



Highlights

- Review of water law in Arizona, Colorado, Idaho, Nevada, and Utah
- Instream flow rights were designed to allow for water to be legally appropriated for ecological uses in streams.
- Instream flow rights may prove ineffective, as junior water rights are the first to be cut when water levels are insufficient.

Instream Flow Water Rights

Types of Water Rights

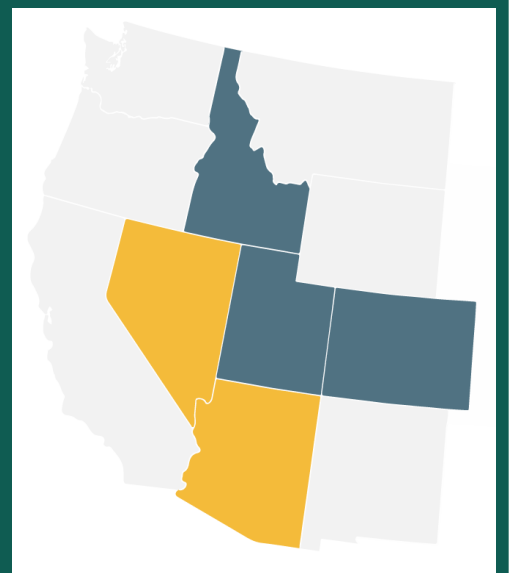
There are two primary legal frameworks for water rights in the United States: riparian and prior appropriation. Landowners that have water running on or against their property border were granted riparian rights. This approach to water rights, implemented as the eastern U.S. was colonized, needed to change as the population expanded west where the majority of water needs were on land that did not have a river or stream. As a result, the prior appropriation doctrine, also known as “first in time, first in right,” was created. Appropriated water rights are granted once water is diverted from a natural water course and put to a beneficial use.¹ Historically, water use for environmental purposes has not been considered a beneficial use. This is especially true for environmental projects that benefit from increased instream flow, since water rights were only granted for diversions.

Instream Flow Rights

A right to instream flows effectively creates a right that allows water to be considered “used” even if left in place to pass through a water course for environmental purposes. Recently, states have changed their laws, permitting a water right to be used for in-stream flows. Arizona, Colorado, Idaho, and Utah have created laws surrounding instream flow programs. Nevada’s instream flow rights stem from a Nevada Supreme Court decision. Because these rights were granted later in time, they are junior (lower priority) to earlier rights holders.

Who can own instream flow rights?

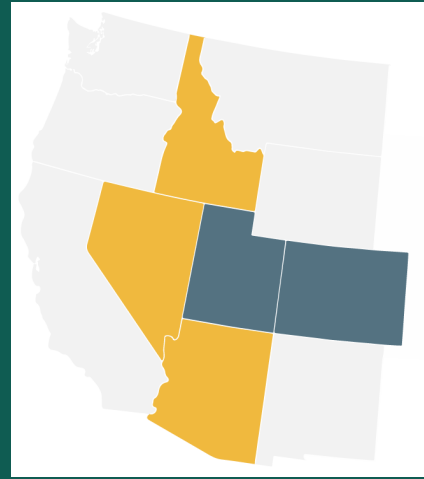
Arizona and **Nevada** allow private individuals or entities to hold instream flow rights, while instream flow rights are owned by governmental agencies in the remaining states.



What is “Beneficial Use”?

Out of the five states examined, only Colorado and Utah include specific statutory language expressing the protection of the environment as a beneficial use. Colorado law creates a beneficial use for protecting “the natural environment”², and Utah considers “the reasonable preservation or enhancement of the natural stream environment” to be beneficial^{3,4}. In contrast, the remaining states allow for the beneficial use of instream flows indirectly by extending beneficial use to include the protection of fish and wildlife habitat, as well as for recreational purposes. While not expressly allowing environmental purposes as a beneficial use, these states have ensured that a mechanism exists whereby water can legally remain in the watercourse, allowing water to be used for environmental purposes.

Expansion of Beneficial Use



Colorado & Utah: protection of the environment is “beneficial use”.

Idaho, Nevada & Arizona: extend “beneficial use” to include the protection of fish, wildlife habitat, and recreational purposes.

Do instream flow rights need to be revisited in light of climate change?

Reduced flows are expected as a result of decreased mountain snowpack, extended periods of drought, and increased evaporation from plants and soils into the atmosphere. These changes will likely result in the inability to meet existing water rights on a given stream, resulting in junior rights, such as those often used for instream flows, going unmet. Practically, this means that in the future a stream could be divested of all its water, leaving no water in the stream to support ecological health.

How Has Water Law Helped to Increase Instream Flow?

The beneficial use standard incorporates the “use it or lose it” approach to water allocation. This means any conservation efforts to reduce the amount of water used would threaten the stakeholder’s water right allocation. Arizona⁵, Idaho⁶ and Utah^{3,4} include language to allow water rights to be retained on conserved water, while Colorado has established an instream flow loan program, which allows water rights holders to reduce their water use for 5 years out of 10 years without losing their legal rights to the water.⁷ Nevada does not provide an exception for water conservation, potentially disincentivizing the use of conserved water for instream flow purposes.

References:

1. Sea Grant Law Center, 2002
2. Co. Rev. Stat. § 37-92-101
3. H.B. 33-272
4. Gen. Sess. Utah 2022
5. Ariz. Rev. Stat. § 45-189.01
6. Idaho Rev. Stat. § 42-250
7. Co. Rev. Stat. §37-83-1