

Recommendations

The Natural Resources Commission recognizes instream uses as valid and important uses of Nebraska's streamflows. On this basis, the Commission recommends a combination of several policy alternatives which, when taken as a whole, would clear up ambiguities in the state's present policies. In summary, the Commission recommends the following:

- 1) Allow instream needs to be met through stored water.
- 2) Alternative#6, with the exception that the designation of protected stream reaches should be the responsibility of the Natural Resource Districts, rather than a state administered system.
- 3) If a stream is designated as a protected stream, subsequent permits issued by the Department of Water Resources would be junior to the instream flow permit. Junior permits would only apply to water in excess of instream needs. Water rights held prior to the designation would remain unaffected.
- 4) Numerous considerations should be investigated and resolved before designations take effect. These include restrictions on development of groundwater adjacent to or upstream from a designated stream, amount of land to be included, and use of groundwater to supplement natural flow.



Across the State

Nebraska's streams and rivers are important to people across the state. Whether used for fishing, canoeing, stockwatering, hydroelectric power production, or purely aesthetic purposes, these streams and rivers play an important role in the lives of many people. Local designation of protected stream reaches would allow permits to be issued for these various instream uses. This makes good sense to the Natural Resources Commission and to the vast numbers of Nebraskans whose lives are enriched through these uses of Nebraska's water.

Mark Twain remarked on one of his first western visits, in observing a dry river bed, that he didn't realize until then "...how much water improves the appearance of a river."

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POLICY ISSUE STUDY ON

INSTREAM FLOWS



State Water
Planning and Review Process

Nebraska
Natural Resources Commission

INSTREAM FLOWS

A fisherman pulls a rainbow trout from the waters of the North Platte River. A canoe is quietly paddled on a scenic journey on the Niobrara River. A tugboat gamely pushes a barge loaded with cement beneath the Bellevue bridge on its way to port facilities at Omaha. A flock of Sandhills Cranes, numbering over 200,000, provide a rare spectacle as they temporarily make the Platte River valley their home each spring.

Each of these scenes is an example of an instream use of water. Other uses of water, such as for domestic, agricultural or manufacturing purposes, are recognized and regulated by the state constitution or by statutes. Instream uses are generally not legally recognized leading to the question of what status, if any, instream uses should have under Nebraska law. This question, and other matters pertaining to instream flow, are addressed in a report which is available from the Natural Resources Commission upon request.

Instream Use Defined

Instream use is defined as "any use of stream flow that occurs within a stream channel and does not require diversion or impoundment." This definition includes the four uses described above: fisheries, recreation, navigation and water supply for wildlife, and also includes such diverse uses as generation of hydroelectric power, instream stockwatering, preservation of wild and scenic rivers, and aquifer recharge.

In recent years, the issue of instream use has gained importance because supplies of water in some parts of the state have not been adequate to maintain both instream and out-of-stream uses. Certain instream uses, such as hydroelectric power generation and aquifer recharge, are restricted to certain streams. Others, such as fisheries and recreation, are important state-wide, and are strongly and adversely affected by low flow or no flow conditions. Expected stream-flow depletions in the future may further affect the use of Nebraska's streams and rivers for instream purposes.



Present State Policy

The legal status of instream uses of water is presently unclear. It has not been addressed by statute, court decision, or formal administrative ruling by the Department of Water Resources. Current laws are clearly aimed at protecting rights of those using water for recognized beneficial purposes, such as domestic use or irrigation. Maintaining flows for instream uses is not provided for under the state's present water laws. These present laws are based upon two legal doctrines: (1) the riparian rights doctrine, and (2) the doctrine of prior appropriation.

Riparian rights may be acquired for instream stockwatering, power production, and milling. The lack of a guaranteed quantity of water, though, causes this doctrine to be considered of little value in ensuring dependable supplies for instream uses.

Nebraska's system of prior appropriation, which allows the holder of a permit to use a specific quantity of water, is also presently considered to be of little value in maintaining flows for instream purposes. The exercise of a natural flow permit allows the appropriator to impound or

divert an entire streamflow if necessary to satisfy his water right, regardless of effects on instream flow values. Natural flow permits may be issued for hydroelectric power production, but present law is unclear as to whether permits may be issued for other instream uses.

There are few provisions in current Nebraska law which protect instream uses from groundwater withdrawals that reduce streamflow. The state's Groundwater Management and Protection Act does not list the maintenance of streamflow as a recognized objective.

Attempts at Change

The lack of a clear state policy towards instream uses has been recognized several times in the past. A 1971 report by the Nebraska Soil and Water Conservation Commission concluded that measures were needed relating to several instream flow values. This report also recommended establishment of a system of protected rivers.

Legislative bills were introduced in 1977 and 1980 which would have allowed the acquisition of natural flow permits for instream uses, but both failed to advance out of committee. A more recent bill, which was passed by the legislature, requires the Director of the Department of Water Resources to consider instream uses when assessing impacts of proposed transbasin diversions.

Water Rights Commitments

Existing water rights must be considered prior to the implementation of any new policy involving instream flow appropriation. Certain streams, such as the tributaries of the North Platte River above Lake McConaughy, are entirely committed to existing water rights. Others may be entirely committed, but only seasonally. Streams in this category include the Platte River in central Nebraska and the White River. Still others, including most streams in the Niobrara River Basin, contain unappropriated flow throughout the year. Streams in this category are considered to have a high potential for possible appropriation for instream uses.

Policy Alternatives

In an effort to formulate a clear and appropriate state policy with regard to instream uses of water, an interagency task force, as part of the State Water Planning and Review Process, has formulated a list of 13 possible policy alternatives. These alternatives provide the legislature with the choices of either continuing present state policy, providing for the maintenance of streamflow for instream uses, or prohibiting the use of certain methods for maintenance of instream flows. Few of the alternatives are mutually exclusive, allowing numerous combinations of the rest in order to implement particular policies.

The alternatives are:

- 1) *Continue present policy*
- 2) *Declare that natural flow permits may be issued for instream uses*
- 3) *Prohibit the issuance of natural flow permits for instream uses other than hydroelectric power production*
- 4) *Authorize the establishment of protected flow levels*
- 5) *Prohibit the exercise of the director's discretionary authority as a means of protecting instream uses*
- 6) *Provide for a state administered system of protected river reaches*
- 7) *Declare that instream flow needs may be met through the use of stored water*
- 8) *Prohibit the use of stored water for instream flow maintenance*
- 9) *Authorize the Department of Water Resources to reassign abandoned or unused natural flow permits for instream uses*
- 10) *Allow the voluntary transfer of natural flow permits for instream uses*
- 11) *Prohibit the voluntary transfer of natural flow permits for instream uses*
- 12) *Declare that groundwater may be used to supplement natural flow to meet instream flow needs*
- 13) *Impose restrictions on the use of groundwater*