the preservation of some natural stream flows, the provisions failed both to introduce a market element to state acquisitions and to open up the instream acquisition game to interested private parties. All instream rights were the result of new appropriations by the State, rather than bargaining between the State and private entities, or among private entities themselves.

In 1989, the Montana legislature passed a statute allowing the Department of Fish, Wildlife and Parks ("MFWP") to acquire lease rights for the purpose of maintaining or enhancing stream flows. [[82]](#footnote-83)82 The 1989 leasing statute was considered "the most controversial, and perhaps the most far-reaching spin-off of the state water plan." [[83]](#footnote-84)83 One observer noted that the original proposal to establish a voluntary instream acquisition program in Montana "created a public controversy seldom seen in the halls of the Capitol." [[84]](#footnote-85)84 Why did the introduction of a bill touted as mutually beneficial to both agrarian and environmental interests set off such a firestorm; how were tensions quelled to such an extent as to not only uphold the program, but in fact expand it?

To begin, the bill the state eventually adopted was a shadow of the bill as originally proposed. Pressure from agricultural interests caused vast modifications to the proposed legislation before both houses and the governor agreed to enact it. [[85]](#footnote-86)85 In hopes of appeasing all interests, DNRC fashioned a working group comprised of the Montana Water Resources Association, the stock growers association, the association of conservation districts, the Montana Farm Bureau, the Montana Wildlife Federation, and the Montana Council of Trout Unlimited. [[86]](#footnote-87)86 While initial discussion centered on allowing private sales and **[\*327]** purchases, the group - ultimately realizing that in-fee transfers would be unacceptable to some of the agricultural interests represented - instead focused on a leasing approach. [[87]](#footnote-88)87

The Montana Consensus Council ("MCC"), a state entity charged with mediating the disputes that arose in the drafting process, declared the working group an abounding success. Interestingly, the MCC attributed the group's success, at least in part, to the fact that "key decision makers with a potential interest in the issue (representatives of the governor, legislature and state agencies) were not invited to the table." [[88]](#footnote-89)88 Only the affected stakeholders crafted the groundwork legislation that presently guides Montana's ISF protection. The final bill called for a temporary "leasing study," with a sunset provision ten years after its passage. [[89]](#footnote-90)89 The success of the program, however, prompted the legislature to renew its terms in 1999. Thus, leases may be acquired under the temporary program until June 30, 2009. [[90]](#footnote-91)90

Originally, the State or its approved subdivisions could lease rights only within five particular basins for the maintenance or enhancement of streamflows for fisheries. [[91]](#footnote-92)91 An irrigator could also lease water rights to MFWP in order to improve fishing conditions. [[92]](#footnote-93)92 Initiation of the program thus "provided an opportunity for all affected interests in the state to study and evaluate the social, economic, and environmental impacts of transferring water from traditional uses to instream uses." [[93]](#footnote-94)93 The subsequent legislation that increased the number of stream reaches upon which leases could be acquired from an original five to ten in 1991 and to twenty in 1993 evidenced the success of the program. [[94]](#footnote-95)94 Today, MFWP is statutorily authorized to apply for leases on up to forty stream reaches in the state. [[95]](#footnote-96)95 For the most part, however, the state limited its acquisition efforts to small leases. As of 1998, no state lease called for leaving more than 2,000 acre-feet of water instream. [[96]](#footnote-97)96

Although the leasing study produced positive results, environmentalists recognized the need for private sector participation in one form or another. Water attorney Jack Sterne detailed the events leading to the 1995 expansion of the temporary study allowing private sector participation:

The bill was the culmination of six years of work on the part of instream advocates. Other bills that would have allowed the purchase **[\*328]** or lease of existing rights … were introduced in both the 1991 and 1993 sessions of the Montana Legislature but failed to attract adequate support. The difference in 1995 was that instream flow advocates worked with agricultural and development interests to ease fears about creating a private market for instream rights. Agricultural and development interests opposed the bill in the beginning, but they later realized that an alternative citizen initiative could produce a stronger piece of legislation. After polls in Montana showed broad public support for such a measure, agricultural and development groups decided that they would rather work with environmentalists than risk a major overhaul of water rights laws through the initiative process. The opposing groups [again] brought in a professional mediation service to help broker a deal. As part of the resulting compromise, instream advocates agreed to limit the bill to leasing because agricultural interests were philosophically opposed to an ownership statute that they believed might permanently remove water rights from the land. [[97]](#footnote-98)97

Sterne's final statement regarding appurtenance is important. Water rights in Montana are, and always have been, attached to the lands they serve. Accordingly, the temporal nature of water leasing helps to ensure rights remain appurtenant. Although conservation groups may have preferred the security of purchase acquisitions, the establishment of a leasing program helped to appease agricultural users while advancing many of the objectives conservation groups sought through ownership. The compromise, in conjunction with the accomplishments achieved through the original leasing program, eased much of the apprehension agricultural users held toward private sector involvement. Today, Montana authorizes private individuals and entities of any kind to lease water for instream purposes for up to ten years, and in particular instances, thirty years. [[98]](#footnote-99)98

b. Legal and Procedural Requirements

Montana law currently provides three means to convert an existing consumptive use water right to instream use. A person may convert the right to an instream use without a lease, lease all or a portion of a water right to MFWP, or lease the water to another party who holds the right to benefit a threatened fishery. [[99]](#footnote-100)99 This section does not address the first option; it is irrelevant to leasing strategies. To date, most leases in Montana are established under the second option, in concert with MFWP. [[100]](#footnote-101)100 However, private organizations such as MTU and the **[\*329]** newly created Montana Water Trust actively participate in the lease acquisition process and have rigorously pursued ISF lease rights in numerous ***river*** basins across the state. [[101]](#footnote-102)101

The procedural requirements for public and private acquisitions are quite similar - most importantly, the "beneficial use" requirements in a private acquisition are the same as State-acquired leases in that acquisitions must "restore and enhance streamflows to benefit Montana's native fish species." [[102]](#footnote-103)102 However, private organizations receive more leeway than MFWP; unlike MFWP, private organizations may obtain lease rights in any ***river*** basin in which willing lessors exist. Furthermore, private entities do not need to maintain political responsiveness. These facts alone open up leasing opportunities for conservation organizations in areas where MFWP would otherwise be precluded from acting.

(Temporary) Water leasing study - State leasing

Under the 1989-authorized temporary leasing study, "the department of fish, wildlife, and parks, with the consent of the [Fish, Wildlife, and Parks Commission], may lease existing rights for the purpose of maintaining or enhancing streamflows for the benefit of fisheries in [designated] stream reaches … ." [[103]](#footnote-104)103 MFWP "may declare a stream eligible for leasing … only if it finds that water leasing is necessary to maintain or enhance streamflows for fisheries. [[104]](#footnote-105)104 Presently, leases may not be issued to MFWP for a term of more than ten years unless the water to be leased is considered "salvaged" water - water made available for leasing through the application of water-saving methods such as ditch lining or improved irrigation practices. [[105]](#footnote-106)105 If the subject water meets the definition of salvaged water, the State may approve a lease to convert the saved amount to instream purposes for up to thirty years. [[106]](#footnote-107)106 Whereas traditional law in prior appropriation states tends to discourage salvaging projects, [[107]](#footnote-108)107 this statutory construction provides a strong incentive for users to integrate water-saving measures into their use practices.

MFWP initiates the leasing process by filing an application for a temporary change with DNRC. [[108]](#footnote-109)108 The required form is a standard **[\*330]** change of use application, the same application that an offstream agricultural user would file when seeking a change in point of diversion, type of [other offstream] use, or place of use. [[109]](#footnote-110)109 The application carries a $ 400 filing fee and must specify, among other things, the amount of water involved, the purpose of the change, and the proposed method of measuring the carriage rate involved in the transaction. [[110]](#footnote-111)110 In addition, a valid application must include a detailed map of the stream reach involved. [[111]](#footnote-112)111

After a preliminary review of the change application, DNRC must serve notice of the application to potentially affected parties including:

(1) an appropriator of water or applicant for or holder of a permit who, according to [DNRC records], may be affected by the proposed appropriation;

(2) any purchaser … of property that, according to the records of the department, may be affected by the proposed appropriation; and

(3) any public agency that has reserved waters in the [area]. [[112]](#footnote-113)112

After notifying the above parties, DNRC must publish notice of the pending change in a locally circulated newspaper. [[113]](#footnote-114)113 The notice must indicate all "facts pertinent to the application" [[114]](#footnote-115)114 to alert any potentially affected water users whom DNRC did not directly inform of the proposed change.

The extensive notice requirements provide a strong safeguard against harm to downstream users not party to the lease transaction. As previously mentioned, Montana was careful not to expand its ISF protection strategies at the expense of the prior appropriation doctrine's no harm rule. As such, change applications do not receive ultimate approval until MFWP overcomes all objections filed with DNRC pursuant to the statute. [[115]](#footnote-116)115 DNRC, in turn, reserves the right to "modify or revoke the lease authorization if an appropriator, other than one involved in the initial change of use proceeding, proves by substantial credible evidence that his water right is adversely affected." [[116]](#footnote-117)116

Leases involving conversions from offstream use to instream flow may be renewed once for an additional ten years. [[117]](#footnote-118)117 Upon submission **[\*331]** of a renewal request, however, DNRC must alert any user who may be adversely affected by the renewal. [[118]](#footnote-119)118 This alert may trigger objections from users claiming potential harm, and therefore may re-initiate the process described above. Those leases involving water made available from the development of water conservation or storage projects are restricted to a term equal to the expected life of the project but not more than thirty years. [[119]](#footnote-120)119

Each year, MFWP must compile a comprehensive report on all new and existing ISF lease holdings. [[120]](#footnote-121)120 In fact, in drafting the 1989 legislation, the state senate viewed the creation of ISF lease rights as pressing enough to compel MFWP to provide, in the annual report, convincing justification for its failure to establish such rights if no new lease agreements are established throughout the year. [[121]](#footnote-122)121

Recognizing the overriding importance of seniority in the prior appropriation system, the legislation also specifically indicates that "the priority of appropriation for a lease … is the same as the priority of appropriation of the right that is leased." [[122]](#footnote-123)122 This clause ensures that waters left instream under lease agreements are protected from claims by competing users and that leased waters have appropriation dates established at the time of the lease execution.

For comparative purposes, MFWP performs a function similar to CWCB. Both are the sole state agency entrusted with the ability to acquire existing water rights for conversion to instream uses. However, MFWP, unlike CWCB, actively pursues leased rights. The dissimilarity reflects under Montana law transfers to ISF use are limited to lease agreements under the state's temporary leasing study; no provisions allow for outright government purchases of ISF rights. However, the distinction may exist because MFWP's stated mission is more conservation oriented than CWCB's. [[123]](#footnote-124)123

(Temporary) Changes in appropriation rights - Private leasing

Notwithstanding the fact that permanent ISF conveyances are prohibited in Montana, the state's 1989 statutory components parallel ***Colorado***'s ISF protection framework in structure, if not in practice. However, Montana's 1995 amendments signify a considerable departure from such "traditional" methods of publicly administrated ISF establishment approaches. The 1995 legislation carved out two **[\*332]** significant exceptions to historical prohibitions against converting existing water rights to instream uses. First, it allowed existing users to unilaterally convert their consumptive uses to ISFs on a temporary basis without transferring the right to a public entity through a purchase or lease agreement. [[124]](#footnote-125)124 Second, and for conservationists most importantly, the legislation opened the door to private transactions between existing users and non-profit conservation groups. [[125]](#footnote-126)125 Montana's expanded program now allows private persons to enter lease agreements with existing users; the existing user is able to change a consumptive use to an instream use through whatever terms the lessor and lessee agree upon in return for compensation from the private lessee. [[126]](#footnote-127)126

The statutory language defines "person" broadly, and any "individual, association, partnership, or corporation" may lease water for instream enhancement providing certain conditions are met. [[127]](#footnote-128)127

Although MTU has been the most active lessor of ISF rights in the years since the legislation's passage, other organizations have begun to vigorously pursue lease rights in the state as well. [[128]](#footnote-129)128 These organizations receive considerable leeway regarding the leasing methods at their disposal. Rather than specifying split-or dry-season leasing methods, the statute allows considerable room for flexibility, stating that a change of use approval may be granted for either "consecutive or intermittent uses." [[129]](#footnote-130)129

To reiterate, all changes to instream use in Montana must be temporary. For all practical purposes, then, the conversions are "lease agreements" because - as with transactions involving MFWP - the law "authorizes private individuals … to lease water for [only] up to ten years for instream purposes." [[130]](#footnote-131)130. Like leases entered under the temporary leasing study, temporary changes of use are renewable for up to ten years upon mutual agreement between the contracting parties. [[131]](#footnote-132)131 The program originally terminated in 2005, but its success prompted the state legislature to extend its terms effective upon its original termination date of July 2005. [[132]](#footnote-133)132

In 2005, private entities will also be able to broker longer-term ISF deals with those willing to make improvements to their diversionary, irrigation, or storage practices. At that time, statutory authorization becomes effective and allows private organizations to enter lease agreements for up to thirty years with appropriators who possess **[\*333]** surplus water made "available from the development of new water conservation or storage project development." [[133]](#footnote-134)133 Again, provisions of this type weaken historical disincentives to salvaging while encouraging irrigators to develop creative conservation strategies.

Procedurally, private interests must comport with guiding legal language similar to the language governing the establishment of publicly held lease rights. Like those established through MFWP, all leases entered under the 1995 statute must benefit fisheries and must demonstrably not inflict harm upon non-party users. [[134]](#footnote-135)134 The same "Application to Change a Water Right" form must be filed with DNRC. [[135]](#footnote-136)135 After DNRC determines the application is complete, the water right sought to be changed is "subject to a critical and intense review" even before notice of the proposed change is published. [[136]](#footnote-137)136 Upon publication of notice, water users adverse to the use change may submit objections to DNRC. [[137]](#footnote-138)137 Those opposed to the change may also object during a renewal process and once during the term of the change permit. [[138]](#footnote-139)138 Contingent on whether the change request overcomes such objections, DNRC may grant or deny the parties' request to enter the lease agreement. [[139]](#footnote-140)139 Nevertheless, if it approves a lease, DNRC reserves the right to modify or revoke its authorization if it determines that others' rights are adversely affected by the change at any point. [[140]](#footnote-141)140

Perhaps the most important aspect of Montana's statutory framework is "the ability to change the purpose of an irrigation water right to an instream water right, and retain the priority date of the original water right." [[141]](#footnote-142)141 As with State-held lease rights, "the priority of appropriation for a temporary change in appropriation right is the same as the priority of appropriation of the right that is temporarily changed." [[142]](#footnote-143)142 Again, conservationists adamantly fought for the inclusion of a provision guaranteeing that appropriation dates would remain unaffected by temporary transfers of rights or changes in use. Since the 1988 passage of Senate Bill 447, [[143]](#footnote-144)143 maintaining the seniority of ISF rights has remained a paramount concern to those seeking to establish and preserve ISF rights in Montana, a concern that gained victory in the letter of the law.

**[\*334]**

2. The Oregon Water Trust: Innovator in Private Facilitation

a. History and Statutory Construction

Oregon is commonly identified as the first state to proactively seek to protect ISFs when, in 1915, it took measures to protect natural stream flows along the Columbia ***River*** Gorge. [[144]](#footnote-145)144 Since that time, the rules governing streamflow protection have witnessed tremendous evolution; in 1955, Oregon became the first state to establish a minimum stream flow program, and in 1970, it created the Scenic Waterways program, which - by its very nature - serves to maintain healthy stream flows. [[145]](#footnote-146)145 Oregon's aggressive approach to ***river*** and stream protection lives on today, as the state "continues to lead the development of instream flow markets" in the West. [[146]](#footnote-147)146

Oregon's current ISF protection scheme was solidified in 1987 with the passage of Senate Bill 140. [[147]](#footnote-148)147 Building on Oregon's progressive history of instream protection, the new legislation authorized any person, public or private, to "purchase or lease all or a portion of an existing water right … for conversion to an in-stream water right." [[148]](#footnote-149)148 This transfer of private rights was considered "critical … because it offered the only route for an in-stream water right to obtain a valuable senior priority date." [[149]](#footnote-150)149 The other water right transfer methods in the bill could not offer priority dates prior to 1955. [[150]](#footnote-151)150 On over-appropriated ***rivers*** and streams, such junior appropriation dates would fail to guarantee the actual preservation of necessary minimum flows in dry years when senior right holders could conceivably divert water beyond the full call of the ***river***. [[151]](#footnote-152)151

Though private ISF purchase acquisitions are lawful and not uncommon in the state, Oregon specifically recognized the right to lease water for instream purposes with the passage of the 1987 legislation. [[152]](#footnote-153)152 Amendments to the statute in May 2001, however, moved beyond mere authorization and specified that use of a water right could be "split" between the lessor and the lessee within a given calendar year. [[153]](#footnote-154)153 To date, the only requirements for split-season leasing are that (1) the original right holder must refrain from **[\*335]** diverting water out of stream while water is concurrently left instream under the lease agreement, and (2) the parties to the transaction must measure the amount of water applied to each use and report the data to the Oregon Water Resources Department ("OWRD") on an annual basis. [[154]](#footnote-155)154 Although not expressly allowed under the statute, dry-season leasing would not appear to offend the broad statutory language that allows leasing of "all or a portion of the existing water right … for a specified period." [[155]](#footnote-156)155 Dry-season leases merely specify lease periods with regard to natural conditions rather than time.

The majority of states that allow ISF right transactions do so only when special circumstances exist on the proposed reach of a ***river*** or stream. In Montana, parties may enter lease agreements only when doing so will demonstrably benefit or enhance a recognized fishery. [[156]](#footnote-157)156 In ***Colorado***, environmentalists have long decried a system that (until recently) [[157]](#footnote-158)157 restricted CWCB from obtaining any rights other than those that would maintain "the minimum flow necessary to protect the natural environment to a reasonable degree." [[158]](#footnote-159)158

Oregon, however, decided to cast off the shackles of prior appropriation, disregarding traditional limitations on how much and for what reasons water could be applied to ISF maintenance. According to OWRD, almost any valid water right may be leased for instream purposes in the state, if doing so does not cause injury to existing users. [[159]](#footnote-160)159 Thus, instream water rights may be transferred on a temporary basis to protect a diversity of needs including the protection of fish and wildlife, scenic values, and water quality. [[160]](#footnote-161)160 In addition, OWRD may hold ISF lease rights for "public use." [[161]](#footnote-162)161 This allowance has opened the door to many leasing opportunities since inclusive in the definition of public use are threatened recreational values. [[162]](#footnote-163)162

The provisions in Oregon law regarding salvaged water are similar to those of Montana law. Whereas "most western states do not allow users to keep or sell water that becomes surplus through conservation efforts such as installing more efficient irrigation systems, lining ditches, or repairing pipes," Oregon water users not only maintain a right to such waters, but may, in fact, be rewarded financially for their efforts. [[163]](#footnote-164)163 In Oregon, salvaged, or "conserved water" is created when a **[\*336]** right holder reduces the amount of water traditionally diverted to satisfy an existing beneficial use by "improving the technology or method for diverting, transporting, applying or recovering the water … ." [[164]](#footnote-165)164 The right to the amount of water conserved maintains "the same legal status as any other water right for which a certificate has been issued." [[165]](#footnote-166)165 Thus, agency rules state that such rights may be freely transferred, or leased for instream use, as if they were originally perfected through diversionary means. [[166]](#footnote-167)166 Once again, this allowance represents a significant departure from historical prior appropriation restrictions and "aims to correct the misguided incentives of the beneficial use requirement by giving water right holders an incentive to conserve water." [[167]](#footnote-168)167

Although Oregon law is quite favorable to private involvement in the ISF conversion process, some ambiguity remains as to whether private individuals may hold instream rights. [[168]](#footnote-169)168 An instream right is defined as a "right held in trust by the Water Resources Department for the benefit of the people … ." [[169]](#footnote-170)169 This language contradicts that authorizing "any person" to lease existing rights for conversion to instream use. [[170]](#footnote-171)170 Until 1998, the State maintained the position that the former wording was controlling, requiring title to each instream right obtained by a private entity in turn be transferred to OWRD. [[171]](#footnote-172)171 After a decade of adherence to this condition, some private groups began to argue vociferously that ownership was essential to the success of their efforts. [[172]](#footnote-173)172 In response, OWRD began issuing "flow enhancement water rights," which are essentially the same as ISF rights, but private organizations may hold the right. [[173]](#footnote-174)173 Thus far, however, the state has declined to issue such rights for temporary lease transfers, opting to limit this declaration to rights acquired permanently by sale, grant, or donation. [[174]](#footnote-175)174

While some organizations may see possession as an indispensable component of successful flow protection, the prudent conservationist must realize that the importance of maintaining title to a right is secondary to the ability to facilitate acquisitions. The primary organization in Oregon's emergent ISF water market, the Oregon **[\*337]** Water Trust ("OWT"), has shown a remarkable ability to preserve water in threatened areas without maintaining possessory rights. In fact, more has been accomplished under the Oregon program - which generally precludes private, organizational, or corporate ownership of instream rights - than under the Montana legal framework, which openly permits non-government possessory interests. What must also be remembered are the numerous benefits conservation groups reap from State oversight. While the majority of these will be discussed below, it suffices to say here that state agencies are able to provide continuity of stewardship, while administering the transaction process with a greater degree of impartiality than organizations with vested interests.

OWT's creation was directly attributable to the 1987 legislation that recognized the validity of ISFs in the context of Oregon's prior appropriation system. [[175]](#footnote-176)175 Nonetheless, it would not be until six years later, in the winter of 1992, that "a small group of individuals representing agriculture, environmental, legal, and tribal interests got together … to discuss possible alternatives" to the existing utilization of the law. [[176]](#footnote-177)176 Shortly thereafter, OWT emerged as the state's primary "broker for private parties interested in donating their rights to the State for instream flow." [[177]](#footnote-178)177 Over the next decade, OWT - modeling its conservation efforts after successful land trusts such as the Nature Conservancy and the Trust for Public Land - broadened its strategic approach to ISF protection by pursuing creative and mutually beneficial lease transactions based on free market ideology. [[178]](#footnote-179)178 Today it is said that "more than any other private organization, OWT demonstrates the applicability of markets to water policy." [[179]](#footnote-180)179

As might be expected, OWT's efforts were not universally accepted. In fact, "the Trust began its activities in a polarized atmosphere that had set farmers against environmentalists." [[180]](#footnote-181)180 Even in the face of continuing success in improving the state's waterways, legislative challenges invariably arose in an attempt to restrict the ease with which consumptive water users could lawfully transfer rights to those such as OWT who would convert them to instream uses. For example, in both 1995 and 1997, state lawmakers introduced legislation that would have severely limited the transferability of out-of- **[\*338]** stream water to instream rights. [[181]](#footnote-182)181 Under the terms of the 1997 bill, water rights originally "issued for agricultural purposes [would have been transferable] only to other agricultural uses." [[182]](#footnote-183)182 Fortunately, the state legislature failed to adopt the regressive measures, and OWT was allowed to flourish.

Over its first summer, OWT entered into five lease agreements for ISF rights. [[183]](#footnote-184)183 Under the terms of its first negotiated lease, OWT agreed to purchase hay the lessor would have otherwise grown on his riparian land to feed cattle; [[184]](#footnote-185)184 another lease was donated; and the Trust provided monetary compensation at market value for the remaining three. [[185]](#footnote-186)185 By 1998, OWT had completed thirty-one transactions and by the end of 1999, its portfolio included fifty-one instream rights - the majority of them established on a temporary basis. [[186]](#footnote-187)186 These temporary rights accounted for about 28.71 cfs of the total 32.28 cfs left instream that year under OWT-facilitated agreements. [[187]](#footnote-188)187 By the 2001 irrigation season, OWT was involved in eighty-two projects, preserving 101.66 cfs of natural flows - 93.56 cfs of which were preserved under temporary leases. [[188]](#footnote-189)188

Other private organizations in Oregon have also played a part in the state's ISF restoration program. For instance, in 1994, the Bonneville Power Administration ("BPA") and an agricultural user entered into an instream flow lease. Under the lease, which included an option to purchase the rights, BPA left 150 cfs in the Snake ***River*** and 68.4 cfs in the Malheur ***River***. [[189]](#footnote-190)189 Nonetheless, leases involving private parties other than OWT are rare. As a result, OWT is the most prominent player in Oregon's ISF protection regime and is now widely respected as "the oldest and most active private acquirer of instream rights" in the West. [[190]](#footnote-191)190

b. Legal and Procedural Requirements

Keeping in mind recent debate over the issue, the general rule is that only OWRD may hold leased rights to instream water for any meaningful period. Notwithstanding the issuance of "instream enhancement rights," the State's position is that "any person who leases, purchases, or receives … a water right and converts it to instream flow must transfer the right to [OWRD] to hold in trust for **[\*339]** the people of Oregon." [[191]](#footnote-192)191 However, unlike the ***Colorado*** system, private parties are granted substantial leeway in targeting reaches of stream, facilitating various transactions, and holding ISF rights, even if only temporarily. [[192]](#footnote-193)192

The differences in the developmental histories of the Montana and Oregon leasing laws create a sharp distinction between the two states' statutory structures. Montana, over a six-year period, experienced an evolution in its leasing flow program. The program originally called for a state-only acquisition program but later created an allowance for private-sector involvement in ISF acquisitions. [[193]](#footnote-194)193 Because Montana initially prohibited non-agency involvement in stream protection efforts, the legislature drafted the original legislation to allow flexibility in the State's dealings with private right holders - thus, the temporary leasing study. Were the State restricted to acquiring permanent rights through donation or purchase, it would have lacked the flexible nature of leasing strategies necessary to restore healthy flows in threatened basins where users were unwilling to completely relinquish their rights.

The Oregon experience was quite different. When the Oregon legislature drafted its ISF enabling statute in 1987, it simultaneously created the first avenues for both state-and privately-initiated ISF transactions. As such, the state legislature perhaps did not feel similarly compelled to draft specific language decreeing a State's right to enter lease agreements. Instead, the mission of the State would hinge more on the "establishment of new in-stream water rights." [[194]](#footnote-195)194

This somewhat subtle variation in the creation of the two states' leasing laws has had a profound effect on the manner in which government agencies and public interest groups have pursued available rights. In Montana, MFWP, in a sense, competes for the same rights sought by non-profit groups. Although guided by different laws, they are nonetheless governed by virtually the same standard of non-harm. [[195]](#footnote-196)195 In Oregon, however, state agencies and public interest groups each have specific areas of interest and, for the most part, operate within two different legal frameworks. While the nature of the law focuses state efforts on the establishment of new ISF rights, conservation groups - most notably OWT - tend more to seek out and develop ISF rights through the right transfer process, often on a temporary basis. [[196]](#footnote-197)196 Moreover, State acquisitions are more stringently reviewed than transactions between two contracting private parties. [[197]](#footnote-198)197

**[\*340]** State Powers - OWRD issuance of ISF water right certificates

Prior to the 1987 legislation that in effect "converted all existing minimum flows into instream rights," OWRD could unilaterally "investigate adoption of minimum perennial streamflows" for threatened areas. [[198]](#footnote-199)198 The new legislation, however, precluded the agency from establishing a right on its own motion. [[199]](#footnote-200)199 Instead, OWRD may now consider requests to establish ISF rights only from three state agencies: Fish and Wildlife, Environmental Quality, and Parks and Recreation. [[200]](#footnote-201)200 That the statutory language expressly calls for flow requests from agencies with a broad range of responsibilities is indicative of the numerous ISF purposes that may qualify as beneficial uses.

In ***Colorado***, however, requests from secondary state agencies are neither necessary nor expressly solicited. CWCB must consider requests from any persons or governmental agencies and request recommendations from the Division of Wildlife and the Division of Parks and Outdoor Recreation prior to its initiation of the ISF appropriation process. [[201]](#footnote-202)201 However, a 1987 amendment to the WRDA made clear that "the authority of the Board to file for instream flow rights, or rights to maintain natural lake levels, [is] exclusive." [[202]](#footnote-203)202

Although outside agencies play a large part in Oregon's instream appropriation scheme, new ISF rights are established through a certification process ultimately overseen by OWRD. OWRD grants certificates for new rights only after the applicant agency submits a valid application including, but not limited to the following: (1) a detailed description of the particular reach of ***river*** or stream to be protected; (2) the public use to be served through establishment of the right; and (3) the amount of water requested, the period of its use, and the technical methods to be used to determine the requested amounts. [[203]](#footnote-204)203 In addition to the mandatory requirements, the requesting agency is encouraged to include: "(a) [the] means and location for measuring the instream water right; (b) the strategy and responsibility for monitoring flows for the instream right; and (c) any provisions needed for managing the water right to protect the public uses." [[204]](#footnote-205)204

Upon receiving an application from one of the three certified agencies, OWRD embarks on a lengthy bureaucratic certification process. Prior to final certification, OWRD must perform (1) a completeness review; (2) an initial review to determine whether the **[\*341]** requested water is available and whether granting the certificate would run contrary to statutory law; and (3) an issuance of public notice to potentially affected state and federal agencies, Indian tribes, and persons on OWRD's weekly mailing list. [[205]](#footnote-206)205 At the completion of this process, OWRD may either approve the new instream right as requested, issue a certificate for a new right for a lesser quantity than requested, or deny a certificate for a new ISF right upon a determination that doing so would either benefit or run contrary to the public interest. [[206]](#footnote-207)206

Privately facilitated agreements including split-and dry-season leases

Individuals may acquire existing rights, or portions thereof, and take responsibility for changing the use to instream purposes in an administrative hearing, but then must turn the right over to OWRD to be held in trust for the people of the state. [[207]](#footnote-208)207 All leases entered into under the program are "short-term" leases because under no circumstances may the lease terms exceed a period of five years. [[208]](#footnote-209)208 If the agreement specifies split-season use, the lease may be valid for only one year. [[209]](#footnote-210)209 However, there are no limitations on renewals in Oregon for either full-or split-season ISF leases. [[210]](#footnote-211)210 Leasing to private parties is thus an attractive prospect to many landowners, as it gives them the chance to "test the market waters," and either negate their commitment after a short period, or continue to operate under a "temporary" agreement for as long as they wish.

Transferring water rights through private contract rather than through governmental channels in many cases allows grantors to avoid cumbersome bureaucratic processes. For example, in Oregon, the issuance of a new certificate is not mandated when private parties draft ISF lease agreements among themselves; rather the temporary right is established by the lease agreement itself. [[211]](#footnote-212)211 OWRD may, however, at the request of the lessor, issue a new certificate for the instream water right indicating the priority date. [[212]](#footnote-213)212 Nevertheless, parties who convert all or a portion of a water right to instream use through a lease agreement must comply with the standard statutory requirements for the transfer of a water right. [[213]](#footnote-214)213

Applications for instream right transfers are submitted to the Oregon Water Resources Commission ("OWRC"), a seven-member board appointed by the governor to oversee the activities of OWRD. [[214]](#footnote-215)214 **[\*342]** First, OWRD reviews all lease applications to ensure the application itself is in compliance with agency rules, and, "if possible, to develop conditions to prevent enlargement of the original right or injury to other water right owners." [[215]](#footnote-216)215 In order for a lessor to receive agency approval, "instream transfers must show that injury will not occur and that a beneficial use will be made of the water during the lease period." [[216]](#footnote-217)216 As previously mentioned, the later qualification is relatively easy to satisfy - OWRD rules ask: (1) that the lease agreement state how the lease will serve a public use; [[217]](#footnote-218)217 and (2) that the application specifically identify the public uses, which include pollution abatement, improvement of aquatic and wildlife habitat, or recreational values. [[218]](#footnote-219)218

In most cases, applicants need only fill out a standard "Short-Term Water Lease Agreement," [[219]](#footnote-220)219 specifying standard information such as the party names, amount of water to be leased, and the public value sought to be protected or improved. If the right conversion is to occur on a split-season basis, the contracting parties must file a simple addendum in conjunction with the standard form, stating the periods when the right will be applied to its historical use and when it will be left instream. [[220]](#footnote-221)220 In addition, the application must convey the location and type of device to be used to measure the flows, the frequency with which such measurements will be taken, and the identity of the parties responsible for recording the measurements. [[221]](#footnote-222)221

Perhaps in an effort to reduce burdensome red tape, and to establish more effective basin-wide conservation efforts, OWRD has shrewdly devised a procedural framework for those situations where multiple landowners are attracted to the idea of leasing rights on a collective basis. Rather than having to process multiple change applications from users within a single basin, Oregon law encourages the pooling of multiple requests to enter lease agreements. Instead of requiring each individual right holder to enter separate lease agreements with interested conservation groups such as OWT, irrigation districts may enter such agreements on the landowners' behalves via the submission of a "pooled lease form" [[222]](#footnote-223)222 containing **[\*343]** water right information from each participating landowner. [[223]](#footnote-224)223 Although an application submitted in this fashion must be accompanied by individual forms completed by each right holder, [[224]](#footnote-225)224 the OWRC reviews and approves or denies the conversion request as it would a lease agreement executed between a trust and a single right holder.

Following the receipt of the change application, the OWRD Director, under authority of the OWRC, must make a determination whether "the amount and timing of the proposed instream flow is allowable within the limits and use, including return flows, of the original water right; and the proposed reach(es) is (are) appropriate." [[225]](#footnote-226)225 If OWRD determines the proposal may inflict injury upon existing rights, or cause an enlargement of the original right, the lease is not necessarily rejected. The agency retains the authority to modify the agreement to prevent enlargement or injury. [[226]](#footnote-227)226 Following approval, OWRD "may [also] revoke … the temporary transfer at any time if [it] finds that the transfer is causing injury." [[227]](#footnote-228)227

Thus, while the Oregon system resembles that of ***Colorado*** in vesting power with a single entity to maintain ISF rights, the similarities do not carry much further. Notwithstanding that OWRD, much like CWCB, is empowered with the sole authority to hold ISF rights in trust for the people of the state, the Oregon system grants broad permissibility as to who may originally acquire the right. This distinction, perhaps more than any other, sets the Oregon approach to preserving its natural ***river*** and stream flows apart from the ***Colorado*** approach. Unlike ***Colorado***, "Oregon actively enforces its rights," provides market incentives for acquiring instream rights, and provides that ISF decrees may automatically stop additional future development. [[228]](#footnote-229)228

**[\*344]**

C. Growing Interest and Commitment of Resources to Private ISF Rights

Stakeholders across the West have advanced multiple justifications for expanding the breadth of private-sector involvement in the ISF preservation game. Arguably, a market approach creates flexibility in the system, eliminates political and bureaucratic barriers to meaningful conservation efforts, and allows public interest groups' direct involvement with agricultural users, which in turn enables the establishment of mutual trust between agricultural and environmental interests. However, from an economist's point of view, the overriding attractiveness of introducing market forces to a given endeavor is that doing so promotes financial feasibility while maximizing benefits to the contracting parties. In states that limit instream acquisitions and transfers to agency action, fiscal constraints have tended to severely limit the number of ISF conversions that governing agencies can reasonably complete each year. [[229]](#footnote-230)229 Those systems that allow private money to filter into the acquisition scheme, however, have shown a much greater ability to stave off harmful ***river*** and stream depletion. [[230]](#footnote-231)230

In market systems, water trusts and other conservation groups are often able to successfully fulfill their missions without resorting to costly and harmful adversarial battles with competing interests. Litigating suits under federal laws such as the Endangered Species Act ("ESA"), or Clean Water Act ("CWA"), or under state regulation necessitates quick and severe drains on organizational funds. Political campaigning and lobbying for more stringent flow regulation are also costly, not to mention time consuming. In many cases, efforts to protect threatened waterways are time sensitive - the areas that organizations are fighting to protect suffer while opportunities for cooperation among the two sides wane. Lease transactions, on the other hand, enable conservation groups to apply their resources directly to mending the threat, thereby maximizing their spending efficiency. Lease transactions also benefit water right owners in any number of ways depending on the type of transaction owners feel is right for them: "Water leases provide cash and flexibility, purchases offer large cash payments, and donations can provide tax relief." [[231]](#footnote-232)231

Those who view with skepticism the ability of emergent ISF water markets to continue to grow need only look at the statistics: Overall expenditures on instream rights have grown tremendously in recent years. Whereas outlays among the northwestern states for ISF leases and purchases were almost undetectable in 1990, they grew to $ 6 million in 1994, and to $ 9 million in 1996. [[232]](#footnote-233)232 From 1990 to 1998, "an estimated $ 36 million was spent on leases and purchases of water for **[\*345]** instream use" in the Pacific Northwest. [[233]](#footnote-234)233 The vast majority of this money ($ 30.5 million) was applied to lease purchases. [[234]](#footnote-235)234 Although state and federal governments are still the dominant investors in the establishment of ISF rights, "private acquisitions … are increasing in size and number," and if focused on small tributaries, "may represent the entire flow of the stream." [[235]](#footnote-236)235

In Montana, MFWP-held rights still account for the majority of the total number of ISF flows held in the state. [[236]](#footnote-237)236 However, MFWP has not negotiated a new lease since 2001. [[237]](#footnote-238)237 Moreover, most of the fifteen lease rights it holds are for relatively small amounts of water ranging from 1.0 cfs to 41.4 cfs annually, with the majority of them coming in at the lower end of that range. [[238]](#footnote-239)238 While MFWP has been relatively hesitant to lease any new or larger rights, MTU now holds five ISF leases that leave over 250 cfs instream during critical periods. [[239]](#footnote-240)239 Taken together, three of these leases - all executed with the same offstream user under a single agreement - represent "the largest lease of its kind, not only in Montana, but also in the West." [[240]](#footnote-241)240 MTU purchased the split-season rights, collectively named the "Sun Ranch" leases after the lessor's farm, in order to protect flows on three separate tributaries of the Madison ***River***. [[241]](#footnote-242)241 The three flows account for approximately 220 cfs of water previously diverted out of stream; this is approximately the same amount of water left instream each year under all fifteen MFWP leases during times of minimum diversion. [[242]](#footnote-243)242

The impressive growth in the number of private acquisitions is attributable to an influx of funding to privately sponsored public interest organizations, all of which were made possible by the aforementioned developments in Montana and Oregon law. OWT began in 1994 with an annual operational budget of approximately $ 120,000. [[243]](#footnote-244)243 By 1998, the budget more than doubled to $ 264,000; between 1994 and 1998, OWT's funding for acquisition of water rights **[\*346]** totaled $ 284,000. [[244]](#footnote-245)244 Additionally, the Trust acquired $ 370,000 worth of donated water rights. [[245]](#footnote-246)245 In 1993, OWT started out merely as an idea to test a free-market environmental protection policy. By 1998, the Trust had protected over 450 miles of threatened ***river*** throughout the state. [[246]](#footnote-247)246 The appearance on the water market horizon of new organizations such as CWT and the Montana Water Trust, which recently negotiated its first ISF lease right, [[247]](#footnote-248)247 evidences a burgeoning interest in privately facilitated transactions.

As a final note on the economics of instream right transactions, a glaring cost discrepancy exists between purchase acquisitions and lease transactions. In 1998, the mean price for purchased ISF rights in the Pacific Northwest was $ 151.38 per acre-foot; leased rights were valued at a more affordable $ 30.40 per acre-foot. [[248]](#footnote-249)248 Comparing these figures, it becomes immediately evident why the majority of conservation efforts focus on the establishment of lease rights. Taking into account the finite budgets of organizations operating in the market, leased rights offer the best way to keep the most water instream during late summers or dry years. In many cases, purchased rights provide no conservation benefits beyond those a lease on the same watercourse establishes. Yet purchased rights demand massive commitments of financial resources, which may foreclose the possibility of other acquisitions. While leases may fail to offer guarantees for perpetual natural flow preservation, there is little doubt the public interest groups' expenditures have, nonetheless, translated into noticeable improvements to the natural conditions of depleted ***rivers*** and streams throughout the Northwest.

[*V*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831). POSSIBLE LIMITATIONS OF OFFSTREAM TO INSTREAM LEASE TRANSFERS: WHAT BARRIERS EXIST?

To be sure, "voluntary market transfers of water rights are an increasingly important means of shifting water from out-of-stream uses to in-stream uses." [[249]](#footnote-250)249 Nevertheless, one should be careful not to hail the free market as a universal panacea for ***Colorado***'s depleted ***rivers*** and streams. Regulatory safeguards such as the ESA [[250]](#footnote-251)250 and the CWA, [[251]](#footnote-252)251 together with judicial declarations upholding such legal principles as **[\*347]** the public trust doctrine [[252]](#footnote-253)252 and the validity of federal reserved rights, [[253]](#footnote-254)253 play a vital role in the continuation of effective stewardship. Most conservationists remain doubtful that absent these safeguards a free market approach to ISF protection would manage, on its own, to sustain natural streamflows to the same extent as under the present regulatory and common law framework. [[254]](#footnote-255)254

Indeed, many see free market transfers merely as a valuable complement to the broader existing methods of ***river*** and stream protection. Some, meanwhile, believe the free market has no place whatsoever in the allocation scheme of a public good such as water. In either case, it market transfers have limitations, and, in fact, drawbacks of which advocates of private instream leasing should be acutely aware. The following list is not meant as an exhaustive summary of the problems that arise with ISF leasing; it merely highlights some issues that surface and, in some cases, offers solutions or clarifications:

1. Restricted reach and duration. The first fundamental limitation of voluntary leasing programs is that they represent just one potential tool for restoring and preserving ISFs. For rapid, far-reaching change, voluntary acquisition programs fall short. As previously mentioned, most lease agreements leave relatively small amounts of water instream. Therefore, to restore natural historical flows to an entire basin, one must look beyond leasing strategies for answers. Likewise, lease agreements invariably fail to offer restoration in perpetuity due to their temporary nature. If a landowner has a change of heart, transfers title to the land to which the water is appurtenant, or if the market no longer provides the best opportunity for profit, the lease may expire without renewal.

Some environmental organizations may be leery of entering short term ISF leases out of fear that the original right holders will use such arrangements to "park" their water rights until a more profitable option presents itself. The potential for water parking occurs when a consumptive right holder anticipates that an appropriative right will have significant market value as a different out-of-stream use in the near future - municipal consumption for instance. A temporary conveyance of that right to an instream use may allow a party to profit from the right until its consumptive value ripens. [[255]](#footnote-256)255 The environmental objective of ISF leasing thus becomes confounded as right holders maximize their financial gain under the guise of ecological responsibility, with little or no intent for their right to serve the goal of maintaining healthy streamflows in the long-term. In such **[\*348]** circumstances, the lessee water trust serves merely as a pack mule, carrying the right until the consumptive worth of the right surpasses its ISF lease value.

The lure of water parking is particularly powerful in ***Colorado***, where urban sprawl promises to continue its advance into presently underdeveloped areas. Rapid commercial and residential growth continues to thrive in areas where agricultural water users hold numerous senior rights. The majority of all water rights changes in ***Colorado*** in recent years have involved changes from agricultural use to municipal and other non-agricultural uses. [[256]](#footnote-257)256 Agricultural users eager to profit from their rights may be tempted by the prospect of leasing these rights to water trusts while they survey other options. Leasing in this manner gives potential opportunistic lessors a means of warehousing a right on a temporary basis. Conservation groups, on the other hand, are denied the promise of continued streamflow preservation.

The contrapositive condition is that those organizations in the business of acquiring rights are not tied to long-term stewardship commitments on particular reaches of ***river*** or stream. Leasing options allow organizations to "assess how effective water rights are in protecting stream flows" in a given area. [[257]](#footnote-258)257 If, for some reason, the need to maintain or augment flows in a certain region decreases - for instance if a stream becomes so depleted by subsequent diversions that the lease, if renewed, would no longer serve its purpose - the lessor can decide to let the agreement expire. The ability to discontinue conversion agreements thus enables such organizations to dedicate funds to more imminently threatened segments of ***river***. This flexibility allows conservation groups to "yield significant ecological benefits" with relatively small budgets. [[258]](#footnote-259)258

2. Willing lessors and the consumptive use requirement. Obviously, conservation groups cannot enter ISF leases with unwilling parties. Leases, whether split-or dry-season, offer a viable conservation option only when parties on both sides are eager to execute the transaction. Those interested in free-market transfers have found that "finding willing sellers is one of the most challenging tasks in acquiring water rights for instream flows." [[259]](#footnote-260)259 Locating sellers willing to temporarily convey water rights to financially strapped non-profits may be an exceptionally daunting task in ***Colorado***, where such groups must compete with deep-pocketed cities and municipalities eager to find new water sources. Unfortunately, "streams that suffer from low flow almost invariably have cities on them." [[260]](#footnote-261)260 These cities will usually have **[\*349]** superior financial and political resources at their disposal to pursue and acquire available senior water rights.

A scarcity of willing lessors could present a particularly problematic stumbling block in ***Colorado***, which holds steadfastly to consumptive use requirements. Under statutory law, a right holder may change only that portion of a water right for which a consumptive use can be established. [[261]](#footnote-262)261 As Professor Corbridge notes, however, "inadequate analysis of historical utilization or ambiguity in the law as to how that historical use should be measured can lead to uncertainty and confusion in the administration of the transfer system." [[262]](#footnote-263)262 When an appropriator temporarily forgoes a diversionary right, electing instead to leave water instream for a specified period, this non-consumptive period may create more ambiguity as to the status of the right. "This uncertainty [in turn] may dissuade creative transfer proposals and thereby ultimately stand as an impediment to the efficient allocation of water." [[263]](#footnote-264)263

Some potential lessors may feel uneasy about entering agreements that would have them leave water instream due to the potential for adverse users to claim the right abandoned. Abandonment of a right precludes its transferability. [[264]](#footnote-265)264 In ***Colorado***, abandonment is defined as "the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder." [[265]](#footnote-266)265 Because ISF leasing in almost all circumstances involves the conversion of a previously consumptive and active use to a passive benefit, leases for extended periods may give rise to the presumption of abandonment in the face of a challenge. Conceivably, a water court hostile to the notion of an instream flow as a continued use could find that the lease itself satisfies the intent requirement. As such, a leased ISF right may be declared abandoned and therefore available for appropriation or for satisfying the rights of existing downstream users. With such concerns in mind, an agricultural user interested in a split-or dry-season arrangement may opt to enter a more traditional agreement with a consumptive user after weighing the conservation alternative.

Lease transactions between willing parties serve a valuable purpose by providing environmental benefits while avoiding the inevitable tension that arises though the imposition of traditional "command and control" mechanisms on private entities. [[266]](#footnote-267)266 Nonetheless, they are quite limited by their strictly voluntary nature. Some believe that since instream uses tend to serve the public in general, it "makes sense **[\*350]** that public agencies should have control over instream protection activities" in a state. [[267]](#footnote-268)267 Absent legal safeguards that allow the State to establish and maintain minimum stream flows in depleted and heavily appropriated basins, it seems doubtful that enough willing and able lessors exist to support a water marketing approach in isolation of other mechanisms. [[268]](#footnote-269)268 Others have warned that if water users become too reliant on the market system, offstream users may cease converting their rights to instream uses when there is no financial incentive to do so. [[269]](#footnote-270)269 Thus, ISF water marketing may be a viable option only in those regions where there are both lessees with the ability to purchase ISF rights and willing lessors.

3. Existing streamflows. There are few areas in ***Colorado***, if any, where more water flows than has been claimed for consumptive uses; almost every stream in the state is overappropriated. [[270]](#footnote-271)270 This is not the case in some of the more humid areas of the West, such as the northwest coast, where unappropriated water still flows through sparsely populated areas. [[271]](#footnote-272)271 In such places, or wherever surplus water is available, water leasing does not provide a mechanism for the preservation of these existing ISFs. Because a lease agreement memorializes a temporary transfer of a right, they cannot establish new rights.

Gillilan and Brown have suggested that private involvement in the establishment of instream rights would be possible save a few interceding factors. First, "water users, water agency officials, and the general public" tend to lack a general understanding of instream rights. [[272]](#footnote-273)272 This lack of understanding, particularly where property rights are at issue, has caused a widespread aversion to instream conversions, even when existing water is available. Second, they outline the belief that establishing new ISFs limits possibilities for future economic development. [[273]](#footnote-274)273 The potential for such a limitation, they concede, is partially true. However, if more users were aware of such strategies as split-season leasing, these users would realize that the establishment of new ISFs "does not categorically exclude offstream uses." [[274]](#footnote-275)274 As with existing rights, there is no reason a newly-established right could not be shared by different users and serve different values during different seasonal periods depending on needs and conditions.

One final concern with instream appropriations is that if permitted, "private environmental groups could seek to appropriate all remaining unappropriated waters … for speculative reasons, preserving the water **[\*351]** in the ***river*** only until a good marketing opportunity comes along." [[275]](#footnote-276)275 Agricultural and other users thus fear that speculators, under the guise of environmental protection, will buy up the entirety of a surplus flow, forcing out current water users through high prices. However, while speculation has been common in domestic and municipal water purchases, little evidence exists thus far of widespread speculation in the instream sector. [[276]](#footnote-277)276

4. Standards of oversight. Some have warned that states run the risk of imposing different standards or quality of stewardship by opening water markets to the public. [[277]](#footnote-278)277 Public entities generally have an established protocol for overseeing the maintenance and enforcement of acquired rights. Letting many players in the ISF acquisition game, the argument progresses, can destroy continuity of oversight. A host of organizations could potentially employ disparate standards of management, monitor their rights with varying frequency and accuracy, and participate in ISF programs for different reasons. From the policy and legal perspectives, agency oversight is preferable to a review of complaints under differing enforcement standards. Courts would likely prefer the imposition of a single standard applied to disputes arising under a lease agreement.

On the other hand, restricting ISF acquisitions to public entities creates inconsistency of care. According to Sterne, the bureaucratic process inherent in public acquisitions "prevents instream rights from being fully integrated into the prior appropriation system," and thereby relegates minimum streamflows to a status of "second-class" water rights. [[278]](#footnote-279)278 Without the status as a full private property right, courts and public agencies are less likely to vehemently uphold the terms of an instream transfer. Moreover, "inadequate funding may be the biggest impediment to vigorous enforcement of public instream flows." [[279]](#footnote-280)279 When a private organization invests significant time, money, and ideological commitment to acquire a right, that organization is more apt to avidly enforce the right than a public agency with limited resources.

5. Inordinate expenditures. In most cases, water transfers entail "substantial transaction costs." [[280]](#footnote-281)280 These may include "gathering information, overcoming bureaucratic hurdles, and meeting legal requirements." [[281]](#footnote-282)281 A 1990 study found that transaction costs in ***Colorado*** ranged from thirty-seven cents ($ 0.37) to $ 1702.00 per acre-foot of water transferred. [[282]](#footnote-283)282 Agricultural users thus often cite the **[\*352]** financial burdens associated with lease transactions as a deterrent to selling unused or unwanted water. While lease transactions often necessitate the same up-front expenditures in terms of measuring requirements and administrative or adjudicative costs, the return on investment is smaller than a permanent conveyance provides.

While all lease transactions require significant expenditures, the "transactions costs for instream flow acquisition are likely to be higher than for water rights purchased for off-stream uses." [[283]](#footnote-284)283 Thus, those with marketable offstream water rights might find it more appealing to sell their rights to those who would apply the right to other offstream uses rather than incurring the additional costs of leasing rights for instream uses. Moreover, potential lessors "often face opposition by neighboring water users who fear the flexibility of their own rights will be constrained. Thus, high costs are incurred in overcoming objections to the proposed new instream use of the water rights." [[284]](#footnote-285)284 With the aggressive presence of municipal water seekers on ***Colorado***'s Front Range, acquisition costs for potential lessees are driven upwards beyond those that water trusts would expect to pay in more rural areas of states like Montana and Oregon. [[285]](#footnote-286)285

The fiscal concerns with transferring rights from offstream use to instream uses are indeed genuine. Nevertheless, these concerns are often premised on the relatively short history of dealings with public, rather than private, entities. Often, bureaucratic stepping-stones and multi-departmental review translate into high transaction costs, which the lessor, lessee, or both must absorb.

In what is a relatively new approach to flow protection, these costs will come down as the acquisition system becomes streamlined and familiar. As private organizations gain more experience in the market process, transaction costs will tend to decrease as the experience level of an organization with leasing increases. [[286]](#footnote-287)286 Moreover, in states that have allowed private sector involvement in public leasing, increased cooperation among public and private entities has also reduced costs. [[287]](#footnote-288)287 Finally, private organizations tend to have more financial resources than public agencies to cover such costs. [[288]](#footnote-289)288 In a free market system, potential parties to a lease contract can always choose not to execute the lease. If they choose to do so, they incur the costs themselves; in most existing systems, the costs associated with establishing instream rights must be absorbed by the public, sectors of which may not support the acquisition program and are thus hesitant to pick up the tab.

**[\*353]** 6. Bureaucratic red tape and the ***Colorado*** Water Court distinction. When state agencies acquire the responsibility to request and hold ISF rights, they must establish guidelines and agency rules that balance the need to protect downstream, non-party users against the need to process right changes in a timely fashion. The process called for by such guidelines may have substantial impacts on policy implementation. For instance, the Oregon Department of Environmental Quality ("DEQ"), in response to the state's adoption of an ISF program, established a set of rules that would employ a rigorous methodology of flow rate determination. [[289]](#footnote-290)289 However, in the four years following the enactment of the statute, the DEQ had failed to file for a single ISF right. [[290]](#footnote-291)290 The Oregon Department of Fish and Wildlife's ("DFW") self-imposed requirements [[291]](#footnote-292)291 are less strenuous; DFW filed 900 applications for instream right certificates during the same period. [[292]](#footnote-293)292

As the Oregon DEQ-DFW distinction indicates, the bureaucratic process can vary significantly among agencies even within the same state. However, in states such as Oregon that allow both public and private establishment of instream rights, the general rule is that "an agency that wishes to set a minimum flow or acquire an instream right must develop more data and endure a much longer and more time-consuming hearings process than a private party seeking a new consumptive appropriation or transfer." [[293]](#footnote-294)293 As noted above, this rule may apply to new acquisitions and transactions involving transfers from one offstream use to another and may also apply to agreements that convert offstream uses to instream rights. Again, in Oregon, agencies must comport with certain filing and application requirements that do not apply to private actors. [[294]](#footnote-295)294

Although the bureaucratic process for privately obtained or facilitated rights is generally less arduous than that for agency-funded rights, transfers negotiated among private parties may require a time consuming, bureaucratic effort. In Montana, for example, the private right transfer process is more rigid than the process required under Oregon law. [[295]](#footnote-296)295 The Montana Water Trust advises potential lessors that completion of a change of use process could take anywhere from six months to a year. [[296]](#footnote-297)296 Unlike state water agencies, private organizations are not susceptible to political pressures in the right establishment process. [[297]](#footnote-298)297 This reality negates the need to balance the importance of establishing an ISF right against other competing public interests. [[298]](#footnote-299)298 **[\*354]** Moreover, as with the burden of high transaction costs, the lengthy bureaucratic process associated with ISF conversions is due, at least in part, to the relative novelty of the ISF leasing approach. [[299]](#footnote-300)299 As the practice becomes more commonplace, agencies should be able to process requests from private organizations in a more streamlined and timely fashion.

While Montana and Oregon have clearly defined protocols for the private establishment of instream leases, the means for doing so in ***Colorado*** remains opaque. "***Colorado*** law provides limited opportunities for temporary water transfers," of any type, much less temporary transfers to ISFs. [[300]](#footnote-301)300 Because private ISF leasing is generally untested in ***Colorado*** and the law is void of legal provisions specifically addressing the issue, if allowed by law, leasing mechanisms would presumably need to operate within the existent water transfer framework. ***Colorado***'s water law system is unique in that the water judges of the state's seven water districts - rather than administrative agencies as is the case in virtually all other western states - grant water right transfers and changes in use through an adjudicative process. [[301]](#footnote-302)301 In Oregon the OWRD and in Montana the DNRC - agencies with relatively conservationist mandates - ultimately approve offstream to instream conversions. [[302]](#footnote-303)302 In ***Colorado***, however, CWCB must file through the state attorney general in the water court in order to establish an adjudicated ISF right. [[303]](#footnote-304)303

The water court distinction could have profound ramifications on the operation of a leasing system. If the State were to allow private entities to facilitate and fund temporary ISF conversions, it would likely do so on the condition that CWCB be involved in the leasing process. Lawmakers would likely demand significant CWCB oversight of the transactional process and would ensure the agency holds leased water rights in trust for the people of the state. Under the current legal framework, each transfer request would require review through the adjudicative process, with CWCB sitting as the petitioning party. Such adjudication of the right could lead to lengthy, adversarial contests straining both agency and private party resources. Even when there is little or no resistance to an adjudicative change, water court determinations can take years to complete. [[304]](#footnote-305)304 This process, in itself, would produce a disincentive to ISF leasing and impose damaging time-consuming requirements on potential lessors and lessees.

Considering the likelihood of lengthy and costly adjudicative **[\*355]** approval of ISF leases, instream advocates should seek excuse non-permanent right transfers from the adjudicative process - at least for an interim period while the transfer is under water court consideration. In 2002, the ***Colorado*** General Assembly granted such an exemption for Substitute Supply Plan ("SSP") requests. [[305]](#footnote-306)305 SSPs are plans for augmentation through which persons seeking to make a new use of water agree to replace depletions resulting from the new use with an alternate water supply equal in "amount, location, time and quality" to the new use. [[306]](#footnote-307)306 In other words, SSPs allow out-of-priority diversions by providing the stream with a substitute water supply. House Bill 02-1414 granted the State Engineer the authority to authorize SSPs while a change of use approval is pending in the water court system, and even under certain circumstances when there is no parallel water court change application pending. [[307]](#footnote-308)307

SSPs requests differ from requests for ISF lease authorization in that they involve diversionary rather than instream water uses. [[308]](#footnote-309)308 Nevertheless, amendments to the new legislation could easily make a similar administrative allowance for ISF lease agreements. The statutory construction created by House Bill 1414 already provides a "mechanism to allow new uses of water to occur while an applicant seeks to obtain formal Water Court approval." [[309]](#footnote-310)309 Thus, through its enactment of House Bill 1414, the ***Colorado*** General Assembly has demonstrated a willingness to provide water users with a less formal administrative avenue when a protracted adjudicative process threatens to defeat a use change without a sound justification. "***Colorado***'s change of water procedures could be modified to facilitate temporary water transfers by streamlining the approval process." [[310]](#footnote-311)310 This streamlining would not necessarily compromise the no-harm principle. The plain language of House Bill 1414 prevents the State Engineer from approving any plan that would inflict injury on other decreed water rights within a basin. [[311]](#footnote-312)311 Therefore, a safety net exists to preclude approval of any ill-conceived transactions.

7. Dismantling traditional tenets of law and tradition. Many in the water law community have argued that any type of statutory adoption that usurps historic water users' control over watercourses would lead to a "slippery slope" and enable further intrusion on long-established possessive rights. [[312]](#footnote-313)312 The concern is that when the private right to leave water instream gains legal recognition, the holder of the right may **[\*356]** gain not only a very senior appropriation date for the quantity of water leased, but also a vested right to have the water left instream beyond the period of the lease. Thus, the fear is that legislation embracing and encouraging private leasing agreements marks a dangerous departure from legal norms. The mere recognition of such rights poses a problem for some: "The legislative adoption of an instream acquisition program endorses the importance of instream flows and undercuts the traditional preference in western water law for consumptive uses." [[313]](#footnote-314)313 Instream acquisition programs, by this logic, "undermine policy arguments against involuntary instream reallocations." [[314]](#footnote-315)314

While some fear that allowing private organizations to acquire rights through lease purchases serves as a premonition for heightened involuntary intrusion on property rights, others believe severing appropriative water rights from property is alone condemnable. Those in the latter camp object to the expansion of instream protection programs for the simple reason that it marks a break with long-standing tradition. "Many individuals, therefore, do not look kindly on the idea of separating the water from the land … . They view a complete separation of the two as a direct threat to their way of life." [[315]](#footnote-316)315

The arguments against water leasing come from more than just agricultural or municipal users. In fact, many environmentalists believe such strategies signal a regression in sound environmental policy. [[316]](#footnote-317)316 First, if the programs are strictly government-run, as they usually are, "legislative appropriations are unlikely to fully reflect public support for instream acquisitions." [[317]](#footnote-318)317 Although allowing the influx of private funding to acquisition schemes would resolve this issue, some in the conservation field nonetheless believe "by paying some water users for instream flows, the government may undercut the argument for direct regulation." [[318]](#footnote-319)318

The alternate argument rests on the presumption government will step in to maintain and restore ISFs if market activity does not protect them. If concerned parties cannot agree upon devices such as ISF leasing statutes, farmers and ranchers may lose their rights without compensation. This scenario is not merely conjectural; numerous judicial decisions have affirmed that existing rights to water are not always absolute and may be subject to loss with little or no compensation under either the public trust doctrine or federal law. [[319]](#footnote-320)319

8. Expansion of historic use. Some resistance to broader ISF leasing laws emanates from a concern lessees will gain temporary title to **[\*357]** greater amounts of water than historically applied to consumptive uses. Those with such concerns seek assurances leases will not expand historic use. [[320]](#footnote-321)320 Shortly after Oregon adopted its ISF program in 1987, OWRD began receiving complaints "from agricultural, municipal, and rural domestic interests." [[321]](#footnote-322)321 The complaints included allegations that applications for instream rights under the program "requested flow levels greatly exceeding what is naturally possible," and that such requests sought flows in excess of those that historically remained in the streams after appropriation. [[322]](#footnote-323)322

Statutory language guarantees, at least on paper, that lessors cannot temporarily transfer more water than historically diverted through offstream use practices. [[323]](#footnote-324)323 Given the difficulty of measuring historical and current use, however, there have undoubtedly been circumstances in which more water remained instream under lease agreements than has historically been applied to out-of-stream uses. The response to such concerns must involve the establishment of strict measuring requirements. Although monitoring requirements may impose a burdensome cost, paying for such costs is preferable to having a lease right invalidated because it causes an expansion of historical use.

9. ***Colorado***'s heightened state of water administration. As demonstrated earlier, a region's hydrological backdrop profoundly affects that region's approach to water management. In states such as Oregon and Montana with less heavily appropriated ***rivers*** and streams, more laxity exists concerning changes in use and user. In ***Colorado***, by contrast, tremendous growth, delivery obligations under interstate compacts, and severely over-appropriated ***rivers*** and streams have fostered an environment with no tolerance for slack in the administration of the state's water resources. The fact that ***Colorado***'s State Engineer administers water rights with unmatched rigidity is a vital point to consider when contemplating an ISF leasing allowance.

10. Delayed return flows and - potential for harm. One of the most hardened of all principles embodied by the prior appropriation doctrine is the "no harm rule." [[324]](#footnote-325)324 The most pressing issue associated with ISF lease transfers - and that which has caused the most resistance to the adoption of leasing statutes in general - is the potential for harm to non-party downstream users:

**[\*358]**

Downstream water users, for example, fear that reallocations will negatively affect the timing of flows that are crucial to their operations. In the dry season, farmers often depend on the return flow from earlier upstream irrigation; if an upstream irrigator transfers his water to instream flow, the delayed return flow upon which the downstream users rely will disappear. [[325]](#footnote-326)325

Indeed, some allude to this potential for harm as a reason to expand state programs rather than to establish a truly free water market. There are benefits to delayed return flows upon which many offstream users have historically depended. When a conflict arises as to whether a downstream user or the natural condition of a ***river*** or stream will suffer harm, the downstream user typically wins the battle. Thus, politically accountable state agencies, such as CWCB, must consider not only the benefits lease transactions could afford contracting users, but also the potential detriment that downstream users might incur. [[326]](#footnote-327)326

States that have chosen to adopt aggressive ISF conversion mechanisms have not done so oblivious to this risk, however. As discussed in the preceding section, state legislatures are heedful of the need to incorporate vigorous initial review processes, standards of notice, opportunities for airing grievances, and, if necessary, the denial of ISF conversions - if it becomes evident at any time throughout the process that a non-party water user may suffer harm to his or her existing right. The adoption of such vigilant laws, however, does necessitate a trade-off. States such as Montana, which boasts an overwhelmingly stringent review process, tend to experience less ISF marketing activity than states such as Oregon where the conversion process is more permissive. [[327]](#footnote-328)327

Considering the rigid standards CWCB already employs in its establishment and acquisition of instream flow rights, [[328]](#footnote-329)328 it would seem doubtful that more lax criteria would apply to privately funded institutions, should they participate directly in the acquisition process. [[329]](#footnote-330)329 Historically in ***Colorado***, "[a] water right cannot be changed in … type of use, place of use, or otherwise if the change will **[\*359]** result in material injury to other water rights." [[330]](#footnote-331)330 If temporary, private transfers were legally permissible, one would assume they would require lessors and lessees alike to maintain strict adherence to this principle throughout the duration of a transfer. As noted below, the limited legislation that has moved ***Colorado*** toward greater permissibility tends to incorporate strong language meant to protect the interests of all potentially affected water users.

[*VI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831). DEVELOPMENTS IN ***COLORADO*** LAW: STEPS TOWARD FREE-MARKET EXCHANGES

The statutory language authorizing CWCB to lawfully acquire "such waters of natural streams and lakes as the board determines may be required for minimum stream flows" [[331]](#footnote-332)331 represented a significant departure from the traditional diversion requirement whereby water must be removed from the watercourse in order to perfect a right. [[332]](#footnote-333)332 As with most laws, however, its limits would ultimately be tested and its scope redefined.

In 1986, the City of Fort Collins sought to obtain an instream right on the Cache La Poudre ***River*** to return water to its historic channel and support a boat chute and a fish ladder for recreational purposes. [[333]](#footnote-334)333 In a challenge to the City's proposed "instream diversion," the ***Colorado*** Supreme Court held that under the statute, "the exclusive authority vested in the CWCB to appropriate minimum stream flows [did] not detract from the right to divert and to put to beneficial use unappropriated water by removal or control." [[334]](#footnote-335)334 Because Fort Collins controlled the water within its natural course for a beneficial use using a structural device (i.e. a nature dam), the court held the instream use was a valid appropriation. [[335]](#footnote-336)335 In so holding, "the court took pains to point out that the appropriation by the City of Fort Collins did not constitute an "instream flow right,'" the type that only CWCB could appropriate. [[336]](#footnote-337)336

In May 2002, [[337]](#footnote-338)337 nearly ten years after the Cache la Poudre case, ***Colorado*** Governor Bill Owens signed Senate Bill 02-156 ("Senate Bill **[\*360]** 156"). [[338]](#footnote-339)338 The bill, as originally introduced, contained language that would have allowed for the private acquisition of ISF rights. [[339]](#footnote-340)339 However, the governor opposed such a radical alteration of the existing scheme; proponents of an expanded program were forced to settle on the amendment as it presently stands. [[340]](#footnote-341)340

Nevertheless, the legislation effected the most reaching alterations to ***Colorado***'s ISF protection program in some time and may have significant implications for its future operation. Senate Bill 156 made essentially two changes to the WRDA. First, where the former statutory language allowed CWCB acquisitions only "by grant, purchase, bequest, devise, lease, exchange, or other contractual agreement," the enactment specifically added the acquisition of ISF rights by donation. [[341]](#footnote-342)341 This inclusion, however, was more or less a formality. Since the passage of the original 1973 legislation, CWCB has always operated under the assumption that it could secure ISF rights by donation. [[342]](#footnote-343)342 The second provision, however, fundamentally altered the program's guiding language - where the statute formerly allowed the CWCB to acquire "interests in water as [it] determined may be required for minimum stream flows," CWCB may now appropriate "water in such amount as [it] determines is appropriate for stream flows." [[343]](#footnote-344)343 While the original language effectively put a cap on the amount of water CWCB could convert under the ISF protection program - namely that necessary to preserve streamflows to support aquatic life - the new language permits appropriations beyond those necessary to merely sustain the ***rivers***; the statute now allows for the acquisition of rights that will improve currently degraded environments.

Supporters of Senate Bill 156 touted the legislation as "a powerful new tool for instream protection" that could facilitate a significant improvement to ***Colorado***'s ***rivers***. [[344]](#footnote-345)344 However, if the political environment plays its typical part in the policy implementation stage, this provision of SB156 could conceivably go by the wayside: "opponents worry the bill would prevent agricultural and development interests from completely draining ***rivers*** and streams in times of need." [[345]](#footnote-346)345 Moreover, the language "may acquire" [[346]](#footnote-347)346 suggests **[\*361]** that CWCB retains broad discretion in deciding when, where, and if to apply the new standards.

In view of CWCB's friendly disposition toward consumptive users, it seems more likely that CWCB will employ the provisions of Senate Bill 156 sparingly rather than liberally. The extent and incidence with which CWCB applies these new provisions may depend on continuing pressure from the bill's original supporters. "SB 156 enjoyed support from a diverse range of interests including Trout Unlimited, the ***Colorado*** Water Congress, the ***Colorado*** Cattlemen's Association, Denver Water, the Northwest ***Colorado*** Council of Governments, the ***Colorado*** ***River*** Water Conservation District, Environmental Defense, Audubon, and Clean Water Action … ." [[347]](#footnote-348)347

While public interest groups statewide were scrambling to find ways to effectively implement the conservation components of Senate Bill 156, the ***Colorado*** legislature took yet another significant step toward flexibility in 2003 when it adopted House Bill 03-1320 ("House Bill 1320"). [[348]](#footnote-349)348 Signed by Governor Bill Owens in June 2003, House Bill 1320 was part of a larger "drought package," which was the direct result of the crippling drought conditions ***Colorado*** experienced in 2002-2003, and included three other bills aimed at mitigating the effects of future drought conditions. [[349]](#footnote-350)349 Whereas CWCB could previously acquire only permanent rights, House Bill 1320 allows water users to loan water to CWCB for instream purposes, so long as the water left instream flows through a basin or county in which the governor has declared a drought emergency. [[350]](#footnote-351)350

Following a preliminary review by CWCB in order to determine whether the loan would interfere with other decreed water rights, [[351]](#footnote-352)351 the right holder interested in conveying the temporary loan must file a proper request together with a $ 100 filing fee. [[352]](#footnote-353)352 The request for State approval must include:

(A) Evidence of the proponent's legal right to use the loaned water right;

(B) A statement of the duration of the proposed loan;

(C) A description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right;

(D) A description of the new proposed points of diversion, the return flow pattern, the stream reach, and the time, place, and types **[\*362]** of use of the loaned water right; and

(E) A reasonable estimate of the historic consumptive use of the loaned water right. [[353]](#footnote-354)353

The Division Engineer ("Engineer") must then review the request. [[354]](#footnote-355)354 In deciding whether to approve a voluntary loan, the State Engineer's central task is to determine whether granting the temporary instream flow would injure others' existing water rights. [[355]](#footnote-356)355 In so doing, the Engineer must ensure the proponent has provided proper notice to potentially affected users and that the proposed use of the water is for instream flow purposes. [[356]](#footnote-357)356

Following the public notice period, concerned water users have fifteen days to submit comments to the Division Engineer. [[357]](#footnote-358)357 The comments may claim potential injury, or recommend terms the petitioner(s) believes are necessary in order to avoid such injury. [[358]](#footnote-359)358 In response to such comments, the Engineer may either hold a hearing to address the issues raised or, without conducting a hearing, impose such terms and conditions as are necessary to ensure the no-harm standard is met. [[359]](#footnote-360)359 The statute thus calls for a redundant review process under which both CWCB and the Engineer's office must review loan proposals in order to verify that the temporary transfer will not harm non-party users. Those proposing the use change also enjoy the protection of the courts; if the Engineer rejects a loan proposal, the proponent may appeal the decision to a water judge in the appropriate water division within fifteen days. [[360]](#footnote-361)360

It remains unclear whether ***Colorado*** will follow in the footsteps of other states by allowing loan transfers only when low flow levels threaten fisheries. Alternatively, courts will interpret the statutory language to allow temporary transfers for the benefit of a broader range of interests including recreational use. Since waters loaned to CWCB under the statute are valid instream rights for the duration of the loan, [[361]](#footnote-362)361 the guiding principles of Senate Bill 156 should apply. This being the case, CWCB could lease waters in order to "improve the natural environment to a reasonable degree." [[362]](#footnote-363)362 However, House Bill 1320 contains language that significantly constrains the applicability of loan transfers. First, no loan may exceed a period of one hundred twenty days. [[363]](#footnote-364)363 In most cases, loan transfers would fail to provide an adequate mechanism to effect lasting ecological benefits. Second, **[\*363]** considering drought conditions must be present before a water user may permissibly loan a consumptive use right to the State, [[364]](#footnote-365)364 any waters acquired would fail to augment streamflows beyond minimum flow rates. Nevertheless, the terms of House Bill 1320 offers a viable preventative measure insofar as private loans during drought may head off total depletion and ecological devastation during times of extreme need. Furthermore, if the water loaning experiment meets with success, non-profits will have more cause to argue for the establishment of a leasing program.

OWRD has already implemented a plan not unlike that contemplated under House Bill 1320, except Oregon offers compensation for the drought-time transfer. [[365]](#footnote-366)365 Agency rules permit "any person holding a water use subject to transfer [to] enter into a temporary drought instream lease agreement to convert a water right or a portion of a water right to an instream water right." [[366]](#footnote-367)366 The OWRD director will approve such leases provided: "(a) the temporary instream lease shall not result in injury to an existing right; and (b) total water use for the proposed instream lease [does] not exceed the amount in the leased right." [[367]](#footnote-368)367 Such leases cannot last for periods beyond one year. [[368]](#footnote-369)368 Moreover, if the governor declares an end to the drought before the lease period expires, the lease agreement automatically terminates. [[369]](#footnote-370)369

Although ***Colorado*** law has opened the door to permanent, and now temporary, right transfers to instream use in the last two years, it has nonetheless stopped short of creating market incentives for temporary conversions. Although CWCB may enter lease agreements, the financial lure private involvement otherwise provides is still non-existent within the ***Colorado*** legal framework. Agencies such as CWCB must operate on limited budgets, and are subject to political constraints. Thus, while CWCB is presently party to five different lease agreements, [[370]](#footnote-371)370 other opportunities that arise could go by the wayside due to fiscal restraints.

**[\*364]**

[*VII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831). SOME UNANSWERED QUESTIONS

A. Legal Recognition of Private Party Involvement?

Although virtually every state in the West has adopted the prior appropriation doctrine, each has done so differently by adopting unique rules for water management. In no area of water law is this more true than in the promulgation of ISF protection statutes, where "each state has had to work within the context of its own geography, climate, and legal, political, and social institutions." [[371]](#footnote-372)371 Because the notion of providing legal protection to non-consumptive uses is a recent development and generally runs counter to the basic principles of prior appropriation, the approaches of the various states differ widely. [[372]](#footnote-373)372 One must take special note of a state's legal particularities in order to determine whether implementation of the legal principles adopted in another state is feasible. [[373]](#footnote-374)373 Any analysis must begin with an understanding of the legal domain within which the adopted laws would apply - in ***Colorado***'s case, the ISF program that has grown out of the 1969 WRDA. [[374]](#footnote-375)374

While numerous state programs exist with a greater tolerance toward private sector involvement in ISF acquisitions, "integration of instream flow rights as "appropriations' with priorities … has not been widely accepted outside of ***Colorado*** as yet." [[375]](#footnote-376)375 For over thirty years, CWCB has had the authority to "appropriate" instream rights under the same constitutional provision through which consumptive uses are established. [[376]](#footnote-377)376 That ***Colorado*** has specifically recognized ISF rights as valid within its hallowed legal dominion of prior appropriation is significant. Some might assume that ***Colorado***'s long association with natural flow protection would equate to a more acquiescent atmosphere. Why then has ***Colorado*** been so tentative in the face of growing pressures to allow private actors into the ISF transfer game?

To begin with, CWCB came into being in 1937, long before it received exclusive oversight of ***Colorado***'s ISF program. [[377]](#footnote-378)377 From its inception, CWCB has had many mandates under ***Colorado*** law unrelated to the preservation of natural stream flows. More specifically, CWCB "has been statutorily assigned a pro-development, **[\*365]** pro-water project mission." [[378]](#footnote-379)378 By charging the agency with WRDA oversight, the 1973 legislation forced CWCB, at the onset, to balance conflicting directives; leaving water instream is not the agency's central concern under every circumstance.

For example, when a ***Colorado*** water court granted a use right to the City of Golden to leave 1000 cfs instream for a kayak course, CWCB opposed the grant of the right in subsequent litigation. [[379]](#footnote-380)379 In an official statement, CWCB noted that its opposition stemmed from the fact that such a right would preclude all future development upstream of the park. [[380]](#footnote-381)380 In so noting, CWCB Director Rod Kuharich expressed that the agency's duty is to "ensure the maximum utilization of water," not necessarily to rubberstamp any permit request that comes across the desk. [[381]](#footnote-382)381

Under the letter of the law, "CWCB does not have much room to negotiate an agreement that strikes a balance between the desire for recreational instream flows and the needs for future water development in a given watershed." [[382]](#footnote-383)382 A recent ballot proposal, submitted to the electorate in the November 2003 general election would have compounded this problem. On November 4, 2003, ***Colorado*** voters considered Referendum A, which would have allowed CWCB to borrow up to $ 2 billion through the issuance of revenue bonds. [[383]](#footnote-384)383 The borrowed money would have been earmarked for the construction of new storage and water delivery projects. Local environmental organizations took a strong stand against the referendum, claiming it failed to protect communities, existing water users, or the environment. At the time, the Sierra Club claimed, "the large dams and diversions that Referendum A is designed to fund would likely harm the environment and cause great concern to existing water users because there is [sic] no specific mitigation strategies required for the projects it would finance." [[384]](#footnote-385)384 The measure would have further compromised CWCB's position as the state's lead water resource conservation agency by entrusting it with the authority to approve massive infrastructure-altering projects that would conceivably conflict with CWCB's conservation mandates.

A second point to consider is the manner in which ISF leasing statutes have found a place in states' existent water law structure. The **[\*366]** Montana and Oregon models detailed above developed in states already receptive to instream flow protection initiatives occurring outside the confines of prior appropriation. In Oregon, for example, a citizens' ballot initiative created the 1970 Scenic Waterways Program. [[385]](#footnote-386)385 In Montana, the original "Murphy Rights" carried no real appropriation date; under the 1969 statute, the previously unappropriated waters left instream held "a priority over other uses only until the district court … determined that such waters [were] needed for a more beneficial use." [[386]](#footnote-387)386 Ultimately, Oregon and Montana repealed these and other conservation strategies or assimilated them into their prior appropriation systems. [[387]](#footnote-388)387

Notwithstanding the fact that free market transfers gained acceptance free from the hindrances posed by prior appropriation, the introduction of market mechanisms in each state was, and remains, a laborious chore. In ***Colorado***, lawmakers have been careful to draft ISF protection laws so as not to offend the prior appropriation doctrine. The enduring need to reconcile fully new ISF legislation with the prior appropriation doctrine in ***Colorado*** has hampered legal receptiveness to concepts such as private ISF leasing.

Some have posited that prior appropriation and free-market policies naturally coalesce. However, although the doctrine emphasizes "the allocation of water to and by individuals," most western states treat the transfer of ISFs quite differently than they do the transfer of more traditional rights. [[388]](#footnote-389)388 State government has assumed much of the control over protection activities, and has constrained individuals in their opportunities to protect ISFs. [[389]](#footnote-390)389 "The legal nonreceptivity to private instream acquisitions found in most states is, more likely, a vestige of the historic prohibition of private instream flow rights in the West," [[390]](#footnote-391)390 which is misplaced. Prior appropriation has historically "sought to ensure that unutilized water is available free of charge to anyone seeking to put it to a reasonable and beneficial offstream use." [[391]](#footnote-392)391 Now that ***Colorado*** has recognized protection of the natural environment as a beneficial use, the State should hold water transfers for instream use to the same standards as those for offstream uses.

Putting aside the legal idiosyncrasies that separate ***Colorado*** from other states, one sweeping question remains: is it legal for private individuals to actively pursue existing offstream rights in order to convert them back to natural flows? This question raises compelling considerations regarding the proper steward of the public trust. "Legislatures may view instream flows as uniquely public in **[\*367]** character, reflecting collective decisions about the commonweal." [[392]](#footnote-393)392 Should ISFs become freely tradable within a market system, some may view the move as an intrusion on a domain legally reserved to the state's regulatory bodies.

It would be presumptuous to assume that the existing structure of ISF rules and regulations would systematically embrace the introduction of a leasing program. In order for ISF leasing to work in ***Colorado***, program proponents would need to introduce legislation respectful of the existing methods of ISF establishment. In balancing this need against the necessity to institute a workable means of transferring rights, the plan must work within some existing parameters and require the modification of others. For instance, a proposal might seek adjudicative bypass of lease agreements while stopping short of an overhaul that would preclude CWCB approval of all lease conveyances. Presently, no legal barriers exist to prevent CWCB from entering lease agreements. In 1997, the U.S. Fish and Wildlife Service entered into a five-year lease agreement with CWCB under which USFWS would release 2000 acre-feet of water from Steamboat Lake in late summer at the rate of 25 cfs in order to protect pikeminnow habitat. [[393]](#footnote-394)393 Again, the only major impediment to broader leasing is the legal recognition of private funding mechanisms, which could coexist within the exiting program given some fine-tuning of the law.

B. Political Acceptance?

In 1989, ***Colorado***'s State Engineer noted that the 1973 amendment to the WRDA, which authorized CWCB limited instream appropriations, grew at least in part out of a fear that "lunatics" would appropriate all the state's water and wastefully leave it instream. [[394]](#footnote-395)394 By leaving matters of ISF reservation in the hands of a gubernatorially-appointed body, the ***Colorado*** Legislature could hold radical environmentalists at bay. Thus, some saw the grant to CWCB of exclusive authority over the establishment of new ISF rights as a calculated move to deny private sector influence and funding in the ISF sphere. [[395]](#footnote-396)395 If true, from its inception CWCB has maintained an institutional bias against the infiltration of private interests.

If CWCB indeed holds such a predisposition, this could be problematic for those seeking to append a free market element to the state's ISF protection program. The successes in Oregon and Montana were attributable in no small part to the political support of existing administrative entities. In Montana, for example, House Bill 472 - which allowed private sector involvement in ISF leasing - had the full **[\*368]** support of MFWP. [[396]](#footnote-397)396 MFWP believed a private market would serve as a positive complement to the state program and would allow for more involvement among agricultural users who were "reticent to deal with the state." [[397]](#footnote-398)397 Likewise, in the formative years of Oregon's ISF transfer program, OWT staff members worked closely with OWRD and were "key participants in a two year process of rule development for a leasing program." [[398]](#footnote-399)398

At present, CWCB support for leasing legislation would likely be lesser than that offered by its counterparts in Oregon and Montana. CWCB believes, perhaps rightly so, that its extensive experience, uniformity of oversight and monitoring techniques, and ability to identify and avoid potential harm to downstream water users justify its position as the state's exclusive holder and steward of instream rights. [[399]](#footnote-400)399 With this in mind, the conservation sector should seek passage of legislation providing more opportunities for public interest groups to fund as well as target and solicit rights on endangered ***river*** and stream reaches. Presently few codified means exist through which such organizations may facilitate the leasing of ISF rights, even if only to be held in trust by CWCB.

As a politically responsive executive body, [[400]](#footnote-401)400 CWCB sentiment in large part depends on the prevailing disposition of its "constituency" - the state's (mostly agricultural and municipal) water users. ***Colorado***'s competing water users still have a long way to go to achieve a complete reconciliation of interests. Much can be learned from the experiences of senior right holders in Oregon and Montana who - while similarly situated in confrontational deadlock for a number of years [[401]](#footnote-402)401 - were nevertheless able to fashion a leasing program suitable to all interests.

The principal variable in achieving this success was knowledge. "Lack of information may be the single largest factor preventing the further protection of instream flows." [[402]](#footnote-403)402 Many fears could be allayed and tempers quelled if stakeholders knew more about the benefits of market transfers and the prevalence of harm-preventing safeguards in successful leasing systems. To inform themselves, however, the concerned stakeholders must first create an environment wherein they can exchange ideas and express perspectives.

A quest for a political resolution that satiates all concerns may bring innate conflicts of interest to the surface of the debate. However, this is not to say that a workable solution is entirely elusive. From a practical standpoint, reconciliation will entail bringing a **[\*369]** diverse array of interests to the bargaining table including senior agricultural users, conservationists, agency officials, hydrologists, policy makers, and others. Any working group so comprised, however, must maintain a collective willingness to forgo traditional biases in favor of universal betterment, and they must not only listen to each other's side but also understand it. Professor Donald Snow of the University of Montana has devised a "list of ingredients and attributes that seem to be present in successful collaborative conservation efforts:"

(1) There has to be something significant to negotiate. And there has to be the potential for net environmental gains or improvements that could come about through negotiation.

(2) There is a perceived threat, major challenge, or new opportunity for a power shift felt by all of the stakeholders… . But one does not need to place a negative spin on it. Sometimes, it is instead the power of a perceived opportunity … .

(3) Creative, open-minded, courageous leaders have to be at the table. They provide positive examples to each other and to their constituents. They are capable of both learning and teaching, and they are willing to engage in open conversation that may lead to entirely unpredictable results. Collaborative conservation is fundamentally about flexibility, innovation, and cross-fertility. These are all, ultimately, functions of mature leadership. Organizations with names that include an exclamation point usually have the hardest time with this form of leadership.

(4) Collaboration probably has to be viewed strategically, in large measure as a means of overcoming political inertia. Another way of saying this: The parties must realize that by working together, they have real potential to create good outcomes that none of them could create alone. As Matt McKinney of the Montana Consensus Council puts it, "If you think you can get a better result another way, do it."

(5) There has to be a roughly equal power equation, not an equality of magnitude among the parties at the table (a parity that almost never exists), but rather within the context of the issue at hand. There are many western resource issues in which environmentalists, despite their scarce resources, hold very significant powers - instream flow allocations, for example. As long as environmental organizations can be granted water rights to protect ***rivers*** and streams, they are powerful players under law. Perhaps it comes to this: the parties all must have at least enough power to be able to block each others' initiatives, but not enough power unilaterally to win the issue. [[403]](#footnote-404)403

Professor Snow's observations are remarkably on-target in regard to water market resistance in ***Colorado***. That these elements are **[\*370]** particular to successful conservation efforts should provide encouragement to senior water users and private leasing proponents alike. The first two criteria appear satisfied in ***Colorado***, and the development of a competent consensus group would go a long way toward fulfilling the final three. Coalitions of water interests that could serve as guiding models for working groups have already begun to appear on the horizon. The Western Water Alliance ("WWA"), a Seattle-based coalition of diverse interests has sought to bring sustainable water management practices to the forefront of the policy agenda across the West. In so doing, the organization promotes building "the intellectual capital of the progressive western water movement by collecting case studies, best practices and critical information and commissioning studies that present West-wide perspectives." [[404]](#footnote-405)404 Groups such as the WWA could thus prove a valuable resource in the negotiation and policy formulation process, should instream leasing receive a serious look in ***Colorado***.

Looking back on successful negotiation efforts may be as valuable as looking forward. For instance, the Policy Consensus Initiative issued a case study regarding the Montana ISF leasing program. [[405]](#footnote-406)405 The study addressed the tensions that arose during Montana's early attempts to adopt legislation that would allow farmers and ranchers to sell voluntarily their consumptive rights to interested parties. In the years that followed, the study found, the working group of divergent interests "spent several meetings learning about each other's needs and interests," ultimately "reframing the issue from one of winners and losers to a perspective that the right solution would benefit everyone." [[406]](#footnote-407)406 In so doing, the group settled upon proposed legislation that would allow for the temporary leasing study. [[407]](#footnote-408)407 Important to the legislation's adoption, however, was the fact that during the drafting process, the working group participants - namely agricultural users and environmental interests - routinely "asked for advice from key legislators and representatives from the office of the governor, the [MFWP], and the DNRC." [[408]](#footnote-409)408

In ***Colorado***'s political environment, advocates of broader free marketing should be careful not to "put the cart before the horse." The adoption of less invasive leasing legislation, however, would "provide an opportunity for everyone to "test the waters' at little cost," [[409]](#footnote-410)409 with CWCB maintaining its relative sovereignty and oversight within a broadened ISF program. Implementing a temporary "leasing study" - like that in Montana - might be appropriate. Legislation with a sunset provision would take away any implications of finality while **[\*371]** offering "a way for water right holders and organizations to become comfortable with the idea of instream flow marketing." [[410]](#footnote-411)410 If either public interest groups or agricultural users were unhappy with the result, they could either abandon the program or remedy its faults in a subsequent incarnation of the statute.

C. Practical Concerns

1. Beneficial?

Under even the most collaborative environment, campaigns to conserve natural resources oftentimes necessitate practical problem-solving at the implementation stage. The protection of ISFs presents a paradox in that it is often during times of water scarcity or low flow that competing stakeholders desire water the most. Thus, "governmental agencies … have found it politically difficult to seek enforcement of instream flow rights during drought periods when the instream flows are most needed, but when cities and farmers are also frantic for water." [[411]](#footnote-412)411 Even though ***Colorado*** legally recognizes ISFs as valid appropriative uses, non-profits may struggle to find water users willing to temporarily convert their rights when conditions are most dire. If consumptive users are willing to transfer rights only during times of high or normal flow, it is unclear whether a lease right would in fact promote a beneficial use and thus satisfy the tenets of prior appropriation.

Complicating the situation is the inherent interplay between transferred rights and other decreed rights. When numerous users with valid rights divert water on an overappropriated ***river***, prior appropriation permits those with the earliest appropriation dates to remove their allotment to the detriment of junior users. [[412]](#footnote-413)412 If a junior user in such a situation leases water under the condition that the lessee leaves it instream, there are no guarantees the water will in fact be available should flow rates become inordinately low. It may therefore be difficult to determine before hand whether the leased right will assuredly preserve the natural environment as a "beneficial use" under all conditions.

The positive side is that many dry-and split-season lease agreements result from the fact that during times of exceedingly low flow - particularly late summer - the water remaining in a stream will often not be nearly enough to satisfy the consumptive user's right. Irrigators thus find themselves in possession of surplus water, as they cannot effectively apply it to cropland or other consumptive uses. Although flow rates may be insufficient to irrigate crops, they may suffice to protect aquatic habitat or other beneficial instream needs. Lease agreements under these circumstances present the right holder **[\*372]** with a tempting opportunity to benefit from the remainder of their right without either abandoning it or wasting it.

Even though a water user is unable to achieve a beneficial use through the traditional application of a right, that user may not temporarily transfer the rights on a whim. In keeping with the beneficial use requirement of the prior appropriation doctrine, ISF leasing laws universally demand that the water leased in fact benefit a recognized conservation value. [[413]](#footnote-414)413 In part for the reasons listed above, this prerequisite - while steadfast - does not necessarily provide a clear-cut resolution. MFWP has compiled a simplified checklist for determining whether an instream lease would be appropriate - the lease must "be Advantageous to the fishery, include Actual water dedicated to instream flows, be Administrable by the Department or other appropriate entity, and be Affordable. [[414]](#footnote-415)414 Although the "four A's" are meant to provide guidance for state acquisitions, they are nonetheless applicable to potential private transactions. Following MFWP's advice, targeted flows should meet the following criteria:

1. Advantageous to the fishery. Attractive leasing opportunities are those that address a stream flow problem that significantly limits potential fishery values.

2. Actual water dedicated to instream flows. Leases must involve valid water rights, and quantities leased should be large enough to benefit the stream.

3. Administrable by the Department or other appropriate entity. Leases should involve a reasonable combination of water right seniority and advantageous location so that the instream flow contribution can be ensured and defended through the lease period… .

4. Affordable. Do the benefits … justify the cost of the lease or the project creating the leasing opportunity? [[415]](#footnote-416)415

Concerning the first requirement, ***Colorado*** would afford water marketers more leeway than Montana. As previously mentioned, the Montana Legislature drafted leasing laws solely with the preservation of fish stocks in mind. In ***Colorado***, CWCB may acquire or establish ISFs for the broader purpose of preserving or improving the natural environment. [[416]](#footnote-417)416

What remains unclear is whether CWCB could temporarily convey existing rights to or through private actors for the benefit of **[\*373]** recreational activities. The answer is likely that it could not. Since the Civil War Era, ***Colorado*** water law has refused to recognize recreation as a valid purpose for seeking an instream flow water right. [[417]](#footnote-418)417 Although the Fort Collins [[418]](#footnote-419)418 decision tempered legal hostility toward ISF reservations for recreational purposes, the ***Colorado*** Supreme Court's holding nonetheless failed to officially condone recreation as a legitimate beneficial use. [[419]](#footnote-420)419 Recently, however, the legislature and the courts substantially eased this restriction. A 2001 amendment to the WRDA recognized a municipality's right to file for a "recreational in-channel diversion" ("RICD") and called on CWCB to promulgate rules detailing the process through which cities and towns can request such reservations. [[420]](#footnote-421)420 This statutory validation was upheld last year by operation of law when the ***Colorado*** Supreme Court was equally divided; the decision affirmed the Division 1 water court's approval of an in-channel appropriation by the City of Golden. [[421]](#footnote-422)421 These developments are certainly a boon for public interest proponents of enhanced recreational flows. Nevertheless, those who advocate enhanced recreational opportunities through the establishment of ISFs will likely need to work exclusively through civic channels as the new laws confine the establishment of RICDs to requests submitted by enumerated government entities. [[422]](#footnote-423)422

2. Enforceable?

Aside from advocating that ISF rights meet the statutorily-mandated beneficial use requirement, MFWP guiding principles also present issues in need of assessment at the operational level following the establishment of a lease right. The two major components that stand out are the acquisitions' enforceability and affordability. The enforceability of a water right transferred under a lease depends initially on whether the transfer would enlarge the existing right or somehow inflict harm upon another non-involved water right. CWCB has had over thirty years to hone its competence in evaluating the propriety of converting consumptive rights to instream rights. The agency has extensive experience in both ascertaining the extent of decreed rights and in weighing the potential for material injury to **[\*374]** water users within ***river*** basins of proposed ISFs. [[423]](#footnote-424)423 There is perhaps no agency in the West better equipped to appraise the suitability of potential ISF rights than CWCB.

CWCB has hesitated to permit ISF appropriations that might enlarge a transferred right or cause harm to existing rights. If CWCB were to permit ISF leasing in ***Colorado*** while maintaining a lead-agency oversight position, those involved in the conveyance process would have to meet stringent standards of beneficial use and non-harm. CWCB's record on enforcing ISF rights after they have received approval, however, is not nearly as unblemished. In 1995, the supreme court compelled CWCB to enforce an instream right it held - even though CWCB sought allowance of a diminution in flow. [[424]](#footnote-425)424 The case pitted conservationists against the state agency and raised important questions regarding CWCB's fiduciary duty to the people of the state. [[425]](#footnote-426)425 Ultimately, the court held that CWCB must refrain from administratively relinquishing ISF rights while circumventing the adjudicative process. [[426]](#footnote-427)426 This decision implies private interests would have a receptive forum in the state's water courts in which to air potential grievances and would have strong legal standing to enforce lease rights in the appropriate court should the terms of such agreements be contravened. [[427]](#footnote-428)427 However, any legislation would also need to spell out mechanisms through which funding would be generated in order to cover enforcement costs. "The [CWCB] has no field personnel and quite limited equipment to monitor its rights; thus, enforcement rarely occurs." [[428]](#footnote-429)428

Although competent enforcement of privately leased ISF rights would benefit the public at large, water trusts and other public interest groups should be careful in requesting a provision in the law that would require the State to bear the financial burden of monitoring expenses. The introduction of an ISF leasing allowance within the WRDA would stimulate an influx of decreed temporary rights throughout numerous ***river*** basins. Rather than asking the State to pick up the tab on these monitoring costs, private facilitators could help defray the expenses.

**[\*375]** Under the first option, organizations active in privately funding transfers could audit temporary rights directly - under CWCB authorization and in accordance with agency guidelines. Under the second option, these organizations could compensate the State appropriately through use of a fee schedule. CWCB, in turn, would be responsible for monitoring privately facilitated rights in the same manner as it monitors rights in its current portfolio. Other states have tackled the enforcement cost issue and have come up with workable solutions. For example, in 1991, the Nature Conservancy of Montana committed funding to help establish the Montana Water Leasing Trust Fund, which "served as a repository for contributions from private individuals, foundations, and corporations who wanted to help implement the [state] leasing program." [[429]](#footnote-430)429

The Nature Conservancy approach represents just one potential way to generate revenue to cover enforcement costs, and there is certainly room for creativity in devising new approaches. Regardless of how such revenue is raised, it is important that ISF leasing laws clearly define who pays monitoring costs and how the costs will be divided.

3. Affordable?

The final factor MFWP addresses is cost effectiveness. While issues of enforcement and beneficial use often involve legal determinations and agency collaboration, the true test of a water right's value in a free market is largely determined by the market itself:

The motivating force behind water markets is mutual perception by potential buyers and sellers that economic gains may be captured by transferring water to a place or purpose of use in which it generates higher net returns than under the existing use patterns. Economic returns to buyers must be large enough (or be perceived as large enough) to outweigh the costs of obtaining water through the market process. [[430]](#footnote-431)430

Water marketing - particularly the buying and selling of consumptive use rights - tends to obey general laws of economics; parties enter contracts to acquire goods when doing so will maximize their interests.

Although water is essentially a public resource across the West, [[431]](#footnote-432)431 water rights applied to traditional consumptive purposes have long been freely transferable subject to certain criteria, including the no harm rule. [[432]](#footnote-433)432 Over the years, water brokers have contrived elaborate methods for determining the value of water as applied to particular out-of-channel uses. Those involved in off-stream water marketing **[\*376]** have developed valuation methods for the many means of transferring water, which include sales, exchanges, and leases. In fact, proponents of consumptive-use leasing have looked no further than ***Colorado*** for a blueprint for expanding market approaches to water management. One of the best-established markets for water operates in the Northern ***Colorado*** Water Conservancy District. "About 30 percent of the district's 310,000 shares move through its rental market each year." [[433]](#footnote-434)433

Although cost determination methods are established in markets for diverted water, approaches to appraising instream rights are still in their relative infancy. Valuation methods for instream rights are both less common and more difficult to develop than those for consumptive rights. As discussed earlier, several reasons exist for this. First, and most notably, most state laws prohibit the existence of an open ISF market. [[434]](#footnote-435)434 The absence of legal mechanisms for converting water to instream use has offered little incentive to develop techniques for determining the value of instream flows. [[435]](#footnote-436)435 Second, the aforementioned administrative process associated with ISF transfers assigns external costs to the transactions. Because ISF leasing is relatively untested even where allowed, it may be difficult to quantify these external costs ahead of time in order to factor them into a final appraisal. [[436]](#footnote-437)436 Finally, "instream flows have "public good' characteristics which make it difficult to translate the economic benefits provided by streamflows into money" to be used to compete for rights in a free market. [[437]](#footnote-438)437

Despite the factors working against free ISF leasing, a rapidly emerging market has driven the need to devise means of assigning dollar values to ISF lease rights. Clay Landry, founder of WestWater Research, a firm specializing in water rights valuations, offers four methods. [[438]](#footnote-439)438 The first, the "sales comparison approach," assigns a dollar value to a right based on a comparison of the subject water right with similarly situated water rights. [[439]](#footnote-440)439 The second, the "income capitalization," or "farm-crop budget analysis," approach was that which OWT first employed, and is the most popular method of valuation for lease transactions. This method involves estimating the revenues an agricultural user would forego because of production decreases resulting from a water lease. [[440]](#footnote-441)440 The third, the "land value differential approach," calculates the value differential between the worth of agricultural land with and without appurtenant water rights. [[441]](#footnote-442)441 The final method, "the development-cost approach," assigns an ISF **[\*377]** value based on the price consumptive users would be willing to pay to develop new water supplies in lieu of continued use of the exiting right. [[442]](#footnote-443)442

Each method has its own benefits and shortcomings. Use of the sales comparison method is appealing because of its "straightforward approach." [[443]](#footnote-444)443 However, a lack of comparable water rights in the area of the targeted right may preclude this method. The income capitalization approach allows lessees and lessors to arrive at a figure that reflects the lessor's true economic loss from the agreement. This method has received criticism for simplifying the relationship between water and the rest of the agricultural production process. [[444]](#footnote-445)444 The land differential value has received praise for being "easy to observe and calculate." [[445]](#footnote-446)445 Nonetheless, it offers only a rough estimate of a right's value, which it tends to overestimate. [[446]](#footnote-447)446 Finally, the development-cost approach works well when alternative sources - particularly groundwater - are available for the lessor to develop in lieu of continued use of the existing right. [[447]](#footnote-448)447 This approach has two limitations: OWT has yet to test its effectiveness, and it may be used only when alternative sources are available. [[448]](#footnote-449)448

The above methods offer a useful toolkit for upstart water trusts and conservation groups. Nevertheless, their use must include due regard for the broader picture and the numerous external circumstances that inevitably influence the market worth of surface water rights. For instance, in areas where little urban demand exists, such as Montana, "valuation is based largely on value of crop production foregone in converting an irrigation right to an instream right." [[449]](#footnote-450)449 While this income capitalization approach may be applicable in some areas of ***Colorado***, in other areas it may not be feasible. On the Front Range, where agriculture and municipalities compete fiercely for water, ISF water brokers could expect to pay inordinate lease rates. Landry's 1998 study found that in regions that anticipate growth and corresponding municipal water needs, private institutions could expect to pay up to $ 200 per acre-foot to lease water. [[450]](#footnote-451)450 In areas not susceptible to such encroachment, lessors acquired ISF rights for as little as $ 0.08 per acre-foot. [[451]](#footnote-452)451

Even within a specific geographical region or ***river*** basin, each transaction deserves consideration "on a case-by-case basis, and the dollar value of each deal [must reflect] the unique characteristics of **[\*378]** that particular transaction." [[452]](#footnote-453)452 The seniority of a right is certainly an important determining factor, thus "a senior water right that historically receives its full rate and duty is normally more valuable than a junior right." [[453]](#footnote-454)453 Another important factor to consider is the extent to which a given right will benefit a coveted conservation value. A public interest organization may be willing to pay much more for a late-season lease involving 15 cfs that would restore historical habitat to a threatened species than it would be willing to pay for a 50 cfs lease that would not.

***Colorado***'s sparse history of ISF leasing gives organizations such as the CWT little to go on for comparative purposes. CWCB has entered a limited number of leases, such as the Yampa ***River*** lease, through which it obtained 2000 acre-feet of water at a rate of $ 16.00 per acre-foot. [[454]](#footnote-455)454 Ultimately, however, rights simply carry a value equal to that which a potential lessee is willing to pay to see the water left instream. The crux of the argument for instream right leasing, after all, rests on the premise that water users should be able to deal with more than just other consumptive users. If public sentiment believes ecological restoration and protection are as important a value as consumption, a market will develop, and with it, competitive bidding on available rights.

[*VIII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T502-8T6X-7323-00000-00&context=1516831). CONCLUSION

In the continuing dialogue regarding ***Colorado***'s water management policy, water users, environmentalists, politicians, and others have presented arguments as diverse as the stakeholders themselves. At the center of debate, however, is one fundamental truism - the state's water resources remain finite while contending needs demand increasing amounts of water. The solution to this conundrum lies in alternative methods of apportionment among historically adverse parties. Although budding alliances among various water users have been encouraging, mere amiable conditions alone are far from enough to solve the problem. Regardless of the successful cohesion of the state's water interests, they will still need to overcome numerous legal, logistical, and political barriers.

Financial support will continue to fund an ever-solidifying conservationist agenda. The only question that remains is how that money will affect the management of water in ***Colorado***. To date, public interest groups' primary recourse has been to invest vast percentages of their resources in attempts to litigate and regulate ***river*** basins back to health. At times, the end result is the non-consensual imposition of regulatory or judicial constraints on property owners, which only fuels resentment toward the environmental cause. In other cases, restoration and preservation initiatives are either defeated or **[\*379]** compromised. Regardless of the outcome, reformists and proponents of the status quo continue to waste significant amounts of energy and money in legal entanglements with each other. Current trends in the law have cultivated this adversarial atmosphere. However, the implementation of a free market leasing allowance presents a way not only to quell historical hostilities but also to forge solutions to impending water crises.

This proposition is not merely speculative. States such as Oregon and Montana have proved that the introduction of free market principles to ISF preservation schemes does not ineluctably contravene the tenets of prior appropriation. On the contrary, these states have managed to reconcile ISF preservation and prior appropriation, and in so doing have spawned numerous success stories. The influx of private funding into restoration and conservation efforts has enabled the protection of hundreds of miles of previously depleted ***rivers*** and streams. As demonstrated by the discrete approaches detailed above, states are free to develop leasing strategies uniquely tailored to the states' political nature and existing water management structure. For example, organizations that obtain privately facilitated and funded leases may hold them directly, or the state may hold them in trust for the people. Although administrative barriers at times hinder active trading, recent years have nevertheless witnessed substantial overall growth in private ISF marketing throughout the West.

Lease rights by their very definition offer only temporary fixes, and alone they cannot offer universal redress to water shortage issues. However, given stringent pre-conversion review, and mechanisms to fund sound monitoring and administrative oversight, temporary free market transfers can be an extremely effective tool for leaving water instream. Public interest organizations are able to broker deals with existing water users without acquiring permanent interests, thus maintaining their spending flexibility. Agricultural and other consumptive water users, meanwhile, can exercise free will in terms of how to best utilize their rights. Moreover, market incentives, when properly administered, do not create the same negative connotations as command and control methods for environmental stewardship, and thus foster cooperation instead of conflict.

***Colorado*** was the first state to formally adopt the laws of prior appropriation, which it did in its original constitution in 1876. [[455]](#footnote-456)455 The principles embodied in that doctrine have held strong through many years and in the face of mounting pressure for change. Nevertheless, as in any legal domain, the state's water laws have shown a degree of adaptability. Indeed, state lawmakers have demonstrated a willingness to institute change to many aspects of the ISF protection program. In what may possibly be measured advances toward private involvement in preserving instream flows, the State may now appropriate flows to improve rather than to merely maintain the environment. Although it **[\*380]** fails to introduce market incentives to ISF conversions, the new legislation permitting water users to loan rights to the State during drought conditions nonetheless took an important step in recognizing the legal validity of temporary water right transfers.

In addition to expanding the reach of the existing ISF program, CWCB has shown more activity in establishing new appropriations of late. Although it filed for just one ISF right in 2001, "in 2002, the CWCB filed for instream flow rights on 21 ***river*** segments across the state." [[456]](#footnote-457)456 In one case, CWCB partially relied upon citizen-submitted data in its decision to establish a new ISF appropriation. ***Colorado*** Trout Unlimited touted this move as "an important demonstration that the public can be a partner" in the ISF protection program. [[457]](#footnote-458)457 Nonetheless, for every principle in ***Colorado*** water law that has yielded to the outcry for expanded instream enhancement opportunities, many more have steadfastly resisted change. The state has stopped far short of allowing private actors to exercise fully their purchasing power through the direct funding of ISF transfers. Permitting non-profits such as CWT to engage in such participation, even if merely on a trial basis, would seem to be the next logical step in the continuing evolution of sensible water management policy.

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11. 11 Barton H. Thompson, Jr., Markets for Nature, [*25 Wm. & Mary Envtl. L. & Pol'y Rev. 261, 268-69 (2000).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:420H-J250-00CW-20PV-00000-00&context=1516831) [↑](#footnote-ref-12)
12. 12 Dentry, supra note 2; see generally [***Colo.******River*** *Water Conservation Dist. v. Rocky Mountain Power* ***Co****., 406 P.2d 798, 800 (****Colo.*** *1965).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) [↑](#footnote-ref-13)
13. 13 The ***Colorado*** Constitution mentions certain beneficial uses, instream flows not among them. ***Colo.*** Const. art. XVI, 6; see also [***Colo.******River*** *Water Conservation Dist., 406 P.2d at 800*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-25J0-003D-923P-00000-00&context=1516831) ("The right to the maintenance of the "flow' of the stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation."). [↑](#footnote-ref-14)
14. 14 See generally Thompson, supra note 11, at 274-75. [↑](#footnote-ref-15)
15. 15 Melinda Kassen, A Critical Analysis of ***Colorado***'s Water Right Determination and Administration Act of 1969, [*3 U. Denv. Water L. Rev. 58, 61 n.24 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TV-00000-00&context=1516831) [↑](#footnote-ref-16)
16. 16 S. 97, 49th Gen. Assem., 1st Reg. Sess. (***Colo.*** 1973) (codified at [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (1973)); see also ***Colo.*** Water Conservation Bd., ***Colo.***'s Instream Flow Program, at [*http://cwcb.state.****co****.us/isf/Programs/isf1.htm*](http://cwcb.state.co.us/isf/Programs/isf1.htm) (last visited Feb. 21, 2004). [↑](#footnote-ref-17)
17. 17 Richard J. Schneider, Water Appropriation Bills Introduced, Rocky Mountain News, Jan. 20, 1973, at 28 (emphasis added). Interestingly, in the same year Anderson introduced Senate Bill 97, which vested authority with the CWCB to establish minimum stream flows. Representative Michael Strang, a fellow republican, also introduced a constitutional amendment that would "perpetuate the same basic system of water right appropriation [found in the state constitution] but add to the system provisions assuring minimum stream flows and lake levels." Id. Under the amendment, the legislature would have the power to set these minimum levels. For this reason, Senator Anderson questioned the amendment, noting that this legislative power could "turn into a political football." Id. [↑](#footnote-ref-18)
18. 18 [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-19)
19. 19 37-92-103(4) (1990). In the years following the adoption of the ISFP Program, and up until the ***Colorado*** General Assembly enacted Senate Bill 156 in 2002, a precise definition of "necessary instream flows" remained somewhat elusive:

    The policy in ***Colorado*** … is to protect only those flows necessary to maintain existing resources. Flows at levels that would enhance resource levels are denied. But in practice, flows identified by the Division of Wildlife as necessary for fish fall somewhere between what one might consider "bare survival' and optimum. Bare survival flows would allow survival of a small population [of aquatic life] in the short run. Optimum flows would include occasional vary large habitat-modifying flows.

    David M. Gillilan & Thomas C. Brown, Instream Flow Protection: Seeking a Balance in Western Water Use 130 (1997). [↑](#footnote-ref-20)
20. 20 Trout Unlimited, A Dry Legacy 2: Progress and the New Threats in a Drought Year 2, available at [*http://www.cotrout.org/CTU%20DRY%20LEGACY%20LoRes.pdf*](http://www.cotrout.org/CTU%20DRY%20LEGACY%20LoRes.pdf) (Jan. 2003) [hereinafter Dry Legacy 2]. [↑](#footnote-ref-21)
21. 21 Prop. & Env't Research Ctr., Saving Our Streams Through Water Markets: A Summary, at [*http://www.perc.org/publications/guidespractical/save*](http://www.perc.org/publications/guidespractical/save) streams.php?s=2 (last visited Feb. 19, 2004). [↑](#footnote-ref-22)
22. 22 ***Colo.*** Water Res. Research Inst., Irrigation Water Conservation: Opportunities and Limitations in ***Colorado***: A report of the Agricultural Water Conservation Task Force 1, at [*http://cwrri.colostate.edu/pubs/series/completionreport/CR190.pdf*](http://cwrri.colostate.edu/pubs/series/completionreport/CR190.pdf) (Oct. 1996) [hereinafter Irrigation Water]. [↑](#footnote-ref-23)
23. 23 Natural Res. Conservation Serv., U.S. Dep't of Agric., Weathering Tough Times - The ***Colorado*** Drought, at [*http://www.****co****.nrcs.usda.gov/news/pas/audio-visuals/weathering-tough-times.pdf*](http://www.co.nrcs.usda.gov/news/pas/audio-visuals/weathering-tough-times.pdf) (last visited Mar. 1, 2004) [hereinafter Weathering]. [↑](#footnote-ref-24)
24. 24 Irving L. Janis, Group Think: Psychological Studies of Policy Decisions & Fiascoes 266-67 (2d ed. 1982). [↑](#footnote-ref-25)
25. 25 Dentry, supra note 2. [↑](#footnote-ref-26)
26. 26 For instance, on Bear Creek, a popular foothills trout stream southwest of Denver, suffers from warm temperatures and low flows. Rapid urban growth has exacerbated the problem, leading to several trout kills in recent years. Dry Legacy 2, supra note 9, at 11. [↑](#footnote-ref-27)
27. 27 For a thorough discussion on the effect of urban sprawl on ***Colorado***'s finite water resources, see generally Peter D. Nichols et al., Water and Growth in ***Colorado***: A Review of Legal and Policy Issues ix (Univ. of ***Colo.*** Natural Res. Law Ctr. ed. 2001) [hereinafter Water and Growth]. [↑](#footnote-ref-28)
28. 28 [*General Water Information, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) note 8. [↑](#footnote-ref-29)
29. 29 [*Water and Growth, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) note 27, at x. [↑](#footnote-ref-30)
30. 30 ***Colo.*** Water Res. Research Inst., Cooperation And Compromise - A Public Private Imperative For The South Platte ***River***, at [*http://cwrri.colostate.edu/pubs/newsletter/1996/dec/dec9622.htm*](http://cwrri.colostate.edu/pubs/newsletter/1996/dec/dec9622.htm) (Dec. 1996) [hereinafter Cooperation]. [↑](#footnote-ref-31)
31. 31 Douglas County grew by 13.6% in just a little over a year from April 2000 to July 2001, at which time the population was estimated to be nearly 200,000. News Release, U.S. Census Bureau, U.S. Dep't of Commerce, Most of Nation's 10 Fastest-Growing Counties in South, Census Bureau Reports, at [*http://www.census.gov/Press-Release/www/2002/cb02-59.html*](http://www.census.gov/Press-Release/www/2002/cb02-59.html) (last revised Apr. 29, 2002). [↑](#footnote-ref-32)
32. 32 ***Colo.*** Water Conservation Bd., South Platte/Republican ***River*** Basin Facts, at [*http://cwcb.state.****co****.us/Fact*](http://cwcb.state.co.us/Fact) Sheets/SPlatte fs.pdf (Mar. 2002) [hereinafter S. Platte]. [↑](#footnote-ref-33)
33. 33 ***Colo.*** State Univ. Cooperative Extension, Summary Sheet: ***Colorado*** Data For Cooperative Extension Decade Planning: Realities and Implications, available at [*http://www.ext.colostate.edu/staffres/planning/COplanningdata.pdf*](http://www.ext.colostate.edu/staffres/planning/COplanningdata.pdf) (last revised Mar. 2, 2003) [hereinafter Cooperative Extension]. [↑](#footnote-ref-34)
34. 34 [*Irrigation Water, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) note 22, at 1. [↑](#footnote-ref-35)
35. 35 Cooperation, supra note 30. Mr. Salazar, a fifth generation Coloradan from the San Luis Valley, made this statement while still in private practice as a natural resources attorney, two years before being elected state attorney general. Before entering private practice, he worked as a farmer and a small business owner. Attorney General's Office, Biography of Attorney General Ken Salazar, at [*http://www.ago.state.****co****.us/BIOAG.HTM*](http://www.ago.state.co.us/BIOAG.HTM) (last visited Feb. 19, 2004). [↑](#footnote-ref-36)
36. 36 News, The Forecast for ***Colorado***'s ***Rivers*** and Streams is Dry (***Colo.*** ***Rivers*** Alliance Feb. 2002), at [*http://www.coloradorivers.org/Resources/News/nwSG0202.htm*](http://www.coloradorivers.org/Resources/News/nwSG0202.htm) (Feb. 3, 2002). [↑](#footnote-ref-37)
37. 37 ***Colo.*** Water Trust, Introducing The ***Colorado*** Water Trust, at [*http://www.coloradowatertrust.org/*](http://www.coloradowatertrust.org/) (last visited Mar. 2, 2004). [↑](#footnote-ref-38)
38. 38 Weathering, supra note 23. [↑](#footnote-ref-39)
39. 39 Id. [↑](#footnote-ref-40)
40. 40 Jack Sterne, Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest, [*27 Envtl. L. 203, 203 (1997).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3S3V-2M90-00CW-B24H-00000-00&context=1516831) [↑](#footnote-ref-41)
41. 41 Steven J. Shupe & Lawrence J. MacDonnell, Recognizing the Value of In-Place Uses of Water in the West: An Introduction to the Laws, Strategies, and Issues, in Instream Flow Protection in the West, at 1-9 to 1-10 (Lawrence J. MacDonnell & Teresa A. Rice eds., rev. ed. 1993). [↑](#footnote-ref-42)
42. 42 Gillilan & Brown, supra note 19, at 121-22 tbl.5.1. [↑](#footnote-ref-43)
43. 43 Id. at 122 tbl.5.1. [↑](#footnote-ref-44)
44. 44 Id. at 121 tbl.5.1. [↑](#footnote-ref-45)
45. 45 Clay Landry, Abstract, Pol. Economy Research Center, Instream Flow Marketing in the Pacific Northwest 1 (July 1998), at [*http://www.pnrec.org/1998/papers/clandry.pdf*](http://www.pnrec.org/1998/papers/clandry.pdf). [↑](#footnote-ref-46)
46. 46 Id. See also Shupe & MacDonnell, supra note 41, at 1-10 ("Despite the fact that several western legislatures have explicitly prohibited the creation of in-place water rights held by the private sector, individuals and organizations in some other western states are asserting this appropriation strategy."). [↑](#footnote-ref-47)
47. 47 See, e.g., Landry, supra note 45, at 3. "[A] 1997 Oregonian newspaper poll showed that the decline of salmon constitutes the number one environmental concern in the state." Erin Schiller, Competitive Enter. Inst., The Oregon Water Trust, at [*http://www.cei.org/gencon/025,01354.cfm*](http://www.cei.org/gencon/025,01354.cfm) (Nov. 1, 1998). [↑](#footnote-ref-48)
48. 48 Gillilan & Brown, supra note 19, at 99. [↑](#footnote-ref-49)
49. 49 See Landry, supra note 45, at 3. [↑](#footnote-ref-50)
50. 50 Cooperative Extension, supra note 33, at 2. [↑](#footnote-ref-51)
51. 51 See generally Shupe & MacDonnell, supra note 41, at 1-2 to 1-4. [↑](#footnote-ref-52)
52. 52 Id. at 1-2 to 1-3. [↑](#footnote-ref-53)
53. 53 Wash. Dept. of Ecology, Frequently Asked Questions: Washington Water Acquisition Program, at http://www.ecy.wa/gov/pubs/0211013.pdf (Nov. 2002). [↑](#footnote-ref-54)
54. 54 Id. [↑](#footnote-ref-55)
55. 55 Or. Water Res. Dep't, Resource Management Division: staff structure, organization, and tools 3, at [*http://www.wrd.state.or.us/publication/pdfs/rmd.reorg.pdf*](http://www.wrd.state.or.us/publication/pdfs/rmd.reorg.pdf) (last visited April 13, 2004). [↑](#footnote-ref-56)
56. 56 Clay J. Landry & Clint Peck, Dealing for Water: Western States Are Creating Water Markets Without Compromising the Prior Appropriation Doctrine, Montana Farmer-Stockman (Dec. 1998), reprinted in Or. Water Trust, OWT In The Media, at [*http://www.owt.org/owtmedia.html#anc*](http://www.owt.org/owtmedia.html#anc) mtfarm. [↑](#footnote-ref-57)
57. 57 Id. [↑](#footnote-ref-58)
58. 58 ***Colo.*** Const. art. XVI, 5. [↑](#footnote-ref-59)
59. 59 A Dry Legacy 2, supra note 20, at 6. [↑](#footnote-ref-60)
60. 60 For a specific discussion on the history of fear associated with the loosening of instream acquisition rules, see Gillilan & Brown, supra note 19, at 123. [↑](#footnote-ref-61)
61. 61 Water Res. Program, Wash. State Dep't of Ecology, Washington Water Acquisition Program: Finding Water to Restore Streams 2 (Jan. 2003), available at [*http://www.ecy.wa.gov/programs/wr/instream-flows/Images/strategy/strat1.pdf*](http://www.ecy.wa.gov/programs/wr/instream-flows/Images/strategy/strat1.pdf) [hereinafter Finding Water]. [↑](#footnote-ref-62)
62. 62 Id. [↑](#footnote-ref-63)
63. 63 See generally Montana Fish, Wildlife and Parks, 2002 Annual Progress Report app. A (2002) [hereinafter FWP Progress Report]. [↑](#footnote-ref-64)
64. 64 Gillilan & Brown, supra note 19, at 147. [↑](#footnote-ref-65)
65. 65 See discussion infra Section V. [↑](#footnote-ref-66)
66. 66 Finding [*Water, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) note 61, at 1-2. [↑](#footnote-ref-67)
67. 67 Matthew J. McKinney, Instream Flow Policy in Montana: A History and Blueprint for the Future, in Instream Flow Protection in the West, at 15-1, 15-29 (Lawrence J. MacDonnell & Teresa A. Rice eds., rev. ed. 1993); Michael J. Mattick, Instream Flow Protection in Oregon, in Instream Flow Protection in the West, at 18-1, 18-1 (Lawrence J. MacDonnell & Teresa A. Rice eds., rev. ed. 1993). [↑](#footnote-ref-68)
68. 68 Compare McKinney, supra note 67, at 15-31, with Mattick, supra note 67, at 18-1. [↑](#footnote-ref-69)
69. 69 See McKinney, supra note 67, at 15-1, 15-29 to 15-30; see Mattick, supra note 67, at 18-1 to 18-2, 18-9. [↑](#footnote-ref-70)
70. 70 Barton H. Thompson, Jr., Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions, [*64 Mont. L. Rev. 157, 159 (2003).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:48J9-BBP0-00B1-908K-00000-00&context=1516831) [↑](#footnote-ref-71)
71. 71 See generally [*id. at 157-73*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:48J9-BBP0-00B1-908K-00000-00&context=1516831) (explaining Montana's constitutional provisions regarding the environment). [↑](#footnote-ref-72)
72. 72 Memorandum from Laura Ziemer, Director, Trout Unlimited's Montana Water Project, to Dave White, NRCS State Conservationist (Aug. 28, 2002) (on file with the University of Denver Water Law Review) [hereinafter Ziemer Memorandum]. [↑](#footnote-ref-73)
73. 73 McKinney, supra note 67, at 15-4. [↑](#footnote-ref-74)
74. 74 Act of March 13, 1969, ch. 345, 1969 Mont. Laws 879-81. [↑](#footnote-ref-75)
75. 75 McKinney, supra note 67, at 15-4 to 15-5. [↑](#footnote-ref-76)
76. 76 See id. at 15-4 to 15-7. [↑](#footnote-ref-77)
77. 77 Id. at 15-5. [↑](#footnote-ref-78)
78. 78 Id. at 15-21. [↑](#footnote-ref-79)
79. 79 See id. at 15-21. [↑](#footnote-ref-80)
80. 80 Id. at 15-24. [↑](#footnote-ref-81)
81. 81 Id. [*Mont. Code Ann. 85-2-316(9)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CTN3-CH1B-T4MB-00000-00&context=1516831) (2003). [↑](#footnote-ref-82)
82. 82 Landry, supra note 45, at 2. [↑](#footnote-ref-83)
83. 83 McKinney, supra note 67, at 15-28. [↑](#footnote-ref-84)
84. 84 Thompson, supra note 11, at 274 (quoting Montana Department of Fish, Wildlife & Parks, Fisheries Division, Annual Progress Report: Water Leasing Study 1999, at 2 (Dec. 1999). [↑](#footnote-ref-85)
85. 85 Policy Consensus Initiative, Protecting Instream Flows in Montana 2, at [*http://www.policyconsensus.org/casestudies/pdfs/MT*](http://www.policyconsensus.org/casestudies/pdfs/MT) streams.pdf (Feb. 2004). [↑](#footnote-ref-86)
86. 86 Id. [↑](#footnote-ref-87)
87. 87 Id. at 3. [↑](#footnote-ref-88)
88. 88 Id. at 2 (internal quotation omitted). [↑](#footnote-ref-89)
89. 89 Act of March 31, 1995, ch. 322, 1995 Mont. Laws 990. [↑](#footnote-ref-90)
90. 90 [*Mont. Code Ann. 85-2-436(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831), -437, -438 (2003). [↑](#footnote-ref-91)
91. 91 McKinney, supra note 67, at 15-29. [↑](#footnote-ref-92)
92. 92 [*Mont. Code Ann. 85-2-436(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831) (2003). [↑](#footnote-ref-93)
93. 93 McKinney, supra note 67, at 15-29. [↑](#footnote-ref-94)
94. 94 Id. [↑](#footnote-ref-95)
95. 95 [*Mont. Code Ann. 85-2-437(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5B62-2M61-DYNH-C2V4-00000-00&context=1516831) (2003). [↑](#footnote-ref-96)
96. 96 Landry, supra note 45, at 10. [↑](#footnote-ref-97)
97. 97 Sterne, supra note 40, at 211-12. [↑](#footnote-ref-98)
98. 98 Thompson, supra note 11, at 287; [*Mont. Code Ann. 85-2-436(2)(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831) (2003). [↑](#footnote-ref-99)
99. 99 Montana Dep't of Natural Resources and Conservation, Water Rights in Montana 18 (Dec. 2001), at [*http://www.dnrc.state.mt.us/wrd/home.htm*](http://www.dnrc.state.mt.us/wrd/home.htm). [↑](#footnote-ref-100)
100. 100 Id. The statute provides:

     The state, any political subdivision or agency of the state, or the United States or any agency of the United States may apply to the department to acquire a state water reservation for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at periods or for a length of time that the department designates.

     [*Mont. Code Ann. 85-2-316(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CTN3-CH1B-T4MB-00000-00&context=1516831) (2003). [↑](#footnote-ref-101)
101. 101 Montana Water Trust, Instream Flow Enhancement Handbook: Working Cooperatively to Benefit Streamflows and Water Right Holders 5 (n.d.) [hereinafter Instream Flow Enhancement Handbook]. [↑](#footnote-ref-102)
102. 102 Id. [↑](#footnote-ref-103)
103. 103 [*Mont. Code Ann. 85-2-436(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831) (2003). [↑](#footnote-ref-104)
104. 104 Id. 85-2-437(2). [↑](#footnote-ref-105)
105. 105 Id. 85-2-436(2)(f), 102(16). [↑](#footnote-ref-106)
106. 106 Id. 85-2-436(2)(f). [↑](#footnote-ref-107)
107. 107 This is particularly the case in ***Colorado***, where the state supreme court has expressly held that water saved through salvaging initiatives, for example by removing phreatophytes from one's land, is "subject to call by prior appropriators" and thus must "return from whence it comes - the ***river*** - and thereon … to those the ***river*** feeds in turn." See [*Southeastern* ***Colo.*** *Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321, 1325 (****Colo.*** *1974).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1N70-003D-93WB-00000-00&context=1516831) [↑](#footnote-ref-108)
108. 108 See Montana Dep't of Natural Res. and Conservation, Form 606: Application to Change a Water Right, Aug. 2003, available at [*http://www.dnrc.state.mt.us/wrd/home.htm*](http://www.dnrc.state.mt.us/wrd/home.htm) [hereinafter Form 606]. [↑](#footnote-ref-109)
109. 109 Id. [↑](#footnote-ref-110)
110. 110 Id. [↑](#footnote-ref-111)
111. 111 Id. [↑](#footnote-ref-112)
112. 112 [*Mont. Code Ann. 85-2-307(1)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:684D-THT3-CGX8-00H6-00000-00&context=1516831) (2003). [↑](#footnote-ref-113)
113. 113 Id. 85-2-307(1)(a). [↑](#footnote-ref-114)
114. 114 Id. [↑](#footnote-ref-115)
115. 115 Id. 85-2-308, -436(2)(c). [↑](#footnote-ref-116)
116. 116 McKinney, supra note 67, at 15-30. [↑](#footnote-ref-117)
117. 117 [*Mont. Code Ann. 85-2-436(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831), (f). [↑](#footnote-ref-118)
118. 118 Id. 85-2-436(2)(f). [↑](#footnote-ref-119)
119. 119 Id. [↑](#footnote-ref-120)
120. 120 Id. 85-2-436(3)(a); see, e.g., FWP Progress Report, supra note 63. [↑](#footnote-ref-121)
121. 121 Id. 85-2-436(3)(a). [↑](#footnote-ref-122)
122. 122 Id. 85-2-436(2)(h). [↑](#footnote-ref-123)
123. 123 Whereas Montana FWP's stated mission is to provide "for the stewardship of the fish, wildlife, parks and recreational resources of Montana, while contributing to the quality of life for present and future generations," CWCB directives extend well beyond such conservationist notions. FWP Progress Report, supra note 63. In addition to facilitating and holding ISF rights, CWCB is also charged with the development of the waters of the state, which in practice includes the financing and oversight of out-of-stream diversion projects. See [***Colo.*** *Rev. Stat. 37-60-121*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:65RP-8F53-GXF6-83RT-00000-00&context=1516831) to -125 (2003). [↑](#footnote-ref-124)
124. 124 Mont. Code Ann. 85-2-408(2)(a)(i) (2003). [↑](#footnote-ref-125)
125. 125 Id. 85-2-408(2)(a)-(b). [↑](#footnote-ref-126)
126. 126 Id. 85-2-408(2)(a)(ii). [↑](#footnote-ref-127)
127. 127 Id. 85-2-408(b). [↑](#footnote-ref-128)
128. 128 The Montana Water Trust, for instance, recently acquired a lease right for 300 acre-feet per year. Telephone Interview with John Ferguson, Director, Montana Water Trust (July 9, 2003) [hereinafter Ferguson Interview]. [↑](#footnote-ref-129)
129. 129 Mont. Code Ann. 85-2-407(2) (2003). [↑](#footnote-ref-130)
130. 130 Id. 85-2-407 to -409; Thompson, supra note 11, at 287. [↑](#footnote-ref-131)
131. 131 Id. 85-2-407(3). [↑](#footnote-ref-132)
132. 132 Id. 85-2-407. [↑](#footnote-ref-133)
133. 133 Mont. Code Ann.85-2-407(9) (2001) (amending Mont. Code Ann. 85-2-407 (1979)). [↑](#footnote-ref-134)
134. 134 Mont. Code Ann. 85-2-408(3)(a)-(b)(2003). [↑](#footnote-ref-135)
135. 135 See Form 606, supra note 108. [↑](#footnote-ref-136)
136. 136 Instream Flow Enhancement Handbook, supra note 101, at 43. [↑](#footnote-ref-137)
137. 137 Id. at 43-44. [↑](#footnote-ref-138)
138. 138 Mont. Code Ann. 85-2-407(4)(b) (2003). [↑](#footnote-ref-139)
139. 139 McKinney, supra note 67, at 15-29. [↑](#footnote-ref-140)
140. 140 Mont. Code Ann. 85-2-407(4)(a) (2003). [↑](#footnote-ref-141)
141. 141 Ziemer Memorandum, supra note 72. [↑](#footnote-ref-142)
142. 142 Mont. Code Ann. 85-2-407(5) (2001). [↑](#footnote-ref-143)
143. 143 Codified at 85-2-316(9) (establishing methods for determining priority of appropriation). [↑](#footnote-ref-144)
144. 144 Gillilan & Brown, supra note 19, at 137. See also Sterne, supra note 40, at 212. [↑](#footnote-ref-145)
145. 145 Gillilan & Brown, supra note 19, at 137; Sterne, supra note 40, at 212. [↑](#footnote-ref-146)
146. 146 Clay J. Landry, Pol. Economy Research Center, Saving Our Streams Through Water Markets: A Practical Guide 32 (1998). [↑](#footnote-ref-147)
147. 147 S. 140, 64th Leg. Assem., Reg. Sess. (Or. 1987) (codified at [*Or. Rev. Stat. 537.332-360*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D2Y1-648C-8127-00000-00&context=1516831) (1987)). [↑](#footnote-ref-148)
148. 148 ***Or. Rev. Stat. 537.348(1)*** (2001). [↑](#footnote-ref-149)
149. 149 Janet C. Neuman & Cheyenne Chapman, Wading Into the Water Market: The First Five Years of the Oregon Water Trust, [*14 J. Envtl. L. & Litig. 135, 138 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3YYV-3MF0-00CV-40FX-00000-00&context=1516831) [↑](#footnote-ref-150)
150. 150 Id. [↑](#footnote-ref-151)
151. 151 Id. [↑](#footnote-ref-152)
152. 152 Mattick, supra note 67, at 18-4. [↑](#footnote-ref-153)
153. 153 ***Or. Rev. Stat. 537.348(3)*** (2001). See also Oregon: Water Resources Department Adopts New Rules Addressing Split-season Leasing for Instream Use, 6 W. Water L. & Pol'y Rep. 100, 101 (Feb. 2002). [↑](#footnote-ref-154)
154. 154 ***Or. Rev. Stat. 537.348(3)(a)***, (b) (2001). [↑](#footnote-ref-155)
155. 155 Id. 537.348(2). [↑](#footnote-ref-156)
156. 156 [*Mont. Code Ann. 85-2-436(2)(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831), 85-2-408(3)(a) (2001). [↑](#footnote-ref-157)
157. 157 See discussion infra on ***Colo.*** Senate Bill 156 accompanying notes 337-347. [↑](#footnote-ref-158)
158. 158 A Dry Legacy 1, supra note 26, at 6 (quoting [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2001) (emphasis added)). [↑](#footnote-ref-159)
159. 159 [*Or. Rev. Stat. 540.578(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D301-648C-804H-00000-00&context=1516831) (2001); see also Oregon Water Resources Department, Instream Leasing Program, at [*http://www.wrd.state.or.us/programs/stewardship/instreams.shtml*](http://www.wrd.state.or.us/programs/stewardship/instreams.shtml) [hereinafter OWRD Leasing Program]. [↑](#footnote-ref-160)
160. 160 OWRD Leasing Program, supra note 159. [↑](#footnote-ref-161)
161. 161 [*Or. Rev. Stat. 537.332(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D2Y1-648C-8127-00000-00&context=1516831) (2001). [↑](#footnote-ref-162)
162. 162 Id. 537.332(5)(a). [↑](#footnote-ref-163)
163. 163 Terry L. Anderson & Pamela S. Snyder, Pol. Economy Research Center, Priming the Invisible Pump (1997), [*http://www.perc.org/publications/policyseries/priming*](http://www.perc.org/publications/policyseries/priming) full.php?s=2. [↑](#footnote-ref-164)
164. 164 [*Or. Rev. Stat. 537.455(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D2Y1-648C-813D-00000-00&context=1516831), (2) (2001). [↑](#footnote-ref-165)
165. 165 Id. 537.500(1). [↑](#footnote-ref-166)
166. 166 Or. Admin. R. 690-077-0077(1). However, the law only allows the user employing conservation measures to keep 75 percent of the saved water for additional use, sale, or lease. The remaining 25 percent must remain instream. Gillilan & Brown, supra note 19, at 162. [↑](#footnote-ref-167)
167. 167 Schiller, supra note 47. [↑](#footnote-ref-168)
168. 168 Telephone Interview with Fritz Paulus, Executive Director, Oregon Water Trust (July 10, 2003). [↑](#footnote-ref-169)
169. 169 [*Or. Rev. Stat. 537.332(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D2Y1-648C-8127-00000-00&context=1516831) (2001). [↑](#footnote-ref-170)
170. 170 Id. 537.348(1). [↑](#footnote-ref-171)
171. 171 Landry, supra note 146, at 33. [↑](#footnote-ref-172)
172. 172 Id. [↑](#footnote-ref-173)
173. 173 Id. at 33-34. [↑](#footnote-ref-174)
174. 174 Id. at 45 n.49. [↑](#footnote-ref-175)
175. 175 Neuman & Chapman, supra note 149, at 167. [↑](#footnote-ref-176)
176. 176 Schiller, supra note 47. Originally, OWT was comprised of:

     The president of a large land management company who was also a member of the Oregon Cattleman's Association; the director of Oregon Trout, Oregon's leading wild fish environmental group; the manager of one of the state's largest irrigation districts; and an attorney who had been a long-time activist for in-stream flows … . The Trust founders recruited four more Board members, two academics and two tribal representatives, and waded into the water market.

     Neuman & Chapman, supra note 149, at 135-36. [↑](#footnote-ref-177)
177. 177 Sterne, supra note 40, at 214. [↑](#footnote-ref-178)
178. 178 Neuman & Chapman, supra note 149, at 139. [↑](#footnote-ref-179)
179. 179 Schiller, supra note 47. [↑](#footnote-ref-180)
180. 180 Landry & Peck, supra note 56. [↑](#footnote-ref-181)
181. 181 Richard G. Hildreth, Water Law at the Crossroads, [*14 J. Envtl. L. & Litig. 11 n.53 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3YYV-3KR0-00CV-40FR-00000-00&context=1516831) [↑](#footnote-ref-182)
182. 182 H.R. 2628, 69th Leg. Assem., Reg. Sess. (Or. 1997). [↑](#footnote-ref-183)
183. 183 Neuman & Chapman, supra note 149, at 148. [↑](#footnote-ref-184)
184. 184 Id. [↑](#footnote-ref-185)
185. 185 Id. at 148. [↑](#footnote-ref-186)
186. 186 Id at 149. [↑](#footnote-ref-187)
187. 187 Id. [↑](#footnote-ref-188)
188. 188 Oregon Water Trust, 2001 OWT Projects, at [*http://www.owt.org/deals2001.htm*](http://www.owt.org/deals2001.htm) (last visited Feb. 25, 2004). [↑](#footnote-ref-189)
189. 189 Sterne, supra note 40, at 214. [↑](#footnote-ref-190)
190. 190 Thompson, supra note 11, at 271. [↑](#footnote-ref-191)
191. 191 Sterne, supra note 40, at 213. [↑](#footnote-ref-192)
192. 192 Thompson, supra note 11, at 270-71; see Sterne, supra note 40, at 213-14. [↑](#footnote-ref-193)
193. 193 See supra text accompanying notes 103-123. [↑](#footnote-ref-194)
194. 194 Neuman & Chapman, supra note 149, at 138 (emphasis added). [↑](#footnote-ref-195)
195. 195 Mont. Code Ann. 85-2-407(4), 85-2-408(3)(a) (2001) (private lease transfers); [*Mont. Code Ann. 85-2-436(2)(g)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831) (2001) (FWP Leasing Study). [↑](#footnote-ref-196)
196. 196 See Neuman & Chapman, supra note 149, at 138. [↑](#footnote-ref-197)
197. 197 Telephone interview with Fritz Paulus, supra note 168. [↑](#footnote-ref-198)
198. 198 Gillilan & Brown, supra note 19, at 139; Mattick, supra note 67, at 18-5. [↑](#footnote-ref-199)
199. 199 Mattick, supra note 67, at 18-5. [↑](#footnote-ref-200)
200. 200 Neuman & Chapman, supra note 149, at 138 (1999); [*Or. Rev. Stat. 537.336(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D2Y1-648C-812B-00000-00&context=1516831)-(3) (2001). [↑](#footnote-ref-201)
201. 201 [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-202)
202. 202 James N. Corbridge, Jr. & Teresa A. Rice, Vranesh's ***Colorado*** Water Law 40-41 (James N. Corbridge Jr. & Teresa A. Rice eds., rev. ed. 1999). [↑](#footnote-ref-203)
203. 203 Or. Admin. R. 690-077-0020(4) (2003). [↑](#footnote-ref-204)
204. 204 Id. 690-077-0020(5)(a)-(c). [↑](#footnote-ref-205)
205. 205 Id. 690-077-0027, -0029, -0031. [↑](#footnote-ref-206)
206. 206 [*Or. Rev. Stat. 537.343(1)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D2Y1-648C-812F-00000-00&context=1516831)-(c) (2001); Or. Admin. R. 690-077-0047(3)(a)-(c) (2003). [↑](#footnote-ref-207)
207. 207 Gillilan & Brown, supra note 19, at 122. [↑](#footnote-ref-208)
208. 208 Or. Admin. R. 690-077-0077(1) (2003). [↑](#footnote-ref-209)
209. 209 Id. 690-077-0079(1). [↑](#footnote-ref-210)
210. 210 Id. 690-077-0077(14), -0079(1). [↑](#footnote-ref-211)
211. 211 Id. 690-077-0000(3). [↑](#footnote-ref-212)
212. 212 ***Or. Rev. Stat. 537.348(1)*** (2001). [↑](#footnote-ref-213)
213. 213 Id. [↑](#footnote-ref-214)
214. 214 Or. Admin. R. 690-077-0070 (2003); see also Oregon Water Res. Dep't, About the Oregon Water Resources Commission, at [*http://www.wrd.state.or.us/commission/about.html*](http://www.wrd.state.or.us/commission/about.html). [↑](#footnote-ref-215)
215. 215 Or. Admin. R. 690-077-065(2) (2003). [↑](#footnote-ref-216)
216. 216 Oregon Water Res. Dep't, Water Rights in Oregon: An Introduction to Oregon's Water Laws and Water Rights System 33 (2002). [↑](#footnote-ref-217)
217. 217 Or. Admin. R. 690-077-0077(3)(d) (2003). [↑](#footnote-ref-218)
218. 218 Id. 690-077-0000(3). [↑](#footnote-ref-219)
219. 219 See Oregon Water Res. Dep't, Application for Short-Term Instream Lease (Oct. 2003), available at [*http://www.wrd.state.or.us/programs/stewardship/forms/StandardLeaseForm03.doc*](http://www.wrd.state.or.us/programs/stewardship/forms/StandardLeaseForm03.doc). [↑](#footnote-ref-220)
220. 220 See Oregon Water Res. Dep't, Application for Split Season Instream Lease 1 (Dec. 2003), available at [*http://www.wrd.state.or.us/programs/stewardship/forms/SplitSeason.doc*](http://www.wrd.state.or.us/programs/stewardship/forms/SplitSeason.doc). [↑](#footnote-ref-221)
221. 221 Id. [↑](#footnote-ref-222)
222. 222 See Oregon Water Res. Dep't Application for Short-Term Instream Lease Pooled Lease Form 1 (Dec. 2003), available at [*http://www.wrd.state.or.us/programs/stewardship/forms/RevisedPooledDistrictForm.doc*](http://www.wrd.state.or.us/programs/stewardship/forms/RevisedPooledDistrictForm.doc). [↑](#footnote-ref-223)
223. 223 See OWRD Leasing Program, supra note 159. [↑](#footnote-ref-224)
224. 224 See Oregon Water Res. Dep't, Application for Short-Term Instream Lease, Pooled Landowner Form 1 (Jan. 2004), available at [*http://www.wrd.state.or.us/programs/stewardship/forms/RevisedPooledLandownerForm.doc*](http://www.wrd.state.or.us/programs/stewardship/forms/RevisedPooledLandownerForm.doc). [↑](#footnote-ref-225)
225. 225 Or. Admin. R. 690-077-0075(2)(a), (b) (2001). [↑](#footnote-ref-226)
226. 226 Id. 690-077-077(8). [↑](#footnote-ref-227)
227. 227 Id. 690-380-8000(6). [↑](#footnote-ref-228)
228. 228 Melinda Kassen, Legal Protection for Instream Flows 2 (unpublished manuscript, on file with the University of Denver Water Law Review). [↑](#footnote-ref-229)
229. 229 See generally Sterne, supra note 40, at 221-22. [↑](#footnote-ref-230)
230. 230 Id. at 222. [↑](#footnote-ref-231)
231. 231 Landry & Peck, supra note 56 (quoting Andrew Purkey, former director of the Oregon Water Trust) (quotations omitted). [↑](#footnote-ref-232)
232. 232 Landry, supra note 45, at 5. [↑](#footnote-ref-233)
233. 233 Id. at 3. [↑](#footnote-ref-234)
234. 234 See id. at 6. [↑](#footnote-ref-235)
235. 235 Id. at 8. [↑](#footnote-ref-236)
236. 236 Ziemer Memorandum, supra note 72. [↑](#footnote-ref-237)
237. 237 FWP Progress Report, supra note 63, at app. a. [↑](#footnote-ref-238)
238. 238 Id. It should be noted that some of the leases included in the "fifteen" involve multiple users. In some cases, as many as six water users pooled their existing rights into a single lease transaction with MFWP. Taking into account the pooled lease agreements, approximately twenty different right holders currently convert their offstream uses to instream flow, all on a seasonal basis. [↑](#footnote-ref-239)
239. 239 Letter from David Collinge, Montana Trout Unlimited to Jason Wells 2-3 (July 30, 2003) (including Laura Zeimer's responses to questions posed by Mr. Wells) (on file with the University of Denver Water Law Review). [↑](#footnote-ref-240)
240. 240 News Release, Montana Trout Unlimited, Historic Water Lease Benefitting [sic] Madison ***River*** Fishery Announced 1 (Sept. 5, 2001), at [*http://www.outdoorrelease.com/news*](http://www.outdoorrelease.com/news) releases/news detail.asID=162&cat=13. [↑](#footnote-ref-241)
241. 241 Id. [↑](#footnote-ref-242)
242. 242 Id. Nine of the fifteen FWP leases call for differing flow amounts at different times depending on time of year and seasonal conditions. See FWP Progress Report, supra note 63, at app. A. [↑](#footnote-ref-243)
243. 243 Neuman & Chapman, supra note 149, at 140. [↑](#footnote-ref-244)
244. 244 Schiller, supra note 47. [↑](#footnote-ref-245)
245. 245 Id. [↑](#footnote-ref-246)
246. 246 IUCN - The World Conservation Union, Vision For Water and Nature, A World Strategy For Conservation And Sustainable Management Of Water Resources in the 21st Century 25-26 (2000), available at [*http://www.iucn.org/webfiles/doc/WWRP/Publications/Vision/VisionWaterNature.pdf*](http://www.iucn.org/webfiles/doc/WWRP/Publications/Vision/VisionWaterNature.pdf). [↑](#footnote-ref-247)
247. 247 The MWT lease memorializes an agreement whereby 300 acre-feet will be left instream each year for the duration of the lease. MWT has also negotiated a purchase agreement for 100 acre-feet. Ferguson Interview, supra note 128. [↑](#footnote-ref-248)
248. 248 Landry, supra note 45, at 9. [↑](#footnote-ref-249)
249. 249 Hildreth, supra note 181, at 11. [↑](#footnote-ref-250)
250. 250 Endangered Species Act of 1973, [*16 U.S.C. 1531*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S8T-0KG2-8T6X-707Y-00000-00&context=1516831)-1544 (2000). [↑](#footnote-ref-251)
251. 251 Clean Water Act of 1972, [*33 U.S.C. 1251*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0FN2-D6RV-H3DC-00000-00&context=1516831)-1387 (2000). [↑](#footnote-ref-252)
252. 252 See, e.g., [*Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-F0N0-003D-J1V1-00000-00&context=1516831) [↑](#footnote-ref-253)
253. 253 Primarily as affirmed by the Supreme Court in [*Winters v. United States, 207 U.S. 564, 577 (1908).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [↑](#footnote-ref-254)
254. 254 See, e.g., Thompson, supra note 11, at 314 ("Public good markets are a simple extension of regulatory markets," and thus should act as a means of fine tuning regulation, rather than as a substitution for regulation.). [↑](#footnote-ref-255)
255. 255 Telephone Interview with Melinda Kassen, ***Colorado*** Trout Unlimited (Dec. 16, 2003). [↑](#footnote-ref-256)
256. 256 See Teresa A. Rice & Lawrence J. MacDonnell, Univ. of ***Colo.*** Sch. of Law, Natural Res. Law Center, Agricultural To Urban Water Transfers in ***Colorado***: An Assessment of the Issues and Options 3-5 (1993). [↑](#footnote-ref-257)
257. 257 Landry, supra note 146, at 21. [↑](#footnote-ref-258)
258. 258 Id. at 18. [↑](#footnote-ref-259)
259. 259 Id. at 15. [↑](#footnote-ref-260)
260. 260 Telephone Interview with Melinda Kassen, supra note 255. [↑](#footnote-ref-261)
261. 261 See [***Colo.*** *Rev. Stat. 37-92-302(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G0-00000-00&context=1516831), -92-305(4) (2003); [*Farmers Reservoir & Irrigation* ***Co****. v. Consol. Mut. Water* ***Co****., 33 P.3d 799, 807 (****Colo.*** *2001).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) [↑](#footnote-ref-262)
262. 262 James N. Corbridge, Jr., Historical Water Use and the Protection of Vested Rights: A Challenge for ***Colorado*** Water Law, [*69 U.* ***Colo.*** *L. Rev. 503, 504 (1998).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:3SHB-71S0-00CV-N1PY-00000-00&context=1516831) [↑](#footnote-ref-263)
263. 263 Id. [↑](#footnote-ref-264)
264. 264 Corbridge & Rice, supra note 202, at 245. [↑](#footnote-ref-265)
265. 265 [***Colo.*** *Rev. Stat. 37-92-103(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:689F-SY73-CGX8-03R2-00000-00&context=1516831) (2003). [↑](#footnote-ref-266)
266. 266 See Gillilan & Brown, supra note 19, at 301. [↑](#footnote-ref-267)
267. 267 Id. at 120. [↑](#footnote-ref-268)
268. 268 See id. at 302. [↑](#footnote-ref-269)
269. 269 See generally Thompson, supra note 11, at 277-80. [↑](#footnote-ref-270)
270. 270 See ***Colorado*** Division of Water Resources, The Prior Appropriation System, at [*http://water.state.****co****.us/surfacewater/prior.asp*](http://water.state.co.us/surfacewater/prior.asp) (last visited Feb. 26, 2004). [↑](#footnote-ref-271)
271. 271 Gillilan & Brown, supra note 19, at 99. [↑](#footnote-ref-272)
272. 272 Id. at 302. [↑](#footnote-ref-273)
273. 273 Id. [↑](#footnote-ref-274)
274. 274 Id. at 303. [↑](#footnote-ref-275)
275. 275 Thompson, supra note 11, at 289. [↑](#footnote-ref-276)
276. 276 See Landry, supra note 146, at 14. [↑](#footnote-ref-277)
277. 277 Telephone Interview with Anne Janicki, ***Colorado*** Water Conservation Board (July 17, 2003). [↑](#footnote-ref-278)
278. 278 Sterne, supra note 40, at 219. [↑](#footnote-ref-279)
279. 279 Id. at 217. [↑](#footnote-ref-280)
280. 280 Gillilan & Brown, supra note 19, at 101. [↑](#footnote-ref-281)
281. 281 Id. [↑](#footnote-ref-282)
282. 282 Lawrence J. MacDonnell, U.S. Geological Survey, The Water Transfer Process as a Management Option for Meeting Changing Water Demand 26 (1990). [↑](#footnote-ref-283)
283. 283 Bonnie G. Colby, Benefits, Costs and Water Acquisition Strategies: Economic Considerations in Instream Flow Protection, in Instream Flow Protection in the West, at 6-2, 6-21 (Lawrence J. MacDonnell & Teresa A. Rice eds., rev. ed. 1993). [↑](#footnote-ref-284)
284. 284 Id. [↑](#footnote-ref-285)
285. 285 Telephone Interview with Melinda Kassen, supra note 255. [↑](#footnote-ref-286)
286. 286 See Landry, supra note 146, at 24. [↑](#footnote-ref-287)
287. 287 Id. [↑](#footnote-ref-288)
288. 288 See generally Sterne, supra note 40, at 221-22. [↑](#footnote-ref-289)
289. 289 Mattick, supra note 67, at 18-5. [↑](#footnote-ref-290)
290. 290 Id. [↑](#footnote-ref-291)
291. 291 See Or. Admin. R. 690-400-0015 (2004). [↑](#footnote-ref-292)
292. 292 Mattick, supra note 67, at 18-5. [↑](#footnote-ref-293)
293. 293 Sterne, supra note 40, at 218. [↑](#footnote-ref-294)
294. 294 See [*Or. Rev. Stat. 537.338*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5812-D311-648C-80X9-00000-00&context=1516831) (2001). [↑](#footnote-ref-295)
295. 295 Ferguson Interview, supra note 128. [↑](#footnote-ref-296)
296. 296 Instream Flow Enhancement Handbook, supra note 101, at 44. [↑](#footnote-ref-297)
297. 297 Cf. Sterne, supra note 40, at 218 (describing that state water agencies are susceptible to political pressures). [↑](#footnote-ref-298)
298. 298 Id. (explaining that all instream flow statutes require public instream rights be in the public interest). [↑](#footnote-ref-299)
299. 299 See Colby, supra note 283, at 6-21. [↑](#footnote-ref-300)
300. 300 Corbridge & Rice, supra note 202, at 275. [↑](#footnote-ref-301)
301. 301 David H. Getches, Water Law in a Nutshell 153 (3d ed. 1997). [↑](#footnote-ref-302)
302. 302 Or. Admin. R. 690-077-0075 (2003); Mont. Code Ann. 85-2-408(1) (2003). [↑](#footnote-ref-303)
303. 303 Steven O. Sims, ***Colorado***'s Instream Flow Program: Integrating Instream Flow Protection into a Prior Appropriation System, in Instream Flow Protection in the West, at 12-7 (Lawrence J. MacDonnell & Teresa A. Rice eds., rev. ed. 1993). [↑](#footnote-ref-304)
304. 304 E.g., Michael F. Browning, Substitute Supply Plans: Recent Water Law Developments, 31 ***Colo.*** Law 67, 67 (Aug. 2002). [↑](#footnote-ref-305)
305. 305 H.R. 02-1414, 63d Gen. Ass., 2d Sess. (***Colo.*** 2002) (codified at [***Colo.*** *Rev. Stat. 37-92-308*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831) (2003)). [↑](#footnote-ref-306)
306. 306 Browning, supra note 304, at 67. [↑](#footnote-ref-307)
307. 307 H.R. 02-1414 (codified at [***Colo.*** *Rev. Stat. 37-92-308(4)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), (5)(a) (2003)). [↑](#footnote-ref-308)
308. 308 See Browning, supra note 304, at 67. [↑](#footnote-ref-309)
309. 309 Id. [↑](#footnote-ref-310)
310. 310 Corbridge & Rice, supra note 202, at 276. [↑](#footnote-ref-311)
311. 311 [***Colo.*** *Rev. Stat. 37-92-308(4)(a)(IV)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3G7-00000-00&context=1516831), (5)(a)(IV) (2003). [↑](#footnote-ref-312)
312. 312 Sherry A. Caloia et al., The Water Rights Determination and Administration Act of 1969: A Western Slope Perspective on the First Thirty Years, [*3 U. Denv. Water L. Rev. 39, 53 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TT-00000-00&context=1516831) [↑](#footnote-ref-313)
313. 313 Thompson, supra note 11, at 274. [↑](#footnote-ref-314)
314. 314 Id. [↑](#footnote-ref-315)
315. 315 Schiller, supra note 47. [↑](#footnote-ref-316)
316. 316 Thompson, supra note 11, at 276. [↑](#footnote-ref-317)
317. 317 Id. [↑](#footnote-ref-318)
318. 318 Id. at 277. [↑](#footnote-ref-319)
319. 319 See, e.g., [*Winters v. United States, 207 U.S. 564, 577 (1908);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) [*Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-F0N0-003D-J1V1-00000-00&context=1516831) [↑](#footnote-ref-320)
320. 320 Interview with Michael Browning, President, ***Colorado*** Water Trust (July 18, 2003). [↑](#footnote-ref-321)
321. 321 Mattick, supra note 67, at 18-5. [↑](#footnote-ref-322)
322. 322 Id. at 18-6. [↑](#footnote-ref-323)
323. 323 See, e.g., [*Mont. Code Ann. 85-2-436(2)(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:62JR-CGM3-GXJ9-303T-00000-00&context=1516831) (2003) (clarifying that "the maximum quantity of water that may be leased is the amount historically diverted by the lessor"); see also Or. Admin. R. 690-077-0077(3)(c) (2001) (demanding that all lease agreements include conditions which would "avoid enlargement of the original right"). [↑](#footnote-ref-324)
324. 324 ***Farmer's Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 631-32 (Colo. 1954).*** [↑](#footnote-ref-325)
325. 325 Thompson, supra note 11, at 274. [↑](#footnote-ref-326)
326. 326 Telephone Interview with Anne Janicki, supra note 277. [↑](#footnote-ref-327)
327. 327 Ferguson Interview, supra note 128. [↑](#footnote-ref-328)
328. 328 See [***Colo.*** *Rev. Stat. 37-92-102 (3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831)-(4) (2003). [↑](#footnote-ref-329)
329. 329 Scholars of instream acquisition programs have specifically remarked on the relative strictness of ***Colorado***'s administrative review process when CWCB seeks to establish an instream right versus the review called for when a private party seeks to establish an offstream right:

     For example, ***Colorado***'s Division of Wildlife must submit applications to the staff of the ***Colorado*** Water Conservation Board, which then makes a recommendation to the Board. If approved by the Board, the application is submitted to the state attorney general's office, which then takes the application before one of the state's water courts. Offstream water rights applicants can go directly before a water court.

     Gillilan & Brown, supra note 19, at 135. [↑](#footnote-ref-330)
330. 330 Michael Browning & Steve Bushong, Ditch Lining: The Water Right Issue, 21 ***Colo.*** Law. 1155, 1155 (1992). [↑](#footnote-ref-331)
331. 331 [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-332)
332. 332 E.g. [***Colo.******River*** *Water Conservation Dist. v.* ***Colo.*** *Water Conservation Bd., 594 P.2d 570, 572 (****Colo.*** *1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-1F40-003D-9289-00000-00&context=1516831) [↑](#footnote-ref-333)
333. 333 [*City of Thornton v. City of Fort Collins, 830 P.2d 915 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) For an extended discussion on the case and its impact on the development of ***Colorado***'s instream flow laws, see Christopher H. Meyer, Instream Flows: Integrating New Uses and New Players Into the Prior Appropriation System, in Instream Flow Protection in the West, at 2-8 to 2-9 (Lawrence J. MacDonnell & Teresa A. Rice eds., rev. ed. 1993). [↑](#footnote-ref-334)
334. 334 [*830 P.2d at 930*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) (emphasis added). [↑](#footnote-ref-335)
335. 335 Id. [↑](#footnote-ref-336)
336. 336 Gillilan & Brown, supra note 19, at 118. [↑](#footnote-ref-337)
337. 337 J. Craig Green, Independence Inst., Use It Or Lose It: ***Colorado***'s Oldest and Best Recycling Program, Issue Paper Number 3-2002, at 8 n.14 (2002). [↑](#footnote-ref-338)
338. 338 S. 02-156, 63d Gen. Assem., 2d Reg. Sess. (***Colo.*** 2002) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003)). [↑](#footnote-ref-339)
339. 339 See CTU Supports Bill to Give Coloradoans New Tool to Protect Free-Flowing Streams, Currents February 2002, (***Colorado*** Trout Unlimited, Boulder, ***CO***), at [*http://www.cotrout.org/CenturyClub/currents/currents2.2002.htm*](http://www.cotrout.org/CenturyClub/currents/currents2.2002.htm) (Feb. 2002) (last visited Apr. 13, 2004). [↑](#footnote-ref-340)
340. 340 Telephone Interview with Melinda Kassen, ***Colorado*** Trout Unlimited (Oct. 5, 2002). [↑](#footnote-ref-341)
341. 341 S. 02-156 (codified as amended at [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-342)
342. 342 Telephone Interview with Anne Janicki, supra note 277. [↑](#footnote-ref-343)
343. 343 S. 02-156 (codified at [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003)) (emphasis added). [↑](#footnote-ref-344)
344. 344 Media Advisory, Trout Unlimited, Trout Unlimited Applauds Enactment of SB 156 (May 21, 2002), available at [*http://www.cotrout.org/SB%20156%20becomes%20law.htm*](http://www.cotrout.org/SB%20156%20becomes%20law.htm). [↑](#footnote-ref-345)
345. 345 Theo Stein, Bill Protects "Instream Flows,' Denver Post, Apr. 26, 2002, at 14A. [↑](#footnote-ref-346)
346. 346 S. 02-156. [↑](#footnote-ref-347)
347. 347 Media Advisory, Trout Unlimited, supra note 344, available at [*http://www.cotrout.org/SB%20156%20becomes%20law.htm*](http://www.cotrout.org/SB%20156%20becomes%20law.htm). [↑](#footnote-ref-348)
348. 348 H.R. 03-1320, 64th Gen. Assem., 1st Reg. Sess. (***Colo.*** 2003) (codified as amended at [***Colo.*** *Rev. Stat. 37-83-105(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2003)). [↑](#footnote-ref-349)
349. 349 News Release, Office of ***Colorado*** Governor Bill Owens, Governor Signs SB 236 - Initiative to "Save ***Colorado***'s Water" (June 5, 2003), available at [*http://www.state.****co****.us/owenspress/06-05-03b.htm*](http://www.state.co.us/owenspress/06-05-03b.htm) (last modified June 06, 2003). [↑](#footnote-ref-350)
350. 350 H.R. 03-1320. [↑](#footnote-ref-351)
351. 351 [***Colo.*** *Rev. Stat. 37-83-105(2)(a)(I)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831) (2003). [↑](#footnote-ref-352)
352. 352 Id. 37-83-105(2)(b)(I). [↑](#footnote-ref-353)
353. 353 Id. 37-83-105(2)(b)(I)(A)-(E). [↑](#footnote-ref-354)
354. 354 Id. 37-83-105(2)(b). [↑](#footnote-ref-355)
355. 355 Id. 37-83-105(2)(a)(III). [↑](#footnote-ref-356)
356. 356 Id. 37-83-105(2)(b)(II), (III). [↑](#footnote-ref-357)
357. 357 Id. 37-83-105(2)(b)(V). [↑](#footnote-ref-358)
358. 358 Id. [↑](#footnote-ref-359)
359. 359 Id. 37-83-105(2)(b)(VI). [↑](#footnote-ref-360)
360. 360 Id. 37-83-105(2)(b)(VIII). [↑](#footnote-ref-361)
361. 361 See id. 37-83-105(2)(a). [↑](#footnote-ref-362)
362. 362 S. 02-156 (codified at [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003)). [↑](#footnote-ref-363)
363. 363 H.R. 03-1320 (codified at [***Colo.*** *Rev. Stat 37-83-105(2)(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J378-00000-00&context=1516831)(2003)). [↑](#footnote-ref-364)
364. 364 See id. [↑](#footnote-ref-365)
365. 365 See State of Oregon Water Resources Department, Temporary Drought Instream Lease Agreement 2.4 (2003). [↑](#footnote-ref-366)
366. 366 Or. Admin. R. 690-019-0058(1) (2001). [↑](#footnote-ref-367)
367. 367 Id. 690-019-0058(1)(a), (b). [↑](#footnote-ref-368)
368. 368 Id. 690-019-0058(4). [↑](#footnote-ref-369)
369. 369 Id. [↑](#footnote-ref-370)
370. 370 Three of the leases call for specific quantities of water; the other two provide for established flow amounts. Of the first three leases, two are 99-year agreements for 142.71 acre-ft. annually, the third, an annual lease, calls for a 3155 acre-ft. release from Steamboat Lake into the Yampa ***River***. ***Colorado*** Water Conservation Board, Status of Leases and Contracts for Water 3 (Dec. 2002), available at [*http://cwcb.state.****co****.us/isf/Programs/Annual*](http://cwcb.state.co.us/isf/Programs/Annual) Program Status.pdf. [↑](#footnote-ref-371)
371. 371 Gillilan & Brown, supra note 19, at 111. [↑](#footnote-ref-372)
372. 372 See generally A. Dan Tarlock et al., Water Resource Management: A Casebook in Law and Public Policy 204-05 (4th ed. 1993). [↑](#footnote-ref-373)
373. 373 Interview with Michael Browning, President, ***Colorado*** Water Trust (July 18, 2003). [↑](#footnote-ref-374)
374. 374 S. 81, 47th Gen. Assem., 1st Reg. Sess. (***Colo.*** 1969) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FM-00000-00&context=1516831) to -602) (2003). [↑](#footnote-ref-375)
375. 375 Tarlock et al., supra note 372, at 205. [↑](#footnote-ref-376)
376. 376 S. 97, 49th Gen. Assem., 1st Reg. Sess. (***Colo.*** 1973) (codified as amended at [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003)). [↑](#footnote-ref-377)
377. 377 Compare H.R. 6, 1937 Gen. Assem., 31st Sess. (***Colo.*** 1937), with S. 97 (showing that although CWCB came into being in 1937, it did not have the authority to acquire instream appropriations until 1973). [↑](#footnote-ref-378)
378. 378 Sims, supra note 303, at 12-2. [↑](#footnote-ref-379)
379. 379 Decree, In re Application for Water Rights of Golden, No. 98CW448 (***Colo.*** Water Ct. Div. No. 1, June 13, 2001), available at [*http://www.courts.state.****co****.us/supct/watercourts/wat-div1/ordergolden.htm*](http://www.courts.state.co.us/supct/watercourts/wat-div1/ordergolden.htm). [↑](#footnote-ref-380)
380. 380 News Release, ***Colorado*** Water Conservation Board, State Water Policy and Planning Board Appeals Water Use Decision 1 (Aug. 1, 2001). [↑](#footnote-ref-381)
381. 381 Id. [↑](#footnote-ref-382)
382. 382 Memorandum from Dan McAuliffe et al., to ***Colorado*** Water Conservation Board Members 3 (July 17, 2000) (on file with the University of Denver Water Law Review). [↑](#footnote-ref-383)
383. 383 Legislative Council, ***Colo.*** Gen. Assembly, Analysis of the 2003 Ballot Proposals 11 (2003). [↑](#footnote-ref-384)
384. 384 Steve Glazer, Referendum A Doesn't Solve Anything, Peak & Prairie (Rocky Mountain Chapter of the Sierra Club), Oct.-Dec. 2003, at 1. [↑](#footnote-ref-385)
385. 385 [*Scott v. State ex rel. State Highway Comm'n, 541 P.2d 516, 517 (Or. App. 1975).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-0G90-003F-Y2B3-00000-00&context=1516831) [↑](#footnote-ref-386)
386. 386 McKinney, supra note 67, at 15-4. [↑](#footnote-ref-387)
387. 387 Id. [↑](#footnote-ref-388)
388. 388 Gillilan & Brown, supra note 19, at 120. [↑](#footnote-ref-389)
389. 389 Id. at 111-18. [↑](#footnote-ref-390)
390. 390 Thompson, supra note 11, at 289. [↑](#footnote-ref-391)
391. 391 Id. [↑](#footnote-ref-392)
392. 392 Thompson, supra note 11, at 288. [↑](#footnote-ref-393)
393. 393 U.S. Fish & Wildlife Serv., ***Colorado*** ***River*** Recovery Program, FY 2001 Annual Project Report, at [*http://mountain-prairie.fws.gov/crrip/arpts/2001/wac/01-67.pdf*](http://mountain-prairie.fws.gov/crrip/arpts/2001/wac/01-67.pdf). [↑](#footnote-ref-394)
394. 394 Gillilan & Brown, supra note 19, at 123. [↑](#footnote-ref-395)
395. 395 See id. [↑](#footnote-ref-396)
396. 396 Id. at 211-12. [↑](#footnote-ref-397)
397. 397 Id. at 212. [↑](#footnote-ref-398)
398. 398 Neuman & Chapman, supra note 149, at 173. [↑](#footnote-ref-399)
399. 399 Interview with Anne Janicki, ***Colorado*** Water Conservation Board (July 17, 2003). [↑](#footnote-ref-400)
400. 400 See [***Colo.*** *Rev. Stat. 37-60-104(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:64WK-W7H3-CH1B-T06M-00000-00&context=1516831) (2003) (describing CWCB members, including nine members appointed by the governor). [↑](#footnote-ref-401)
401. 401 See Gillilan & Brown, supra note 19, at 123; see also Policy Consensus Initiative, supra note 85, at 1-3. [↑](#footnote-ref-402)
402. 402 Gillilan & Brown, supra note 19, at 132. [↑](#footnote-ref-403)
403. 403 Donald Snow, Some Lines Cast From Troutdale, in Consultative Group on Biological Diversity, A Report From Troutdale: Community Based Strategies in Forest Stewardship and Sustainable Economic Development (Mar. 1998), available at [*http://www.cgbd.org/visitor/publications/troutdale.doc*](http://www.cgbd.org/visitor/publications/troutdale.doc). [↑](#footnote-ref-404)
404. 404 Western Water Alliance, Approach and Method, at [*http://www.westernwateralliance.org/about*](http://www.westernwateralliance.org/about) who.html (2002-2003). [↑](#footnote-ref-405)
405. 405 Policy Consensus Initiative, supra note 85. [↑](#footnote-ref-406)
406. 406 Id. at 1, 2. [↑](#footnote-ref-407)
407. 407 Id. at 3. [↑](#footnote-ref-408)
408. 408 Id. [↑](#footnote-ref-409)
409. 409 Landry, supra note 146, at 21. [↑](#footnote-ref-410)
410. 410 Id. [↑](#footnote-ref-411)
411. 411 Thompson, supra note 11, at 283. [↑](#footnote-ref-412)
412. 412 See [*City of* ***Colorado*** *Springs v. Bender, 366 P.2d 552, 555-56 (****Colo.*** *1961).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-WWV0-0040-00YJ-00000-00&context=1516831) [↑](#footnote-ref-413)
413. 413 See [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-414)
414. 414 Montana Fish, Wildlife & Parks, Annual FWP Drought Summary 2001, at 49 (2002), available at [*http://nris.state.mt.us/drought/committee/reports/FWPDroughtsum01.pdf*](http://nris.state.mt.us/drought/committee/reports/FWPDroughtsum01.pdf). [↑](#footnote-ref-415)
415. 415 Id. [↑](#footnote-ref-416)
416. 416 [***Colo.*** *Rev. Stat. 37-92-102(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-417)
417. 417 See Karen Abbott & Charley Able, Kayakers' Rights Stand: Split Supreme Court Gives More Power to Recreational Users, Rocky Mountain News, May 19, 2003, at [*5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831)A. [↑](#footnote-ref-418)
418. 418 [*City of Thornton v. City of Fort Collins, 830 P.2d 915, 929-30 (****Colo.*** *1992).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) [↑](#footnote-ref-419)
419. 419 Gillilan & Brown, supra note 19, at 119. [↑](#footnote-ref-420)
420. 420 S. 01-216, 63d Gen. Assem., 1st Reg. Sess. (***Colo.*** 2001) (codified at [***Colo.*** *Rev. Stat. 37-92-102(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831), (6)). [↑](#footnote-ref-421)
421. 421 [*State Eng'r v. City of Golden, 69 P.3d 1027 (****Colo.*** *2003),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48MP-XJ20-0039-4159-00000-00&context=1516831) aff'd by an equally divided court In re Application for Water Rights of Golden, No. 98CW448 (***Colo.*** Water Division Ct. Div. No. 1, June 13, 2001). [↑](#footnote-ref-422)
422. 422 See Christopher L. Thorne, ***Colorado*** Board Adopts Rules For "Recreational In-Channel Diversion" Water Rights, Western Water Law (Jan. 15, 2002), at [*http://www.westernwaterlaw.com/ABAarticle.htm*](http://www.westernwaterlaw.com/ABAarticle.htm). Authorized government entities include "any county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district."[***Colo.*** *Rev. Stat. 37-92-102(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J3FN-00000-00&context=1516831) (2003). [↑](#footnote-ref-423)
423. 423 CWCB agency rules require that even before it initiates a water right filing, the Board find that any proposed ISF appropriation: (1) will benefit the natural environment; (2) entails the appropriation of available water; and (3) can exist without causing injury to other decreed water rights. [*2* ***Colo.*** *Code Regs. 408-2(5i)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:621K-TFK1-DY89-M3F7-00009-00&context=1516831) (2003). [↑](#footnote-ref-424)
424. 424 [*Aspen Wilderness Workshop, Inc. v.* ***Colo.*** *Water Conservation Bd., 901 P.2d 1251, 1261 (****Colo.*** *1995).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-425)
425. 425 See Lori Potter, The 1969 Act and Environmental Protection, [*3 U. Denv. Water L. Rev. 70, 75-76 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VY0-00C3-W0TW-00000-00&context=1516831) [↑](#footnote-ref-426)
426. 426 [*Aspen Wilderness Workshop, 901 P.2d at 1261.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-01C0-003D-92HX-00000-00&context=1516831) [↑](#footnote-ref-427)
427. 427 In fact, current CWCB rules permit any person that provides the Board water for instream use to enforce the transfer arrangement "in the water court having jurisdiction over the water right according to the terms of the contract or agreement." 2 ***Colo.*** Code. Regs. 408-2(6d) (2003). [↑](#footnote-ref-428)
428. 428 Melinda Kassen, A Critical Analysis of ***Colorado***'s Water Right Determination and Administration Act of 1969, [*3 U. Denv. Water L. Rev. 58, 65 n.47 (1999).*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:42FS-2VX0-00C3-W0TV-00000-00&context=1516831) [↑](#footnote-ref-429)
429. 429 Landry, supra note 45, at 8. [↑](#footnote-ref-430)
430. 430 Colby, supra note 283, at 6-15. [↑](#footnote-ref-431)
431. 431 Getches, supra note 301, at 82-83. [↑](#footnote-ref-432)
432. 432 See generally id. at 156, 161-62 (describing the no harm rule's role in changes of use of a water right, and transfers generally). [↑](#footnote-ref-433)
433. 433 Terry L. Anderson & Pamela Snyder: Water Markets, Priming the Invisible Pump 103 (1997). [↑](#footnote-ref-434)
434. 434 See Colby, supra note 283, at 6-21. [↑](#footnote-ref-435)
435. 435 Id. at 6-21. [↑](#footnote-ref-436)
436. 436 See id. [↑](#footnote-ref-437)
437. 437 Id. at 6-22. [↑](#footnote-ref-438)
438. 438 Neuman & Chapman, supra note 149, at 154. [↑](#footnote-ref-439)
439. 439 Id. [↑](#footnote-ref-440)
440. 440 Id. at 154-55, n.58. [↑](#footnote-ref-441)
441. 441 Id. at 155. [↑](#footnote-ref-442)
442. 442 Id. [↑](#footnote-ref-443)
443. 443 Id. at 154. [↑](#footnote-ref-444)
444. 444 Id. at 154-55. [↑](#footnote-ref-445)
445. 445 Id. at 155. [↑](#footnote-ref-446)
446. 446 Id. [↑](#footnote-ref-447)
447. 447 See id. [↑](#footnote-ref-448)
448. 448 See id. [↑](#footnote-ref-449)
449. 449 Letter from [*David Collinge, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-0GS0-003D-914T-00000-00&context=1516831) note 239, at 2. [↑](#footnote-ref-450)
450. 450 See Landry, supra note 146, at 12-14. [↑](#footnote-ref-451)
451. 451 Id. [↑](#footnote-ref-452)
452. 452 Neuman & Chapman, supra note 149, at 156. [↑](#footnote-ref-453)
453. 453 Id. [↑](#footnote-ref-454)
454. 454 ***Colorado*** ***River*** Recovery Program, supra note 393. [↑](#footnote-ref-455)
455. 455 See [*Irrigation Water, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4477-08N0-0039-43BM-00000-00&context=1516831) note 22, at 7. [↑](#footnote-ref-456)
456. 456 Dry Legacy 2, supra note 20, at 2. [↑](#footnote-ref-457)
457. 457 Id. [↑](#footnote-ref-458)