

Presentation to Joint Legislative Task Force on Water Resource Mitigation

Water Resources Laws Regarding Impairment and Mitigation of Regulatory Instream Flows in Other States Compared to Washington State

Adam Gravley; Jenna Mandell-Rice; Rachael Lipinski

Introduction

- ❖ Washington Water Utilities Council (WWUC) requested us to undertake comparison of western state laws regarding instream flow impairment and mitigation to provide information to the Task Force.
- ❖ Our law firm serves as legal counsel to the WWUC, the state association of over 200 Washington water utilities including cities, water districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities.
- ❖ The water systems owned and operated by WWUC members provide drinking water to over 80 percent of the state's population.

Purpose & Scope

- ❖ This survey is intended to provide information and respond to the Task Force's interest in understanding how other state laws treat impairment and mitigation of instream flows.
- ❖ Review water laws of western prior appropriation states and create a chart to outline key elements of other state water laws.
- ❖ Enable comparison to Washington's laws on impairment and mitigation of regulatory stream flows for new water rights, water right change applications, mitigation packages, or water banking.

Background

- ❖ The request for this study was prompted by Department of Ecology Publication 20-11-083 (July 2020) on the Washington Supreme Court’s *Foster* decision.
- ❖ This publication describes *Foster*’s “perfect” mitigation requirement for any, even *de minimus*, depletions of regulatory minimum instream flows.
- ❖ For example, a water right applicant must supply mitigation that is:
 - In kind (wet water mitigation—and not other types of mitigation, like habitat improvements);
 - In time (at the same time as the modeled or actual impairment); and
 - In place (in the same location within the water body).

Process

- ❖ **Step 1:** Isolated laws regarding the standard for impairment of instream flows separate from impairment of appropriative water rights.
- ❖ **Step 2** Defined regulatory flows as instream flow programs based in regulation or statute (which we refer to as “regulatory flow programs” or “regulatory flows”).
- ❖ **Step 3:** Broadly surveyed western prior appropriation states for regulatory flow programs.
- ❖ **Step 4:** Identified the following western prior appropriation states with some form of a regulatory flow program:

California	Montana
Colorado	Nevada
Idaho	Oregon
Kansas	

- ❖ **Step 5:** Generated a chart that outlines impairment and mitigation standards for each of the states identified with a regulatory flow program.

Comparison Overview

California

- ❖ No clearly identifiable statutory or regulatory language or case law on impairment standard for regulatory flows
- ❖ No clearly identifiable statutory or regulatory language or case law on mitigation for regulatory flows
- ❖ Minimal regulatory or case law text addressing these standards

Colorado

- ❖ State water regulatory agency may accept impairment to an instream flow if:
 - Through mitigation, it can continue to preserve or improve the natural environment to a reasonable degree notwithstanding the injury; or
 - It is a de minimis impact to an instream flow (i.e., has a 1% or less depletive effect)

- ❖ The state water regulatory agency has discretion in determining whether to accept mitigation, even where that mitigation is not in kind, in time, and in place

- ❖ Well-developed regulatory scheme

Idaho

- ❖ No clearly identifiable statutory or regulatory language or case law on impairment standard for regulatory flows
- ❖ Mitigation required to offset injury to instream flows; no obligation to “enhance” environmental conditions
- ❖ Minimal regulatory or case law text addressing these standards

Kansas

- ❖ No clearly identifiable statutory or regulatory language or case law on impairment standard for regulatory flows
- ❖ No clearly identifiable statutory or regulatory language or case law on mitigation for regulatory flows
- ❖ Extremely minimal regulatory or case law text addressing these standards

Montana

- ❖ State law recognizes that the creation of an instream flow may impair existing water rights and provides a time-limited remedy
- ❖ No clearly identifiable statute, regulation, or case law provides a specific impairment standard for regulatory flows
- ❖ No clearly identifiable statute, regulation, or case law provides a specific mitigation standard for regulatory flows
- ❖ Minimal regulatory or case law text addressing these standards

Nevada

- ❖ No clearly identifiable statutory or regulatory language or case law on impairment standard for regulatory flows
- ❖ The State Engineer is not authorized to impose mitigation conditions on new water right permits or changes of use
 - The Nevada Supreme Court held there is no statutory basis for the State Engineer to impose mitigation conditions. However, dicta indicates that if mitigation were judicially recognized, it would have to be full mitigation in kind, place, and time
- ❖ Minimal regulatory text addressing these standards but some case law (noted above)

Oregon

- ❖ The state water agency can approve a transfer that would injure an instream flow if (1) that instream flow was created through a request from a state agency (2) the state agency consents to the injury
- ❖ In issuing the consent, the state agency can include conditions necessary to ensure a continued net benefit to resources consistent with the purposes of the instream water right
- ❖ Well-developed regulatory scheme

Summary Points

Findings

- ❖ Washington is the only state that specifically characterizes impairment of regulatory flows to include *de minimus* impairment.
- ❖ Washington is the only western prior appropriation state with regulatory flows that has affirmative law requiring that mitigation to offset impairment be in kind, in time, and in place.
- ❖ In some of the other studied states, like Colorado, the state water regulatory agency has discretion in determining whether to accept mitigation (even when that mitigation is not in kind, in time, and in place).

Questions?

- **For more information:**
 - Adam Gravley avg@vnf.com
 - Jenna Mandell-Rice jrm@vnf.com
 - Rachael Lipinski rlipinski@vnf.com