

**METHODS FOR ESTABLISHING
INSTREAM FLOWS in WASHINGTON STATE**

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1. Washington State Instream Flow Program

A. Overview

Washington state, through the Dep't of Ecology, adopts regulations that establish water rights for rivers, with a priority date as of the date of rule adoption. The flows are subordinate to pre-existing water rights, and senior to all rights granted after. Instream flows rules have been adopted in less than half of Washington's rivers. Pre-dating this process, Washington Dep't of Fish & Wildlife recommendations have led to flow conditions on water rights that effectively set flows for streams and rivers with game fish or other fisheries of importance to the state.

B. Statutes & Regulations

- a. RCW Ch. 90.22 – Minimum Flows Act of 1969
- b. RCW 90.54.020- "Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."
- c. RCW Ch. 90.82 – Watershed Planning
- d. RCW 77.57.020 – WA Dep't of Fish & Wildlife water rights flow consultation
- e. WAC Ch. 173-500 – Water Resources Management Program
- f. WAC Chs. 173-501 through -591 – Water Resource Inventory Area rules

C. Resources

- a. Department of Ecology, 2014 Report to Legislature: Statewide Progress on Setting Instream Flows (2015) (and reports from previous years)
- b. Schromen-Wawrin, Lindsey, Adopting Instream Flow Rules in Washington State: Can Citizens Jumpstart the Process Through the Administrative Procedure Act?, Gonzaga Law Review (2013)
- c. Instream Flow Toolkit: Advocacy Guide to Healthy River and Stream Flows in Washington State (Am. Rivers 2003)

2. Trust Water Rights & Water Markets

A. Overview

Existing out-of-stream water rights may be converted to instream flow rights via purchase or donation. Permanent trust water rights are owned by Washington. Water right holders can also create “temporary” trust water rights to avoid relinquishment.

B. Statutes & Regulations

- a. Trust Water Rights, RCW Ch. 90.42
- b. Yakima Basin Trust Water Rights, RCW Ch. 90.38

C. Resources

- a. Dep’t of Ecology, Trust Water Right Guidance, GUID-1220 (2011)
- b. Dep’t of Ecology, Report to Legislature: Water Banking in Washington State, Publ. No. 12-11-055 (2012)
- c. Washington Water Trust, www.washingtonwatertrust.org

3. Federal Power Act Licensing, Clean Water Act Section 401 Certifications, and Coastal Zone Management Act Certifications

A. Overview

Power-producing dams must have licenses from the Federal Energy Regulatory Commission (FERC). These licenses are renewable and are typically of 30 to 50-year duration. Upon renewal, the licenses are subject to public interest review and conditions that often require release of water to satisfy instream flow uses such as water quality, fisheries protection and recreation. The states may control the water release quantity via Section 401 of the Clean Water Act, which requires that federal permits comply with state water quality standards. Those standards often require protection of uses that involve maintaining flow (e.g., salmon migration, spawning and rearing).

B. Statutes & Regulations

- a. Federal Power Act, 16 USC §791 et seq. and amendments, including Electric Consumers Protection Act, 16 USC §797 (requiring FERC to give “equal consideration” to energy conservation, fish & wildlife, recreation and environmental quality along with power development)
- b. Clean Water Act Section 401, 33 USC §1341 (authorizing states to require that federal permits be consistent with state water quality standards)
- c. RCW 90.48.260 (Ecology is state delegee of federal clean water act authority); RCW 90.48.422 (affirming 401 Cert instream flow authority)

- d. Washington state water quality standards, WAC Ch. 173-201A (requiring protection of fish & wildlife, recreation, navigation and aesthetic values)

C. Resources

- a. Spokane Falls settlement of CELP & Sierra Club v. Avista Corp. (PCHB 2009)
- b. Hooker, Megan, Recreation and Aesthetics in the Public Interest: History and Overview of Hydropower License Denials by the Federal Energy Regulatory Commission, J. of Env'tal Law & Litigation (2014)
- c. Ransel, Katherine, The Sleeping Giant Awakens: PUD No. 1 of Jefferson County vs. Washington Dep't of Ecology, 25 Env'tl. Law 255 (1995)

4. Endangered Species Act

A. Overview

The Endangered Species Act (ESA) requires protection of listed species, notably 13 species of salmon and steelhead in the Columbia Basin, and their habitat. The ESA protects listed species from "take" and "harm," which includes preventing destruction of habitat, including water diversions that deplete instream flows. This requirement may be implemented through designation of critical habitat, enforcement actions, federal agency consultation, Biological Opinions for public and private projects, and habitat conservation plans.

B. Statutes & Regulations

- a. Endangered Species Act, 16 U.S.C. § 1531, et seq, including Section 4 (designating critical habitat), Section 7 (prohibiting federal agency jeopardy and requiring consultation), Section 9 (prohibiting "take"), and Section 10 (habitat conservation planning).
- b. ESA regulations, 50 CFR § 222.102 (defining "harm" and "take")

C. Resources

- a. Craig, Robin Kundis, Does the Endangered Species Act Preempt State Water Law?, 62 U. Kansas L. Rev. 851 (2014)
- b. Melious, Jean O., Enforcing the Endangered Species Act Against the States, 25 Wm. & Mary Env'l L. & Pol. Rev. 605 (2001)
- c. Osborn, Rachael, Fish Out of Water: Intersections Between the Endangered Species Act and Water Rights in the Pacific Northwest (CELP 1999)

5. Public Trust Doctrine

A. Overview

This ancient common law doctrine, handed down from Roman times to modern environmental law, places ownership of the beds, banks and water of navigable rivers (and non-navigable tributaries) with the state. The state serves as trustee for its citizens and is charged to protect public interests in navigation, on-water commerce, fisheries and environmental quality. The doctrine has been utilized in California and Hawaii to protect instream flows and limit water rights.

B. Statutes & Regulations

- a. Institutes of Justinian, § 2.1.1 (533 A.D.)
- b. Wash. Const. art. XV

C. Resources

- a. Johnson, Ralph W., et al., The Public Trust Doctrine and Coastal Zone Management in Washington State, 67 Wash. L. Rev. 521 (1992)
- b. Klass, Alexandra B. & Ling-Yee Huang, Restoring the Trust: Water Resources & the Public Trust Doctrine, A Manual for Advocates (Center for Progressive Reform, 2009)
- c. Dowie, Mark, In Law We Trust (Orion Magazine)

6. The Winters Doctrine & Stevens Treaty Water Rights

A. Overview

All Native American Tribes reserved water, through their treaties and executive orders, to serve on-reservation purposes, which may include fisheries and other water resource needs that require instream flows. In addition, the eleven "Stevens treaties" of the mid-1850's reserved rights of the Pacific Northwest Tribes to 'fish in common' with the people of the territory at off-reservation sites (where the salmon go). This fishing right has an environmental component and may be used to establish instream flows to support sustainable fish populations.

B. Resources

- a. Wilkinson, Charles, Messages from Frank's Landing (UW Press 2000)
- b. Understanding Tribal Treaty Rights in Western Washington (NWIFC website)
- c. Osborn, Rachael P., Native American Winters Doctrine and Stevens Treaty Water Rights: Recognition, Quantification and Management (American Indian Law Journal 2013)