Policy Issue Research Committee Report

Utah Farm Bureau Federation

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Instream Flows
Prepared by Sterling Brown

Purpose of Report
Under the direction of the Utah Farm Bureau Board of Directors, a Policy Issue Research Committee (PIRC) was appointed to help achieve one of its five Strategic Goals – develop and implement grassroots policy through advocacy and education by focusing on 3-5 priority policy issues. PIRCs help accomplish this goal by providing a forum for in-depth analysis on pertinent issues facing Utah Farm Bureau.

Instream flows has been identified as one of those priority issues that warrant further review and action.

All county Farm Bureau members are invited to review this fact finding summary and participate in a county Farm Bureau, grassroots policy discussion before submitting possible policy recommendations to the Utah Farm Bureau Resolutions Committee. Farm Bureau members can only forward Utah Farm Bureau policy recommendations through their respective county Farm Bureau. Proposed policy changes must be received in the Utah Farm Bureau Office by the close of Tuesday, October 31, 2017 – Attention Sterling Brown – 9865 South State Street, Sandy, Utah 84070 or sterling.brown@fbfs.com.

Policy Issue Research Committee (PIRC)

Members
- Jay Humphrey - Orangeville
- Jeremy Sorensen - Spanish Fork
- Kerry Cook - Loa
- Val Jay Rigby - Newton
- Charles Holmgren - Bear River
- John Swasey - Duchesne

Presenters
- Tim Hawkes, Utah Representative District 18 (R-Centerville)
- Paul Burnett, Director for Utah Trout Unlimited
- Laurel Breifer, Director of Salt Lake City Public Utilities Dept.

What is an "Instream Flow?"
Instream flow is simply the water left flowing in a natural stream channel. It really means the same thing as “streamflow,” but the “in” is added to emphasize the flow is occurring in a natural channel rather than in a canal or pipeline. A dry stream channel has no instream flow. A pristine stream with flowing water in it year-round has excellent instream flow.
**Issue**

Private water rights are the foundation of western water law. The existing Appropriation Doctrine states the water in the stream belongs to the public or the state and may be appropriated only for “beneficial uses.” Historically, beneficial uses have been defined as economically beneficial diversions of water from the natural stream channel. Utah law states beneficial uses include: irrigation, livestock, municipal and industrial, hydropower, mining, aquaculture and environmental and recreational.

The Appropriation Doctrine promotes the acquisition and regulation of rights for private use of water and minimizes opportunities to maintain water within the stream channel to protect and preserve instream flow values, such as fish habitat.

**Utah History of Instream Flows**

Instream flow water rights did not become part of Utah water law until 1986. The prevailing view in Utah for decades was that providing water rights for wildlife watering was unnecessary, since as the term implied, wildlife could find water for themselves and watering them provided no particular benefit to any private party. Since 1971, a provision in Utah law provides that the State Engineer, in approving either an application to appropriate or change application, will consider the effect of approval on the natural stream environment and public recreation. If he or she has reason to believe it would be unreasonably affected, they are to withhold his decision until they have further studied the matter and then only approve if the application meets all the statutory requirements, including not being detrimental to the public welfare. The more general public welfare criteria has been in the statute since at least 1939. Although the provision has rarely been exercised to reject an application, there has been a mechanism to protect public water from further appropriation (leave it instream) if it was thought to be a public welfare issue.

In 1986, Representative Gayle McKeachnie passed HB 58 giving Utah’s Division of Wildlife Resources (DWR) authority to apply for an instream flow change application for the specific benefit of fish habitat and propagation, with certain conditions. In 1992, the Utah law was again amended to allow Utah’s Division of Parks and Recreation (DPR) to apply for instream flow change applications for purposes of public recreation. Both DWR and DPR may file applications on: 1) perfected water rights owned by the division; 2) perfected water rights purchased by the division with funding appropriated by the Utah legislature for instream flows or acquired by lease, agreement, gift, exchange or contribution; or 3) water rights acquired with the acquisition of real property. This law has had little impact. DWR has perfected only a handful of instream flow rights and DPR has perfected one.

Efforts to further expand Utah’s instream flow laws met with mixed results in the years that followed. Efforts to add instream flow for water quality purposes was attempted in the 2007 Utah Legislature, but was defeated with the tag line “the solution to pollution is not dilution.” Then, in 2007, legislative efforts to add instream flow possibilities for non-public entities (enhance trout fisheries) was attempted, but unsuccessful. The following year (2008), the Utah Legislature was successful in creating a new section in Utah law (73-3-30) for instream flow change applications.
The 2008 legislation allows a non-profit organization, that specifically promotes fishing in Utah, to file fixed time change applications for instream flow for purposes of protecting or restoring habit of three native trout.

Current instream flow laws provide that the change may not impair any vested water rights and is done on a willing seller basis. Utah law currently states the two Divisions and fishing groups cannot use eminent domain to acquire water rights for an instream flow.

During the 2017 Utah Legislative Session, the legislature considered allowing public water suppliers (PWS) to file instream flow change applications. Those in favor argued PWS water rights are often held for long periods of time before being needed and could be put to a public use by providing water for instream flow. The bill was eventually substituted and passed directing the sponsor and stakeholders to further study the issue in preparation for a bill next year (2018). A PWS is currently defined as an entity that: supplies water, directly or indirectly, to the public for municipal, domestic, or industrial use and is a public entity, a water corporation, a community water system and a water users association.

**Municipal Public Water Supplies**

For example, Salt Lake City’s Department of Public Utilities (SLCDPU) is a department of Salt Lake City. It manages three separate water-related utilities – culinary water, stormwater and wastewater. Salt Lake City’s water systems affect, and are affected by, the local conditions in the Utah Lake and Jordan River watersheds. Water supply and quality are challenged by pollution, drought, diversions and other conditions. In Salt Lake Valley, these challenges are anticipated to increase as changes in population, land-use and public values create more pressure on water supply, quality and public uses.

SLCDPU is investing more than $250 million to rebuild its wastewater treatment plant to meet federal and state nutrient discharge requirements by 2025. In addition, SLCDPU stormwater program was recently audited by the U.S. Environmental Protection Agency (EPA) and Utah’s Department of Environmental Quality (DEQ) to evaluate compliance with various water quality permits. Audit results are still pending, but it is anticipated that the stormwater program will require additional improvements to increasing regularly requirements.

Recent local and national events such as the unprecedented toxic algae bloom in Utah Lake during the summer of 2016, increasing lakebed exposure in the Great Salt Lake during the last few years of drought, the crude oil spill into Red Butte Creek in 2010, the water quality catastrophe in Flint Michigan and the intense drought in California over the last few years are contributing to overall public concern about the future of Utah’s waters. SLCDPU claims their ability to apply water rights to instream flows, for purposes of improving water quality impairments, may be more effective than hard infrastructure solutions, saving costs that would be passed to the public.
There are benefits and concerns when considering expanding Utah’s instream flow laws.

**Benefits**

1. **Completely Voluntary** – Water right holders will use this legislation as their sole option and only if they benefit from that use.

2. **Expands Private Property Rights** – Provides water right holders with additional flexibility to use their water rights to their advantage. Allows private (not just public) entities to hold instream flow rights.

3. **Respects existing water rights** – By law, a change application for an instream flow right may be approved only if it does not impair any vested water right.

4. **Helps avoid forfeiture** – Unused water rights are subject to forfeiture. One who is not fully using a water right may lease or donate the unused portion of that right to a qualified entity for use in stream, thereby putting that water to beneficial use, maintaining ownership of the full water right and avoiding forfeiture.

5. **Provides financial benefit** – Water right holders may sell, lease or donate all or a portion of their water right for instream purposes and receive compensation through either direct payments or tax advantages. Such compensation may exceed returns from other uses. Landowners could benefit from charging entrance fees to access the enhanced fish and wildlife populations.

6. **Encourages Conservation** – May water right holders are reluctant to implement conservation measures because they legitimately fear losing their right to any saved water under the “use it or lose it” principles of Utah water law. Water right holders could put that saved water to beneficial use and thereby generate additional income, creating an incentive to conserve and avoid forfeiture.

7. **Protects Water Quality** – Return flows from upstream diversions often carry salts, chemicals, silt and other pollutants. In addition, reduced stream flows are less able to assimilate pollution. If some of an upstream water right is converted to an instream right and not diverted, downstream users will receive higher-quality water and water providers will reduce their water treatment costs.

8. **Promotes rural economic development** – Most of Utah’s fisheries are located in rural areas of the state. Many fail to reach their recreational and economic potential due to depleted flows. Increasing flows in some of these streams could create premiere fisheries and attract recreational dollars to rural Utah economies. Fishing contributes over $400 million to the Utah economy (USFWS 2001, Preliminary Findings).
Concerns

1. **Junior water right holders** – Water right holders holding junior water rights, and not receiving their full allotment, would see instream flow uses frustrating their gain from partial forfeiture.

2. **Endangered Species Act** – Providing water for instream flow for endangered fish is often cited as a critical reason for needing revisions to the state’s instream flow laws. One of the criteria which must be met under the federal ESA Act before species can be delisted is perpetual protection of habitat critical to the species under consideration.

3. **Public Access** – Increase public demand and challenges for access to private land.

4. **Perception** – Public Water Suppliers have more potential backing than agricultural interests in purchasing water rights.

5. **Increased Diversity** – Creates more diversity of interests within a ditch company or river system that will have to be satisfied.

6. **Private v. Public Flows** – As the universe of people interested in instream flows increase the variation in objectives may also spread. If those other than the public through state agencies may hold water rights for instream flow, what should the policy be regarding those who may wish to hold a private instream flow to use on a stream which crosses their private property? Is it a private stream or a public body of water?

7. **Agriculture v. Water Quality** – In time, will water quality demands surpass agriculture rights and demands? Will the “solution to pollution is dilution” approach trump production agriculture needs?

8. **Unfair competition for purchase/lease** – Many people believe PWS could outbid any farmer for water, thereby buying up water in a particular stream.

**Question for Consideration**

Should instream flow water rights be expanded to include Public Water Suppliers?
Current Utah Farm Bureau Policy

We support:
1) efforts to maintain water on farm lands.
2) an adequate supply of high quality water for agriculture at economically feasible prices.

We oppose:
1) expanding the definition of beneficial use to include recreation.

We support:
12) the leasing of water for instream flows so long as (page 51):
   a. other water rights will not and could not be adversely affected.
   b. Utah does not lose water to other states.
   c. all assessments are retained on the respective rights.
   d. instream flows rights are not acquired through use of eminent domain powers.
   e. instream flow rights are not acquired based on diligence claims unless those claims have been previously recognized by court decree.
   f. the cost of administering the instream flow change is borne entirely by the instream flow holder.
13) careful planning by municipalities, public water suppliers and governmental agencies when acquiring water rights or water stock and when developing new water sources and systems in order to reduce impacts on agriculture and other water users.

We oppose:
3) creation of instream flow rights in artificial water bodies such as reservoirs, canals, and ditches except by arms length agreements with the owners and users of such facilities.
4) the purchase of water rights for instream flows

Committee Recommendations

The Committee did not recommend new or amended policy. However, the Committee feels Utah Farm Bureau should consider supporting pending future legislation that would:

1) make water quality a beneficial use so long as agriculture could also use water rights for water quality purposes, and/or
2) make provisions for PWS’s to lease water rights for instream flow purposes so long as agriculture protections (as listed in existing Utah Farm Bureau policy) are implemented.

NOTE: It’s staff’s recommendation that a new “Instream Flow” section be created for existing policy. Current instream flow policy is scattered throughout three sections.

Recommended Policy

Submit proposed policy changes here:

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