INSTREAM FLOW
WATER RIGHTS IN WYOMING

•2020•

TO MAINTAIN AND IMPROVE THE LONG-TERM HEALTH OF FISH POPULATIONS, IT IS CRITICAL TO KEEP SOME WATER IN STREAMS YEAR-ROUND FOR FISH PASSAGE, SPAWNING, REARING AND LATE SUMMER AND WINTER HABITATS.

WHAT IS INSTREAM FLOW?

Instream flow is the water that flows in a stream. Instream flow law allows the State of Wyoming to hold an instream flow water right for fisheries purposes in a designated stream segment. An instream flow right can be issued to allow specific amounts of water, when available, to remain in the stream channel and be protected for fisheries. Instream flow rights help fish populations while allowing water to flow downstream for other uses.

WHY ARE INSTREAM FLOW WATER RIGHTS NEEDED?

Water is the most important part of fish habitat. Keeping some water in streams year-round to provide for fish passage as well as for spawning, rearing, late summer and winter habitats is critical for maintaining and improving the long-term health of fish populations.

Instream flow water rights are a powerful tool to protect fish habitat and essential river functions for people and wildlife, while protecting existing water users. It's one of the most effective tools, too, because once an instream flow right has been obtained from the State Engineer's Office it should last forever.

INSTREAM FLOW TODAY

As of January 2020, instream flow rights have been permitted or adjudicated for 120 distinct segments totaling 512 miles, which is a small portion of the more than 25,000 miles of streams with fisheries in Wyoming. An additional 23 segments totaling 114 miles are in the application stage. For a listing of filings see **http://wwdc.state.wy.us/instream_flows.**

Instream flow water rights exist across Wyoming and have focused on the state's best fishing streams as well as streams with sensitive, native Yellowstone, Bear River, Snake River and Colorado River cutthroat trout.

Nearly all instream flow segments are on lands with some public ownership such as U.S. Forest Service, Bureau of Land Management, state lands and public fishing easements. However, the instream flow law does not allow trespass across private lands to reach an instream flow segment.

Instream flows benefit the 48% of Wyoming residents who fish. They also help Wyoming's thriving tourism industry reliant upon the flowing streams that provide angling and boating opportunities and enhance sight-seeing, hiking, backpacking and camping.

WYOMING WATER LAW AND INSTREAM FLOW RIGHTS

Wyoming water law dates back to pre-statehood and is based on "the doctrine of prior appropriation."

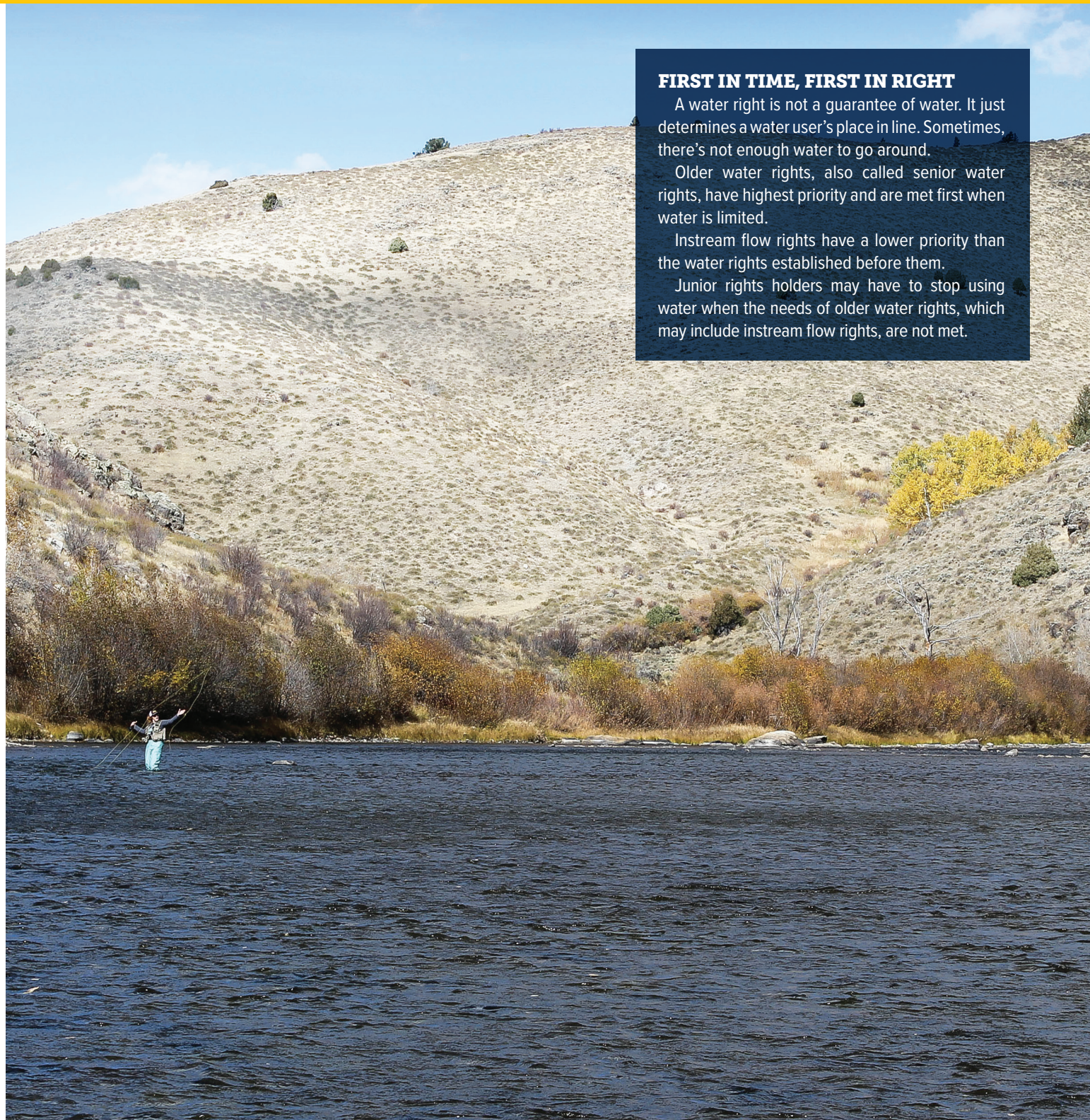
Under this doctrine the first to put the water to beneficial use has the first right, or "first in time is first in right."

Those with the earliest (senior) rights are entitled to water during periods of limited supply, while those with later (junior) rights are denied water during such times. Water rights are administered by the State Engineer's Office.

Prior to 1986, Wyoming water law required water to be diverted from its natural state — such as a stream, lake or spring — and conveyed to a point of use to constitute beneficial use.

A 1986 law designated instream flow for fisheries as a beneficial use. Meaning, water left in a stream ("instream") segment could be considered a beneficial use and legally protected for fisheries purposes. An instream flow water right allows a fishery to benefit by protecting flows up to permitted flow amounts.

This did not change Wyoming's long-standing, traditional water law system; so, instream flow rights on a stream segment are junior to pre-existing water rights and senior to water rights applied for after the instream flow right.



FIRST IN TIME, FIRST IN RIGHT

A water right is not a guarantee of water. It just determines a water user's place in line. Sometimes, there's not enough water to go around.

Older water rights, also called senior water rights, have highest priority and are met first when water is limited.

Instream flow rights have a lower priority than the water rights established before them.

Junior rights holders may have to stop using water when the needs of older water rights, which may include instream flow rights, are not met.

WHAT THE INSTREAM FLOW LAW *DOES*:

- Allows an application for an instream flow water right similar to any other water right application.
- Asserts only the State may hold instream flow water rights.
- Attaches an instream flow water right to a specific stream segment.
- Protects all pre-existing water rights.
- Maintains the State's ability to develop all the water allocated to Wyoming under our interstate compacts and Supreme Court decrees.
- Allows other water rights to be sold or donated to the state for a conversion to an instream flow right — the Wyoming Game and Fish Department has the responsibility of seeking the change from other uses to instream flow and the Board of Control must find no injury to other water rights prior to granting the change of use.
- Allows cities and towns to condemn an instream flow water right for municipal purposes.

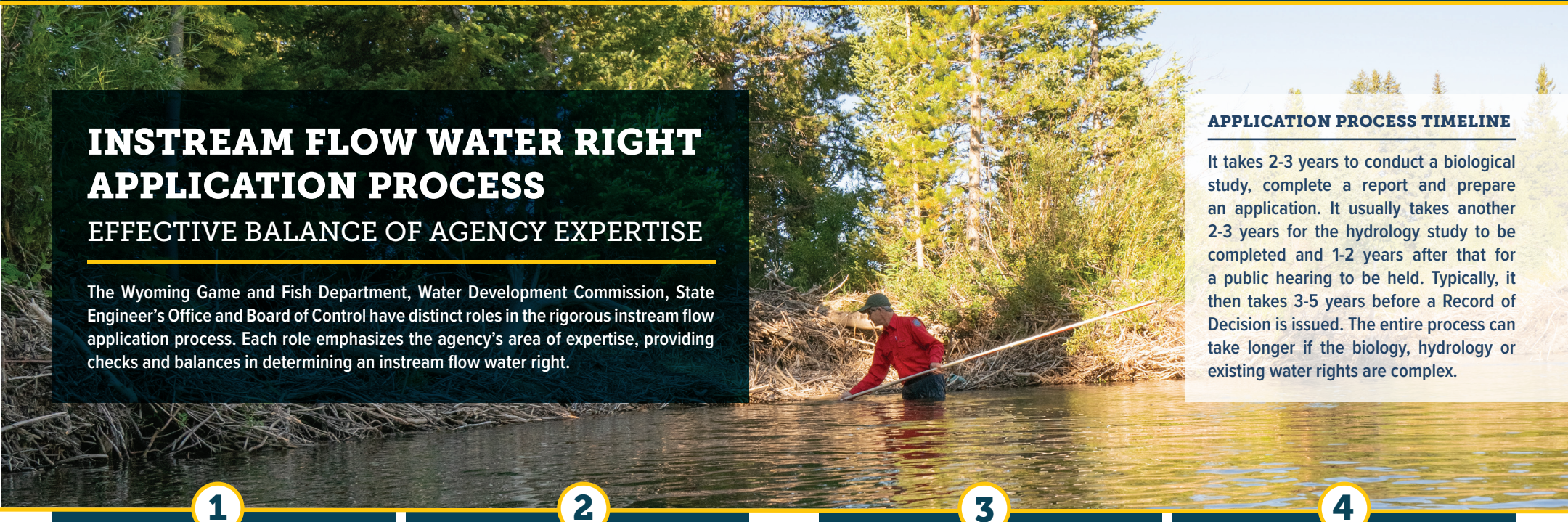
WHAT THE INSTREAM FLOW LAW *DOES NOT* DO:

- Does not allow trespass across private land to reach an instream flow segment.
- Does not permit abandonment or condemnation of existing water rights to secure water for instream flow.
- Does not allow private individuals, organizations or other entities to hold an instream flow water right — instream flow water rights may only be held by the State.
- Does not automatically reserve or designate any amount of water for instream flow in all streams — each instream flow right must be based on site-specific biological and hydrological studies and go through a lengthy review process (See Instream Flow Water Right Application Process).
- Does not allow issuance of an instream flow water right if Wyoming's use of water under an interstate compact or court degree will be impacted.

INSTREAM FLOW WATER RIGHT APPLICATION PROCESS

EFFECTIVE BALANCE OF AGENCY EXPERTISE

The Wyoming Game and Fish Department, Water Development Commission, State Engineer's Office and Board of Control have distinct roles in the rigorous instream flow application process. Each role emphasizes the agency's area of expertise, providing checks and balances in determining an instream flow water right.



APPLICATION PROCESS TIMELINE

It takes 2-3 years to conduct a biological study, complete a report and prepare an application. It usually takes another 2-3 years for the hydrology study to be completed and 1-2 years after that for a public hearing to be held. Typically, it then takes 3-5 years before a Record of Decision is issued. The entire process can take longer if the biology, hydrology or existing water rights are complex.

1 WGFD

(WYOMING GAME AND FISH DEPARTMENT)

BIOLOGICAL NEED STUDY

Identifies stream segments where instream flows for fisheries are critical and unappropriated water seems to be available.

Contacts adjacent landowners and then conducts field studies and prepares reports to identify the seasonal minimum amounts of direct flow needed to maintain or improve an existing fishery in a stream segment. If water will be stored in a reservoir to provide instream flows, then minimum flows needed to establish or maintain fisheries are identified.

Prepares a water right application with WWDC as applicant.

2 WWDC

(WATER DEVELOPMENT COMMISSION)

WATER AVAILABILITY STUDY

Submits water rights application to SEO.

Completes a hydrology study (funded by Game and Fish) to determine the availability of unappropriated water in the stream segment to meet the application request.

3 SEO

(STATE ENGINEER'S OFFICE)

PUBLIC HEARING AND PERMITTING

Issues a temporary filing number and priority date after receiving application.

Holds a public hearing to formally receive pertinent information including Game and Fish and WWDC study results.

Allows at least 30 days after the public hearing for written comments.

Issues a Record of Decision on whether to deny or issue a water right permit, which may be less than the requested right.

4 BOC

(BOARD OF CONTROL)

FIELD INSPECTION AND ADJUDICATION

Performs a field inspection and takes proof of the instream flow water right by measuring streamflows within the segment for 3 years.

Adjudicates (finalizes) the water right, which may be less than the permitted right.

TOP QUESTIONS ON INSTREAM FLOW WATER RIGHTS

How can an instream flow right be provided on a stream if most or all of the flow is already appropriated for downstream uses?

An instream flow right may use the same water as senior, downstream water rights because, unlike permits for diversions, an instream flow right does not consume water but ensures the water will pass through the instream flow segment.

Why is it necessary to file for instream flows in stream segments upstream from existing water users if the water must be delivered to those downstream users anyway?

Existing water law protects downstream water rights but it does not guarantee those flows will reach or remain in the upstream segment. In other words, future diversions could cause water to bypass the instream flow segment. Instream flow water rights are a way to keep needed amounts of water in streams for fisheries while protecting senior water rights.

Does issuance of an instream flow water right reduce the amount of water available for other uses?

Yes and no. When an instream flow right is in priority and not receiving its full permitted amount of water, the State may request regulation to satisfy that right. Such regulation may prevent an upstream, junior user from reducing the streamflow and may limit upstream, senior users to their permitted and statutory water right amounts. The instream flow water right does not consume water, though, so once the water leaves the instream flow segment it is available for downstream uses.

When can the State request regulation to satisfy an instream flow water right?

Like any other water right not receiving its full permitted amount of water, the State may request regulation of the stream to satisfy the instream flow water right. However, as of January 2020, no stream regulation has been requested for an instream flow right.

Isn't storage of water in a reservoir needed to provide instream flows?

The law limits the use of storage water to creating or maintaining fisheries — not improving them. Most instream flow rights are based on direct flow, not storage water. There are few if any places in the state where construction of storage solely to create a fishery would be a cost-effective use of State money. Storage has been used in some cases to maintain fisheries as a mitigation component of some projects and is an effective way to help secure permits for new projects.

Do instream flows tie up all the remaining water in a stream?

It depends on the amount of the instream flow right and where the segment lies within the stream's watershed. Direct flow instream water rights are based on Game and Fish studies that, as required by law, identify the minimum amount of water needed to maintain or improve an existing fishery in a specific stream segment. In most cases, these studies indicate that any reduction of natural flows during low flow periods will harm stream fisheries. So, an instream flow could limit the amount of water available during low flow periods for future water uses upstream. However, the majority of the annual streamflow in most streams comes during spring runoff, and most of that water would still be available for other beneficial uses upstream. Existing and future downstream water uses are not limited by an instream flow right.

Do instream flows prevent future water development?

Certainly not downstream of an instream flow segment. An instream flow water right, like a water right for any other use, can limit future water development upstream in the watershed. In some cases, State-approved instream flow water rights can facilitate the Federal permitting process for water development projects. Knowing instream flow requirements early in the planning process allows developers to plan their projects accordingly, avoiding lengthy studies of instream flow needs and facilitating the permitting process.

How can an instream flow water right provide fishery benefits if the requested amount isn't always present in the stream at the times of year it is requested?

Instream flows water rights are intended to allow the fishery to benefit from naturally occurring stream flows up to the permitted flow levels. The existing fishery has adapted to natural variations in flow. There are fewer fish in streams during drought periods and more during times of abundant water. Maintaining and improving the existing fishery simply means protecting existing flow patterns up to the permitted amounts. An instream flow water right that protects only the lowest flows can lead to drought-like flows every year and losses in the existing fishery.

INSTREAM FLOW

For more information on instream flow law or its application contact:

Wyoming Game and Fish Department
(307) 777-4559
https://wgfd.wyo.gov/Fishing-and-Boating/Instream-Flow-XStream-Angler

Wyoming State Engineer's Office
(307) 777-6475
http://seo.wyo.gov/home

Wyoming Board of Control
(307) 777-6178
http://seo.wyo.gov/agency-divisions/board-of-control

Wyoming Water Development Commission
(307) 777-7626
http://wwdc.state.wy.us/instream_flows/instream_flows.html