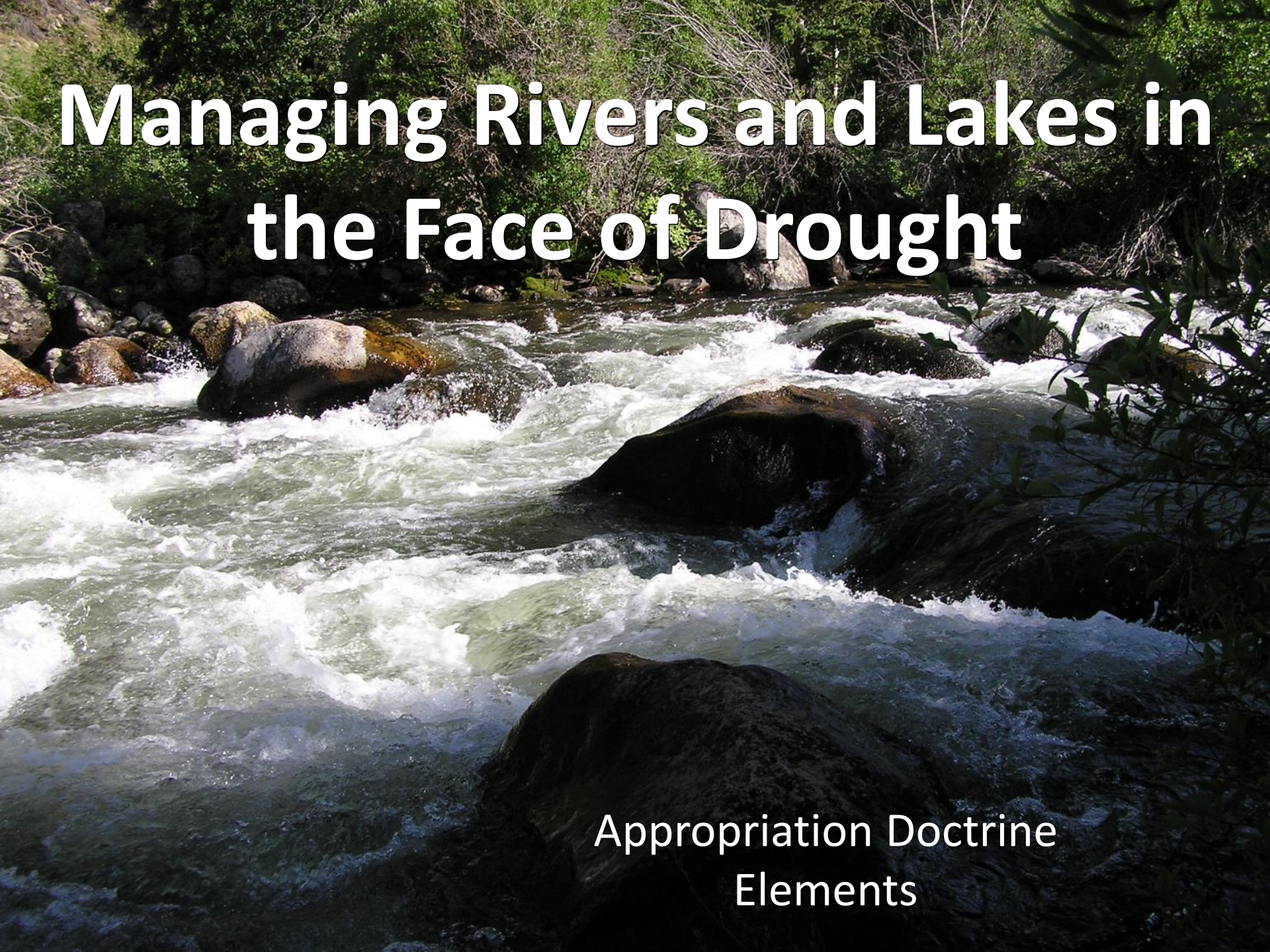
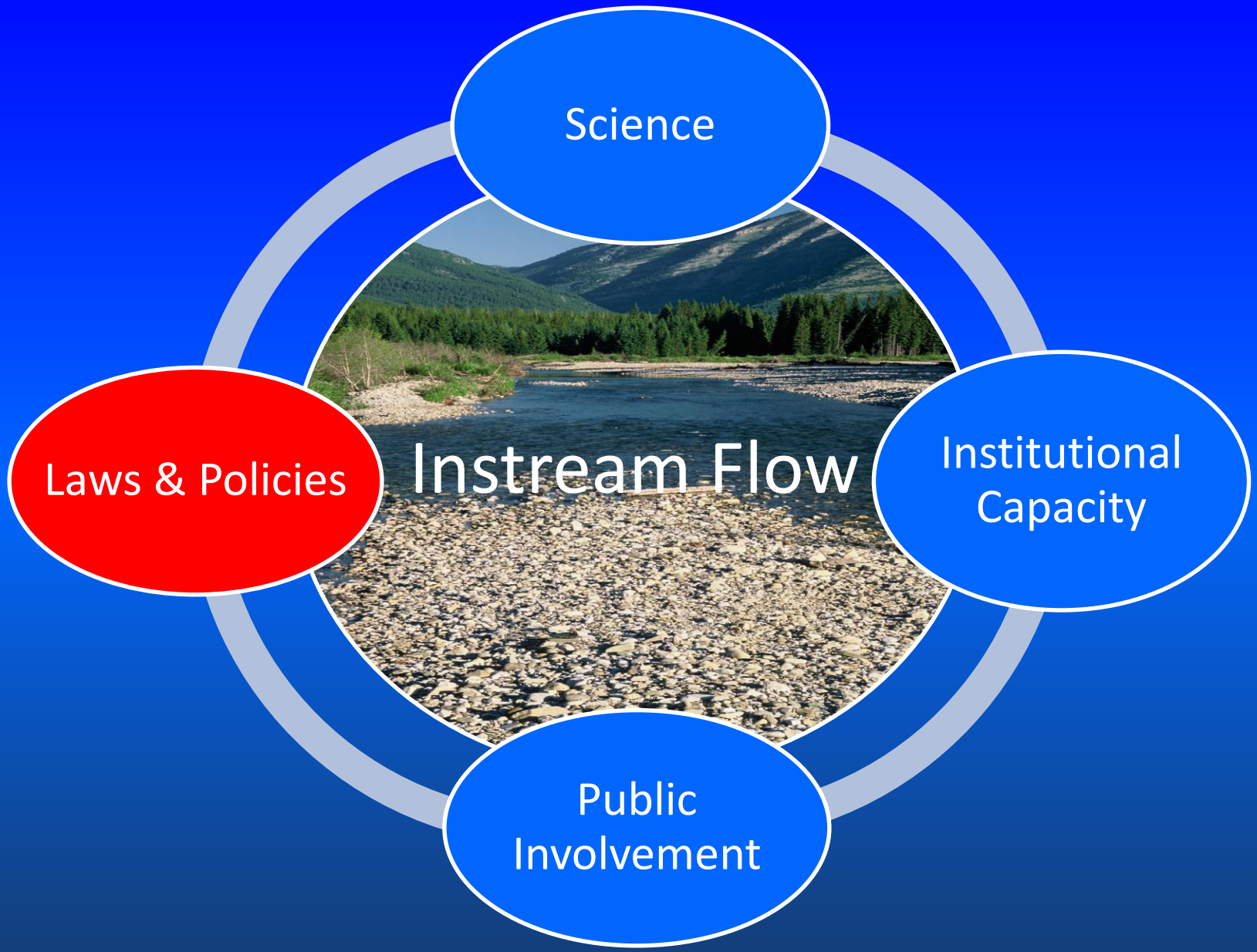


Managing Rivers and Lakes in the Face of Drought

Appropriation Doctrine Elements


Science
Laws & Policies
Instream Flow
Institutional Capacity
Public Involvement

Objectives

- Develop a general understanding of some of the principles of prior appropriation water law related to management of surface and ground waters in the western U.S.
- Develop a general understanding of the diversity of legal opportunities among western states.
- Identify challenges and possible solutions to more effectively manage rivers and lakes in the face of drought.

Why are instream use laws needed?

- **Provide certainty and control**
  - **Water is the most important element of habitat management**
- **Assert state's rights**
  - **States own and allocate water**

State Ownership of Water

The states assumed the authority of the King of England and became the trustees of the beds of navigable waters and tidelands.

"For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the Constitution to the general government."

Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842)

Water Administration & Ownership

- Subsequent states assumed those rights to water on the Equal Footing Doctrine.
- Federal government was delegated reserved rights for navigation to promote interstate commerce in the U. S. Constitution.
- Federal government reserved rights in 1908 under the Winters Act for Native Americans reservations.

Federal Reserved Water Rights

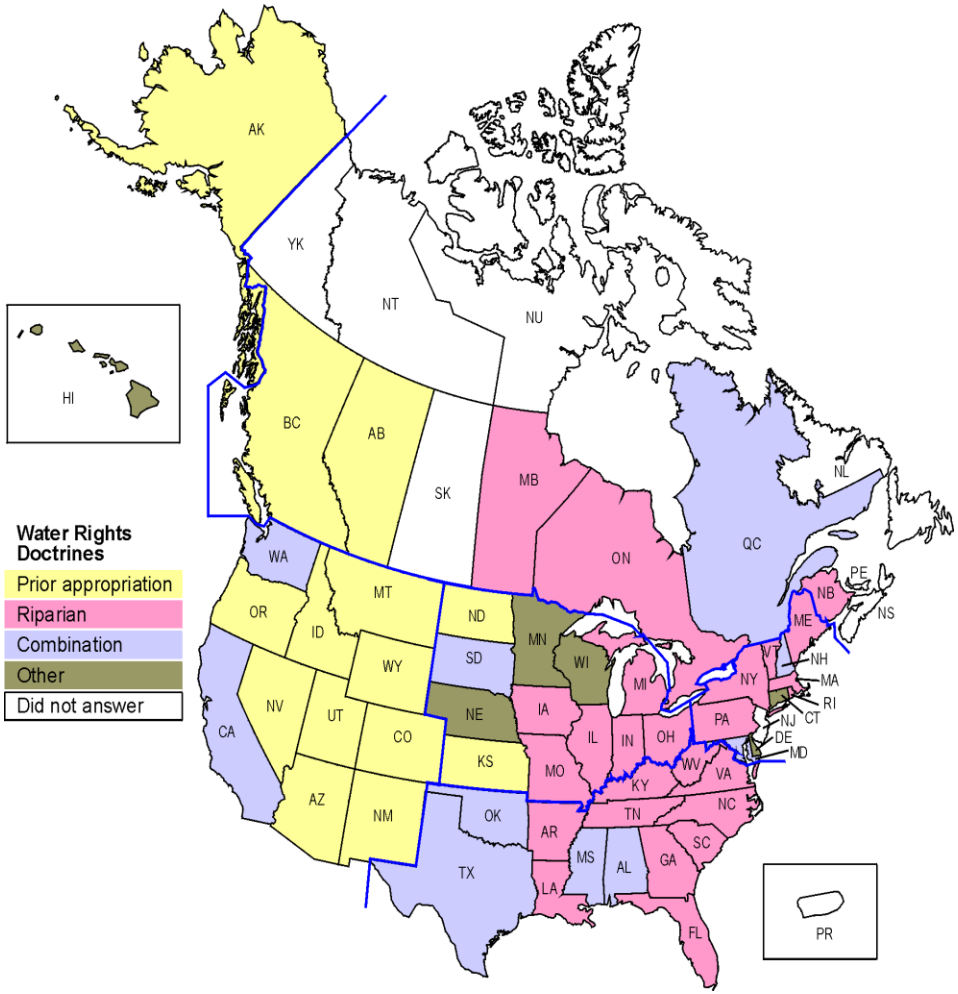
- Supreme Court expanded Winters Doctrine in 1963 (AZ v CA)
  - Impliedly reserves sufficient water to serve the primary purposes for which all federal lands were reserved. The amount of the reserved water is that "necessary to fulfill the purpose of the reservation, no more," (Cappaert, 426 U.S. at 138), and "without [which] the purposes of the reservation would be entirely defeated."

Federal Reserved Water Rights

- Restricted in 1978 (United States vs. New Mexico) that reserved rights were intended only for:
  - Primary purposes of the reservation (adequate water flows and continuous supply of timber)
  - Not for secondary purposes like instream flow for wildlife and other purposes

Water Right Doctrines

- **Prior Appropriation**
- **Riparian**
- **Regulated Riparianism**
- **Reasonable Use**
- **Public Trust**



INSTREAM FLOW COUNCIL

Riparian Doctrine

- Owners of land along streams have right to reasonable use (and correlative right to prevent unreasonable use)
- Use associated with land – doesn't depend on prior use
- Landowners have equal rights (shortages are shared)
- Only pertains to natural flow – no right of storage
- Must protect fisheries to a reasonable degree
- Highly modified by individual states
- Disputes generally resolved in court

Prior Appropriation

- Right was acquired by diverting water
- Older rights have priority over newer rights
- Tied to specific land (fields)
- Limited to amount beneficially used
- Must be used or can be subject to abandonment
- Rights typically administered by State Engineer or equivalent

Regulated Riparianism

- Evolving in riparian doctrine states.
- Combines elements of riparian doctrine with appropriation doctrine (e.g. priority dates).
- Favors development interests.
- Mechanism to take more water out of streams.
- Unclear how this could work for instream flows.

Reasonable Use Doctrine

- Constitutionally and statutorily recognized in CA.
- Inefficient use is unreasonable use
- Pertains to urban, hydropower, recreation, environment, and agriculture
- Application is usually reactive
- Administered by California Water Board

Public Trust Doctrine

- State law – basis for each state's wildlife resource responsibilities
- PTD isn't codified – always combine with other laws (except AK and HI); can vary among states
- PTD is not the same thing as public trust
- Public trust is not the same as public interest
  - Public interest = economic considerations
  - Public trust = matters of common property (air, water, submerged lands, fish, and wildlife)
  - You can act in the public interest and harm the public trust

Basic Tenet of PTD

Certain natural resources, especially the waters and beds of the sea coast and navigable lakes and rivers, are of such importance to the public that they are incapable of purely private ownership and control.

States Have a Duty to Enforce the Trust

"The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, … than it can abdicate its police powers in the administration of government and the preservation of the peace."

Illinois Central R. Co. v. 146 U.S. at 453 (1892)

State ownership of stream beds

“ . . . the title of the riparian proprietors on the banks of the Mississippi extends only to the ordinary high-water mark, and that the shore between high and low-water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters; . . . and especially with regard to the Mississippi and its principle branches.”

Barney v. Keokuk, 94 U.S. 324, 336 (1876)

Day v. Armstrong, 362 P.2d 137 (Wyo. 1961); Wyoming Supreme Court

- The North Platte River is non-navigable
- Federal navigability may have several definitions depending on state laws
- No act of Congress or the state's Constitution limits how states can manage their waters
- Riparian owners have title to the bed and channel
- Right-of-way easement for public to float over private lands
- Boaters may pull, push, and carry boats across riffles
- Riparian owners may not obstruct flow

IFC Public Trust Policy Statement

Laws, regulations, and/or policies affecting fishery and wildlife resources and the habitats upon which they depend should be based on the state or province's legal stewardship responsibilities to manage those resources for the benefit and enjoyment of present and future generations.

(Annear et. al 2004, pg 69)

Water Right Requirements

- **Public Interest**
  - Constitutional requirement in some states
  - Often undefined but efforts to define
  - Sec. 3. Wyoming Constitution
    - No appropriation shall be denied except when such denial is demanded by the public interest

Water Right Requirements

- **Beneficial use**
  - The basis, measure, and limit to the right to use water
  - Often undefined / subjective
  - 93 total recognized beneficial uses in Wyoming

Limit of beneficial use (in Wyo)

- **Irrigation**
  - 1 cubic ft/sec per 70 irrigated acres
  - Second cfs (surplus water) for pre-1945 rights before a post-1945 right can use water.
  - If surplus water is met, “Excess” water is available to supply 2 cfs/70 acres for rights between 1945 and March 1, 1985.
- **Other uses**
  - Livestock & domestic – 25 gpm
  - Municipal – reasonable amounts
  - Instream flow – detailed studies

Kinds of water rights

- **Direct flow**
  - Natural, unregulated water in streams and rivers
  - Water released from reservoirs without ownership
- **Storage rights**
  - Primary rights
  - Secondary rights
  - On-channel storage facilities
  - Off-channel storage facilities

Adjudication

- **Taking proof (of use or control)**
  - Scheduled after allowing time to establish use
  - Take proof of a) diversion, b) adequate conveyance, c) acres irrigated (or use attained)
  - Documented once for the entire use period (so often scheduled during periods of good flow)

Adjudication

- **What about instream flow?**
  - Where's the control?
  - How do you prove use?
  - Taking proof has been an evolving deal
  - Can instream flow rights be abandoned?

Important Terms and Concepts

- **Free River Principle**
  - When senior isn't using water for designated use it's available to the next junior water right holder in priority
  - No such thing as over-appropriated
  - Not codified but exists in every western (prior appropriation) state

Important Terms and Concepts

- **Usufructuary**
  - Having the use or enjoyment but not ownership
  - Can only use for the use(s) listed on the water right certificate
  - Need law to designate alternate uses

Change of Use vs. Enlargement

Change of use

- Show historic consumptive use
  - Usually the last 5 years
  - Assume half of diverted water is consumed
  - Limited to time of year water has been used
- Priority right stays the same
- Must be transparent to the system
  - Cannot diminish the value of any other water right

Enlargement

- Adds a new use
  - New use has current day priority
  - Original use and priority date remain in place
  - Can specify period of use (beyond the underlying use)

Call for Regulation

- **Must show injury (to a water right)**
  - Not getting all the water allowed by permit
  - Not able to “cover” permitted acres
- **Must have standing**
  - Must be the owner of the injured water right
  - Other states don’t have standing (in Wyoming so can’t call for any water that’s not allowed by compact or decree)
  - The public does not have standing (they own the water but don’t own water rights as a class)

Abandonment

(if not put to original use when water is available in 5 years)

- Just makes a right go away. You don't get the water or the right.
- Proving non-use falls on the petitioner to prove
  - Petitioner must have standing (water right)
  - Must show injury if right is reactivated or benefit if right is abandoned
  - Use of water for as little as one hour on one day in a 5-year period when water is available can avert abandonment.
  - Expensive, time consuming, uncertain outcome
- Abandonment is a real deal but often a red herring due to practicalities of cost and uncertainty of outcome.

Level of Flow Regime Protection

- Full flow regime protection
  - No allowances for additional withdrawals or manipulations. Hands-off strategy.
- Comprehensive ecologically based
  - Protection based on all 5 riverine components, varies seasonally and between years.
- Partial ecologically based
  - Protection based on one or more of 5 riverine components
- Threshold protection
  - Baseline protection that is less than the average natural flow at any time during the year

Legal Tools For Protecting And Restoring Flows and Water Volumes

- **Direct filings (current-day priority)**
  - 1960s - state law began passing laws that recognize fish habitat, recreation, etc. as valid beneficial uses.
- **Transfers (temporary use)**
  - Late 1980s - state legislatures began passing laws allowing existing rights to be transferred for environmental uses.
  - Water banks, conservation, leasing
  - Water can be left in stream with priority dates in tact.

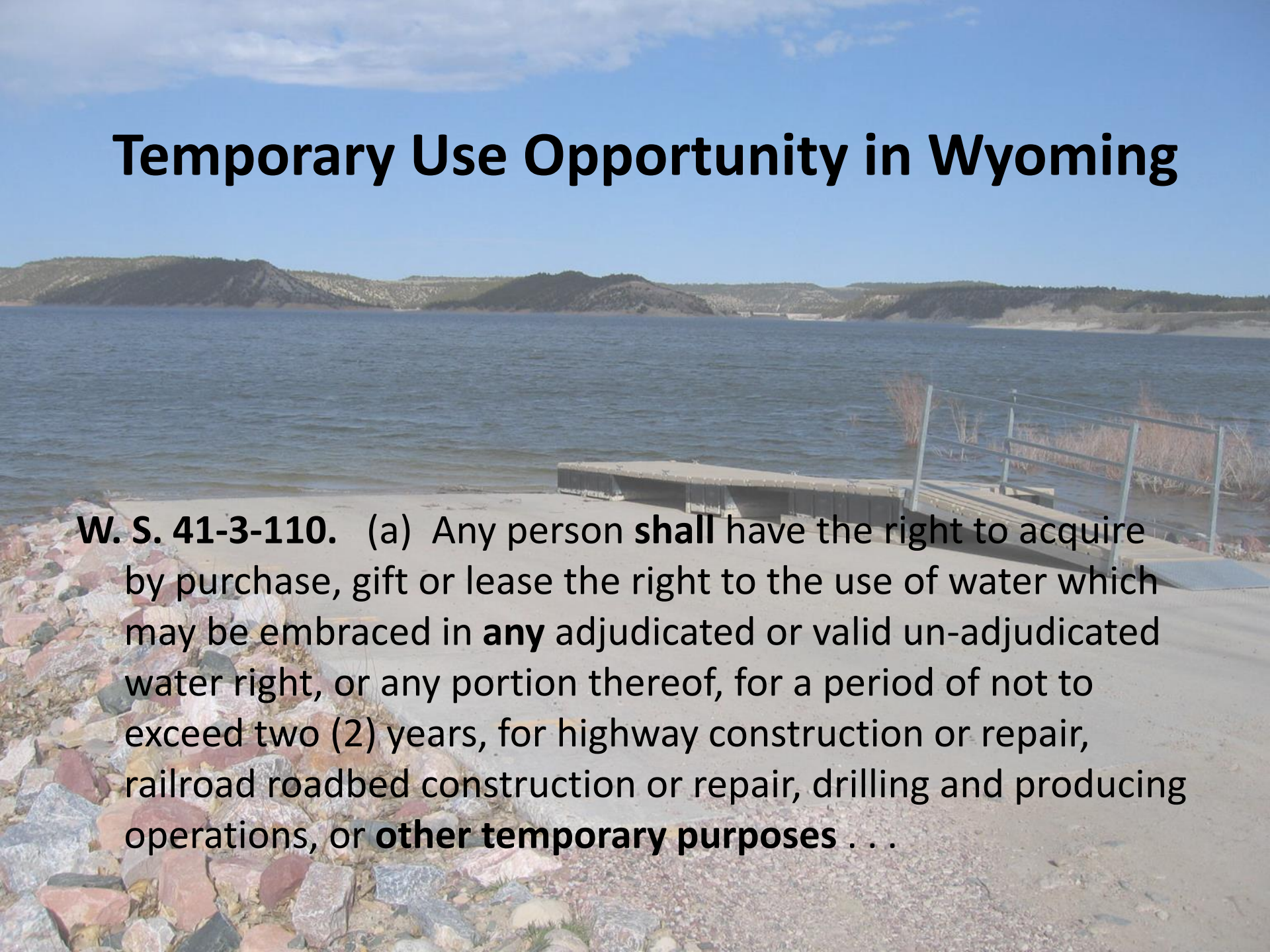
Significant diversity in how western states manage temporary use transfers

- Laws vary in terms of:
  - Limits on quantity & ownership,
  - Scope of permissible transfers (segments),
  - The approval process
- Typically different criteria for instream use vs. out of stream uses

Temporary Use Transfers Vary

- Hundreds of leases and transfers in Washington and Oregon
- Few or none in Wyoming, Arizona, and New Mexico

Temporary Use Opportunity in Wyoming



W. S. 41-3-110. (a) Any person **shall** have the right to acquire by purchase, gift or lease the right to the use of water which may be embraced in **any** adjudicated or valid un-adjudicated water right, or any portion thereof, for a period of not to exceed two (2) years, for highway construction or repair, railroad roadbed construction or repair, drilling and producing operations, or **other temporary purposes** . . .

Water Banks

- Permanent institutions that can manage short-term environmental water transfers.
- Usually set by statute.
- Fee-based between willing seller-buyer.
- Can provide flexibility and ease of transfer.
- Often associated with targeted stream segments and specific species (ESA issues).
- Idaho has used water banks despite limiting instream flow laws.

Conservation

- Must quantify historic, consumptive use
- Allow water right holder to keep discretionary control over conserved water.
- Need laws to address Free River Principle and usufructuary nature of water rights.

Few western states have legal mechanisms to protect conserved water from junior users

- Free River Principle = if a right isn't being used, the water is "free" or available to the next water right holder in priority.
- Unless there is a legal mechanism to manage the saved water, conservation doesn't free up any water.
- Need to be sure you're getting legally protected water in the river.

Lake and reservoir level protection

- Distinguish between natural lakes and reservoirs
- Allow protection of any amount of storage in reservoirs, not just minimum pools
- Emulate natural fluctuations in natural lakes
- Balance volumes in lakes with flows in streams

Few states have strong instream use laws

- Most have more restrictive bureaucratic processes for instream flow than other uses
- Most only allow protection of minimum flows – not the full range of ecosystem flows needed for meaningful habitat protection
- Few states have laws that put fish and wildlife on the same level as other water uses

Key Elements for Effectiveness

- Laws should recognize a range of environmental uses
- Allow private ownership of temporary uses
- Allow extended time or renewal without risk of abandonment (>5 years)
- Allow use of water banks
- Allow split-season transfers
- Allow conserved water to be transferred (and retain ownership)
- Treat transfers for environmental use the same as transfers for all other uses
- Provide certainty and control


So What?

To manage rivers and lakes during drought you must manage water

- Instream use must have same standing and process as other uses.
- Good science and accurate recommendations are important, but not as important as legal standing.
- The goal is certainty and control!


Questions?

When is an instream flow right not an instream flow right?

Clark's Fork Yellowstone River

- Federal nomination for wild & scenic in 1979
- Flow needed to maintain outstandingly remarkable values
- Shoshone N.F. filed state water right application in 1994
- Based on USFS dynamic hydrograph model (85% of instantaneous daily flow up to 25-yr flood flow)
- But for wild and scenic (not instream flow)
- Can only be used on USFS wild & scenic rivers

Laramie River / Greyrocks Reservoir

- Missouri Basin Power – coal fired plant
- Completed in 1980
- Consumes 60,000 ac-ft / year for cooling
- Added to impacts to endangered species in NE
- Multiple law suits and negotiations ended in 1978
- Mitigation included $7.5 million for habitat and seasonally adjusted instream flow measured at the mouth of the Laramie River

Laramie River / Greyrocks Reservoir
What's the problem?

- No person other than the State of Wyoming may own an instream flow right
- Instream flow releases were diverted for irrigation before reaching the North Platte
- The Solution?
  - Change the use of 5,000 ac-ft from industrial to fish & wildlife
  - Release from storage for fish and wildlife could be protected
  - Narrowly defined to apply only for meeting permit requirements demanded by ESA

Characteristics of good state laws

- Put instream use on same footing as all uses
- Define the use (fish, fishery, recreation, riparian, water quality)
- Allow permanent and temporary use
- Allow protection and restoration
- Define a level of (flow regime) protection
- Don’t say minimum flow