

University of Colorado Law School

Colorado Law Scholarly Commons

Instream Flow Protection in the Western United States: A Practical Symposium (March 31-April 1)

1988

3-31-1988

Wyoming's New Instream Flow Law

Gordon W. Fassett

Follow this and additional works at: <https://scholar.law.colorado.edu/instream-flow-protection-in-western-united-states>



Part of the [Hydrology Commons](#), [Law and Economics Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [Public Policy Commons](#), [State and Local Government Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Fassett, Gordon W., "Wyoming's New Instream Flow Law" (1988). *Instream Flow Protection in the Western United States: A Practical Symposium (March 31-April 1)*.
<https://scholar.law.colorado.edu/instream-flow-protection-in-western-united-states/12>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO **LAW**
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

Gordon W. Fassett, *Wyoming's New Instream Flow Law*, in *INSTREAM FLOW PROTECTION IN THE WESTERN UNITED STATES: A PRACTICAL SYMPOSIUM* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

WYOMING'S NEW INSTREAM FLOW LAW

GORDON W. FASSETT
WYOMING STATE ENGINEER
CHEYENNE, WYOMING

INSTREAM FLOWS AND THE PUBLIC TRUST

THIRD ANNUAL
WESTERN STATES WATER COUNCIL
WATER MANAGEMENT SYMPOSIUM PROCEEDINGS

September 11-12, 1986

)

11

)

)

WYOMING'S NEW INSTREAM FLOW LAW

Gordon W. Fassett*

ABSTRACT: In early 1986, the State of Wyoming enacted an instream flow law. This marks the first time that Wyoming water laws have offered a process of appropriation and protection to instream flow uses. The legislation was a product of over ten years of debate and compromise with all interests claiming some victory. Presented is a discussion of the major provisions of the Act, the protections offered to other appropriators and the in-place user, and possible limitations on the instream flow permit. The complex and seemingly cumbersome interagency appropriation process is also briefly reviewed.

INTRODUCTION

In March of 1986, the State of Wyoming enacted an instream flow law. This was the culminating legislative action on this issue that began with serious interest and debate in 1972. This new bill makes available the legal protections offered by the State's water right permit and regulation systems to instream flow purposes.

The legislation is considered a genuine product of education and compromise among the varied and conflicting interests

*State Engineer, State of Wyoming, Herschler Building, Cheyenne, Wyoming 82002 (307-777-7354)

involved. The agricultural, municipal, wildlife, environmental and State regulatory views were heard, molded, balanced and modified into the enacted language. Only practical experience, legislative change and court actions will all test the new law in the years ahead. These comments are presented to review the key provisions of the Act and to discuss the anticipated implementation of the law within Wyoming's regulatory framework.

BACKGROUND DISCUSSION

Although debate, interest and activity regarding the instream flow issue began in 1972, serious legislative action in response to differing public pressures began in 1979. Between 1979 and 1985, 19 instream flow bills were introduced and failed for one reason or another due to plain stubbornness, organized opposition and misunderstandings. Initially, involvement by the Wyoming State Engineer's Office was one of opposition. As the debates continued with many hours of work, the process evolved into a learning and creative experience. Early proposals were not adequately blended into the existing body of water law and administrative procedures. However, all players involved were educating themselves of the issues and possible resolutions.

Many of the legislative stumbling blocks preventing passage of a comprehensive bill were differences of understanding the instream flow problems and needs. Some authors of specific language supported the concept of instream flow releases from reservoir facilities. Others lobbied for a more comprehensive

approach to authorize appropriations for instream flow on a direct (in-stream) flow basis, for releases from reservoirs and under certain conditions, from conversion of existing rights to instream flow uses. While the Legislature seemed firmly stalemated over these differing strategies, work and effort continued during the interim periods to create a compromise bill.

Many early misunderstandings were based on the lack of knowledge of the existing water laws and the related legal and technical efforts needed to combine the new instream flow use requirements with the historic consumptive uses provided under the law for almost 100 years. Through continued hard work and compromise, the present law was framed in mid-1985 and modified slightly prior to passage early in 1986. The Act successfully fit the instream flow appropriation process and newly expanded beneficial use concept, into the existing water rights system under the prior appropriation doctrine used in Wyoming, while providing protections to other appropriators from potential injury as a result of instream flows.

Beginning several years before the final 1986 enactment, a citizen's group (Citizens Committee for Instream Flow, sponsored by Wyoming Wildlife Federation) began an initiative drive to place a 1983 version of a similar instream flow bill on the ballot. They collected over 32,000 signatures by 1985, more than the required number to place the issue before the voters during the 1986 General Election. During the 1985 and 1986 legislative sessions, the existence of the ballot bill, the first initiative

ballot issue of its kind in Wyoming, was a continuing reminder that if the Legislature did not enact a "substantially similar" bill, the initiative process would go forward. The Citizens Committee representatives supported, although not fully endorsed, the final compromise language during the 1986 session. This enacted legislation was subsequently found by the Wyoming Attorney General to be substantially similar, as amended in final form, and the initiative bill was accordingly dropped from the 1986 ballot.

The law, as discussed below, is perhaps more complex than would be necessary and seemingly difficult to manage. However, this complexity was derived from the years of growth and meaningful desire to address the concerns and fears of the public. The Legislation, codified as Wyoming Statutes 41-3-1001 through 1014, 1986, is supported by the State Engineer and attached to this commentary in full text for reference. The State is currently orchestrating the careful implementation of this new law by all State agencies that were specifically provided certain responsibilities.

OVERVIEW OF WYOMING'S INSTREAM FLOW LAW

The new statutes include 14 sections, some with subsections, making it one of the more complex State instream flow laws. As mentioned, this new law has not been tested through pragmatic experience or legal action, however, those delegated authority are working hard to evaluate the interagency procedures and

thoughtfully pursue the initial appropriations, expected sometime in the fall of 1986. As a result, this comment will reflect this author's research and understanding of the legislative intent and desired guidance for the process without specific hands-on working experience with the statutory plan.

Beneficial Use

The heart of the law is provided in the first section (W.S. 41-3-1001) where storage of water for a recreational pool or release for instream flows are declared a beneficial use. In addition, the law states that all unappropriated flowing waters within streams are subject to appropriation for instream uses and also declared a beneficial use of the State's waters. The storage flows are authorized to provide the minimum flow necessary to establish or maintain new or existing fisheries. The direct (in-stream) flows must be the minimum flow necessary to maintain or improve existing fisheries.

This language provides specific guidance to the State agencies involved regarding the collection of data and information for a "minimum flow necessary" determination for either the establishment, maintenance or improvement of a fishery. While allowing all types of desired fisheries, the language provides some assurance to other appropriators that the amounts flowing in these streams during times of regulation should be the minimum amount necessary to protect a fishery and not a subjective or idealized flow requirement. Certainly no

other type of in-place uses would be permitted under this language such as for aesthetics or wildlife values.

With this definitional beginning, simply stated, the remaining sections of the law present limitations, procedural steps and responsibilities and guidance to all involved with the new appropriation concept and process. Many of these sections will be briefly and summarily touched upon below.

Stream Segments

Instream flows are only to be granted for specific stream segments or reaches (W.S. 41-3-1002). The minimum amount required for the instream flow purpose must also be specified. Although a number of alternative maximum segment lengths were presented in the legislative debates, the language provided allows the desired flexibility to review each application on its own merits. The law specifically provides that waters, after passing through the segment, are available for reappropriation and use.

Ownership

Wyoming's Instream Flow Law specifically states that only the State of Wyoming can own an instream flow water right (W.S. 41-3-1002(e)). Since Wyoming's Constitution says that the water of all natural streams and lakes within the State are declared the property of the State, it seems logical that the State should own the instream flow right. This provision also lessens the

concern of existing diverters that anti-development interests or radical environmental organizations would acquire and appropriate all available waters of the State and cause shortages for the future.

Acquisition and Transfer

As mentioned previously, Wyoming's Instream Flow Law allows appropriation of water either on a direct (in-stream) flow basis or for the storage and release of water for instream flow purposes. In addition, specific authority under W.S. 41-3-1007 is given the State to acquire existing water rights by voluntary transfer or gift for the purpose of instream flow uses. Upon receipt of such rights, the State must then change the use of the right in accordance with applicable State law. Such changes, from a consumptive to an instream use, would, in conformance with State statutes, be limited to the historic amount consumed and must not interfere or impair the value of existing water rights. Other related issues concerning the period of use, location of use, the historic return flow characteristics and possible effects on other appropriators would all be considered routinely by the State Board of Control in these type of changes in use proceedings. Transfers of this nature are typically guided by the "no-injury to other appropriators" concept and will also consider the potential effect upon Wyoming's allocated water protected by various river basin compacts and U.S. Supreme Court decrees.

Change in use proceedings can be time-consuming and costly and in some cases may be of little benefit in providing the desired streamflows, depending on the specific factual circumstances. Although this type of change in use under the instream flow law was strenuously debated, the protections offered to appropriators under the existing water laws and Board of Control procedures are adequate and should provide firm assurance to all users that their rights will not be harmed under such conditions.

Condemnation and Litigation

To emphasize the voluntary nature of the acquisition authority granted under W.S. 41-3-1007 discussed above, the law succinctly denies any power of condemnation to the State Game and Fish Commission for the purchase of existing rights for instream flow purposes (W.S. 41-3-1009). This section of the Act also contains language regarding protections to existing water rights against any diminishment of the value of their property interests. Likewise, the Legislature in a subsequent section of the law provided an appropriator the ability to obtain all costs of litigation from the holder of an instream flow right, if they prove in District Court that their right to use water has been impaired or diminished as a result of the instream flow right (W.S. 41-3-1010). Procedurally, such an action would most likely be initiated before the State Engineer or State Board of Control and upon appeal reach the District Courts. Without benefit of

detailed legal analysis, this seemingly direct language, in combination with case law, may be subject to further interpretation and court testing. On its face though, this section would act as a deterrent within the process against an unreasonable quantification request for instream flows and may also create water right regulation problems in the future.

Abandonment

Wyoming law also prohibits the beneficiary of instream flow rights to file for abandonment against another appropriator (W.S. 41-3-1011). Companion language further limits the instream flow right holder the ability to acquire a right for the purpose of providing instream flows through the process of abandonment. Since, under other State law, the State Engineer also has the authority to initiate an abandonment proceeding on his own, this language would certainly preclude such an action in an effort to establish an instream flow right. The prohibition wording for filing abandonments was included to alleviate concerns against wholesale or basinwide actions brought by the instream flow appropriator once established, in order to improve their relative priority position on a stream. This section, by implication, also recognizes the fact that an instream flow right would be difficult to abandon, based on proof of non-use for five successive years as provided in State law.

Right-of-Way

Through the years of debate, another concern expressed by riparian landowners was potential conflicts over the right of ingress or egress through private property to streams and rivers with instream flow rights. The Legislature responded through wording derived from the 1983 initiative bill clarifying that no such rights-of-way can be construed from the new law. Ranchers and other private landowners along streambanks obtained assurance that the presence of an instream flow right is not accompanied by an easement to cross their private land (W.S. 41-3-1012). Specific provisions in the law also assure landowners that the power of eminent domain will not be used by the State to acquire access across private land to certain stream segments with flow rights. Early discussions with the State Game and Fish Commission indicate that this was certainly never their intent in support of new legislation, and have presented a list of their initial candidate stream segments and selection criteria. The priority list of streams for appropriation considers the present existence of public access as a determining factor in the Game and Fish Commission's selection process.

Interstate Compacts and Decrees

Repeatedly, concern and fears were raised by some opponents of instream flows that downstream states would reap the benefits of Wyoming's new law, by making use of the extra streamflows that may be forced to leave the State under the guise of an instream

flow right, above those allocated by interstate compact and U.S. Supreme Court Decree to the other states. In response and after much debate and discussion, the compromise bill and enacted law provides three, and perhaps in a practical sense, four overlapping subsections containing protections against these fears. Specific language in the law offers a clear reading of the Legislature's intent and provides guidance to the State Engineer concerning the relation of the new law and Wyoming's ability to fully utilize waters allocated to the State.

Section 41-3-1014 of the law succinctly provides that no provision of the entire instream flow Act can be construed to limit Wyoming's right to appropriate and beneficially use the waters preserved for the State's use under interstate compact or court decree. The far majority of all waters arising within the State's boundaries flow from the State under allocations set by compact or decree. Aside from the North Platte River drainage, most river basins are not yet fully appropriated within Wyoming, resulting in streamflows to downstream states in excess of requirements. These surplus flows in many regions are used by the heavy consumptive users in the downstream states, particularly within the Colorado River drainage. As Wyoming's population, industrial and agricultural growth continues and water demands increase, these surplus flows will diminish requiring firm water right regulation. To allow continued consumptive uses in the future, without constraint by instream

flows, the above limitation on an instream flow right must be considered.

An additional subsection of the law provides direct authority to the State Engineer to refute an appropriation for instream flow use where such a right would be considered or accounted as a part of Wyoming's allocated share of compacted or decreed waters (W.S. 41-3-1006(g)). Although similar in meaning to the previous section, this language affirms the State's intent to hold open all opportunities for the consumptive beneficial use of the apportioned water for the future.

As a further protection relating to this issue, a companion subsection, W.S. 41-3-1006(h), was enacted. This portion of the law supplements the previous language specifying a limitation on the amount of water appropriated for instream flow within each river basin. This limit was set as an amount of appropriated water that results in no more water leaving the State than is allocated under interstate compact or U.S. Supreme Court Decree for use in downstream states outside of Wyoming. This language may not present a serious limitation upon the State in the early years of implementation, however, unnecessary restrictions in appropriations may arise in the future. Consider an example where the headwater streams in mountainous regions of the State may have water available for appropriation for instream flows. After flowing through the designated stream segment, the water is then subject to further prior appropriation before returning to the stream and leaving the State. This language may

unnecessarily limit the amount of in-place flow rights in the upper reaches of the basin to meet a prescribed level of compact flow requirement, when in a practical sense, the same waters are currently used and reused several times prior to crossing the State boundary. However, in the spirit of compromise, this limitation was added and will be the subject of further commentary with continued implementation.

Relating to this same issue is another section of the law providing for the appropriation of instream flow waters for other beneficial uses within certain specified reaches of streams in the State. The river segment locations delineated in W.S. 41-3-1002(d) include each one mile length of river directly upstream of the State's boundary or in some cases, the one mile river segment upstream of the larger reservoirs which straddle the State Line on the Big Horn, Green and Snake Rivers. Also included for further appropriations are one mile length reaches above the point where any stream in the drainage joins the mainstem of the North Platte River. This language would essentially prohibit any designated instream flow segment from touching the State Line between Wyoming and a downstream state. This too supports the concept of allowing the maximum beneficial consumptive use of the State's waters and prohibits the granting of an instream flow right where surplus water is sent unnecessarily out of the State without benefit of further use.

APPROPRIATION PROCESS

The commentary presented to this point has addressed the major provisions of the law. The remaining portions of the legislation discuss the appropriation process, the responsibilities of the four prime State agencies involved and the administration or stream regulation requirements for an instream flow right. The complexity criticism that the Wyoming law has received in the short time since its enactment has been primarily directed at the seemingly cumbersome and overly bureaucratic administrative approach of checks and balances, studies, public hearings and re-studies prior to granting a permit or rejecting the application by the State Engineer. While this author agrees up front, in part with this argument, all agency representatives involved must first test the process, the outlined interactions and authorities described in the legislation. Once tried under "real world" situations and conditions, any necessary legislative action in the form of amendments can be presented in an educated and pragmatic manner.

The statutory procedures still being ironed out in further detail at this time, were condensed and summarized briefly below. Many particulars of the precise sequence of events and of specialized interagency activities are of little consequence to understanding the framework of the law, except to those directly involved with the process and are omitted for this discussion.

To review in a very simplified manner, the Game and Fish Commission will perform their fishery studies, in part to

estimate the minimum flows necessary, identify stream segments and flow rates to be appropriated, and report this information to the Wyoming Water Development Commission and the Water Division of the Economic Development and Stabilization Board (EDSB). The EDSB will file applications with the State Engineer for appropriation of natural flow in the identified stream segment. The Water Development Commission will analyze whether natural flow is available for instream flow purposes, whether storage is required, or a combination thereof. The water storage for instream flow purposes can be included in another water development project and pursued through the Water Development Commission's own analytical procedures and the related legislative authorization process provided in State law. The storage water right obtained for instream flow purposes from the State Engineer can be a part of the Water Development Commission's project right or a separate application for a permit to construct a reservoir, including the new instream flow uses.

The priority date for instream flow rights, like all other water rights in Wyoming, is established on the date the application for permit is received in the State Engineer's Office. The State Engineer cannot issue a permit for an instream flow use until completion of the Water Development Commission's hydrologic and feasibility report, conducting his own studies as may be necessary to determine water availability, potential injury to appropriators or analysis of compact allocations, and

completion of the mandated public hearing. The State Engineer may condition the instream flow permit to require a future review of the continuation of the permit, the need for measuring devices or other limitations as may be necessary. Lastly, in partial conformance with the concept that construction of works is a needed feature of a Wyoming water right, the legislation provides that it shall be deemed that for direct flow appropriations, commencement and completion of construction of work and application of water to beneficial use are completed 30 days after the permit is granted. Adjudication will not be completed for three years later.

CONCLUSION

The years of debate over instream flows in Wyoming came to an end in early 1986. This new law brought change and modified theories and interpretation of nearly 100 year old concepts, that were embeded throughout the evolution of Wyoming water laws. The new recognition of instream flow purposes was a needed change to protect values important to Wyoming citizens now and in the future. The State Engineer's Office supports these new concepts and is committed to work with legislative guidance and for the implementation of this law alongside all other laws affecting water and its use.

With all the experienced ups and downs and fears and hopes, the compromise approach achieved a result and took the step that was needed. Further debate and perhaps polarization of the

genuine interests through the initiative process was avoided by the legislative action and those provided authority and responsibility must now move ahead for successful implementation and modification as may be necessary.

REFERENCES

Matthew Reynolds, Wyoming's New Instream Flow Act: An Administrative Quagmire, Comment in Law and Water Law Review, U. of Wyoming, Vol. XXI, Number 2, 1986.

Instream Flow Act, 1986 Wyo. Sess. Laws, Chapter 76, codified as Wyo. Stat. 41-3-1001 to 1014 (Supp. 1986).

Cynthia Lummis, Legislative History of Wyoming's Instream Flow Act, July, 1985 (unpublished Manuscript sent to Legislators before 1986 Session).

Communications between Game and Fish Commission and State Board of Control during Instream Flow Workshops, August 21, 1986.

CHAPTER 76

Original House Bill No. 209

INSTREAM FLOW

AN ACT to create W.S. 41-3-1001 through 41-3-1014 relating to water for instream flow purposes; declaring storage of water for recreation purposes or the release of instream flows to establish or maintain fisheries, to be a beneficial use; providing waters appropriated for instream flows may be sold or transferred under certain conditions; providing for identification of areas of critical need; providing for study of feasibility of supplying instream flows from existing or new storage facilities; authorizing construction of measuring devices; requiring a report and recommendations to the legislature; authorizing delegation of authority; providing for direct flow appropriations if water storage is not feasible; providing for acquisition of existing rights; providing the holder of instream flow rights may call for regulation under certain conditions; providing limitations on appropriations for instream flow purposes; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 41-3-1001 through 41-3-1014 are created to read:

ARTICLE 10

INSTREAM FLOWS

41-3-1001. Waters stored for instream flows a beneficial use of water; natural stream flows allowed for instream flows.

(a) The storage of water in any drainage in Wyoming for the purpose of providing a recreational pool or the release of water for instream flows to establish or maintain new or existing fisheries is a beneficial use of water subject to normal stream loss.

(b) Unappropriated water flowing in any stream or drainage in Wyoming may be appropriated for instream flows to maintain or improve existing fisheries and declared a beneficial use of water on a case by case basis by the state engineer if such use does not impair or diminish the rights of any other appropriator in Wyoming.

(c) Waters used for the purpose of providing instream flows under subsection (a) of this section shall be the minimum flow necessary to establish or maintain fisheries.

(d) Waters used for the purpose of providing instream flows under subsection (b) of this section shall be the minimum flow necessary to maintain or improve existing fisheries.

41-3-1002. Instream flows to be by stream segment; waters for instream flows may be sold, transferred or otherwise conveyed under certain restrictions; ownership restricted.

(a) All waters used for the purpose of providing instream flows shall be applied only to that segment of the stream for which they are granted. The stream segment and the determination of a minimum amount of water required for instream flow purposes shall be defined specifically.

(b) After waters allowed for instream flows have passed through the specific stream segment, all rights to those instream flow waters are relinquished, and the water shall be available for reappropriation, diversion and beneficial use.

(c) Storage water appropriated for the purpose of providing instream flows in specified stream segments or existing water rights which are converted to instream flow under provisions of W.S. 41-3-1007 of this act may later be sold, transferred or otherwise conveyed to any other purpose pursuant to the requirements of W.S. 41-3-104, except that the board of control shall require that an advertised public hearing be held.

(d) Any person may divert and appropriate, as provided by law, instream flow waters for any beneficial use other than for instream flows at the following places:

(i) Within one (1) mile upstream from any point where the instream flows cross the Wyoming state line;

(ii) Within one (1) mile upstream from any point where the instream flows enter the main stem of the North Platte River;

(iii) Within one (1) mile upstream from any point where the instream flows enter the Big Horn Lake;

(iv) Within one (1) mile upstream from any point where the instream flows enter the Flaming Gorge Reservoir;

(v) Within one (1) mile upstream from any point where the instream flows enter the Palisades Reservoir.

(e) No person other than the state of Wyoming shall own any instream flow water right.

41-3-1003. Game and fish commission; construction of measuring devices; recommendations; permits.

(a) The game and fish commission shall construct any measuring device the state engineer considers necessary for the administration of an instream flow right.

(b) The state game and fish commission may report to the water development commission annually those specific segments of stream which the game and fish commission considers to have the most critical need for instream flows. The game and fish commission shall identify the points on the stream at which the need for instream flows begins and ends, the time of year when the flows are most critical and a detailed

description of the minimum amount of water necessary to provide adequate instream flows.

(c) The division of water development within the economic development and stabilization board shall file applications in the name of the state of Wyoming for permits to appropriate water for instream flows in those segments of stream recommended by the game and fish commission. The state engineer shall not grant any permits to appropriate or store water for instream flows prior to the completion of the study provided by W.S. 41-3-1004 or prior to the hearing required by W.S. 41-3-1006.

41-3-1004. Water development commission to determine storage feasibility; report to the game and fish commission and the legislature; delegation of authority.

(a) Immediately after permits have been applied for under W.S. 41-3-1003(c), the water development commission shall determine the feasibility of providing instream flows for the recommended segments of streams from unappropriated direct flows or from existing storage facilities or from new facilities. The feasibility study shall include a determination of water necessary to maintain or improve existing fisheries for water rights under W.S. 41-3-1001(b) or of water necessary to provide fisheries for water rights under W.S. 41-3-1001(a). The feasibility study shall also include the availability of storage sites, the estimated cost of providing any required storage and such other findings and conclusions as the water development commission deems appropriate.

(b) The water development commission shall make a report to the game and fish commission and the legislature outlining their findings.

(c) The water development commission may delegate its authority under W.S. 41-3-1003 through 41-3-1006 to the division of water development within the economic development and stabilization board for particular stream segments.

41-3-1005. Approval of storage project. If the water development commission determines that storage of water to provide instream flows is feasible and in the interest of the state of Wyoming, it shall request authority from the legislature to proceed with the design and construction of storage facilities and the storage of sufficient water for such purposes. The costs of the project may be shared with other water users benefiting therefrom, or paid solely from funds appropriated from the water development account, or otherwise as the legislature directs.

41-3-1006. Appropriation of unappropriated waters for direct instream flows.

(a) Any application for a permit to appropriate direct flow waters for the purpose of providing instream flows shall be by stream segment, as defined in W.S. 41-3-1002.

(b) If the water development commission, under W.S. 41-3-1004, determines that storage of water for the purpose of providing instream flows is not feasible but that appropriation of direct flow water appears feasible, the state engineer shall act on applications for permits to appropriate water filed under W.S. 41-3-1003(c) in the name of the state of Wyoming.

(c) Subsequent to submission of an application for an instream flow appropriation, the game and fish commission shall conduct relevant studies on the proposal.

(d) The applicant for an instream flow water right shall publish a notice of the application and hearing in a newspaper of general circulation in the area near the proposed reservoir site or stream segment, once each week for at least two (2) consecutive weeks prior to the hearing provided by subsection (e) of this section which notice shall briefly describe the application.

(e) Prior to granting or denying the application, the state engineer shall conduct any studies as are deemed necessary to evaluate the proposed instream flow and the necessary amount of water to maintain existing fisheries and shall hold a public hearing. At the public hearing, the game and fish commission shall present its studies and any other interested parties shall present views on the proposed instream flow appropriation. The state engineer may place a condition on the permit, if one is granted, requiring a review of the continuation of the permit as an instream flow appropriation.

(f) If an application for an instream flow appropriation is approved by the state engineer, it shall be deemed that work has been commenced and completed and beneficial use made thirty (30) days after the date of approval for purposes of W.S. 41-4-506 and proof of appropriation shall not be submitted until three (3) years thereafter.

(g) The state engineer shall not issue an instream flow permit where the instream flow right would be included as a portion of the consumptive share of water allocated to the state of Wyoming under any interstate compact or United States supreme court decree.

(h) The amount of water appropriated for instream flow in each river basin in Wyoming shall not result in more water leaving the state than the amount of water that is allocated by interstate compact or United States supreme court decree for downstream uses outside of Wyoming.

41-3-1007. Acquisition of existing rights for instream flow purposes.

(a) The state of Wyoming may acquire any existing water rights in streams of Wyoming by transfer or gift for the purpose of providing instream flows, provided that a change in use of the right acquired shall be in accordance with W.S. 41-3-104. Any right acquired and changed shall be in the name of the state of Wyoming and shall be administered by the state engineer and the board of control, who shall insure that the use of water for instream flows shall not interfere with existing water

rights or impair the value of such rights or related property. The game and fish commission shall act as a petitioner in a petition for change in use under this section.

(b) Any such water rights acquired and changed shall be limited to a specified stream segment by the board of control with priority date intact.

41-3-1008. Holder of instream flow rights may call for regulation of streams if injury to fisheries can be shown.

(a) The game and fish commission shall report to the water division within the economic development and stabilization board the need to regulate a stream to protect the priority of an instream flow right. The report shall include information establishing present or future damage to the fishery if the stream is not regulated. The division of water development, on the next working day, shall submit the report to the state engineer and call for stream regulation. The state engineer shall not regulate the stream to protect the instream flow right:

- (i) Unless present or future injury to the fishery has been shown;
- (ii) If the call for regulation is a futile call; or
- (iii) If the call for regulation will impair senior water rights.

41-3-1009. Statement regarding condemnation and impairment of existing water rights. This act does not grant, nor shall it operate or be so construed to grant the power of condemnation to the game and fish department for acquisition of existing water rights for the purpose of providing instream flows, nor shall it operate or be so construed as to impair or diminish the value of or divest existing water rights.

41-3-1010. Litigation costs. If any other appropriator in a drainage where waters are allowed for instream flows proves in district court that his right to use appropriated waters has been impaired or diminished by the allowance for instream flows, the costs of litigation, including reasonable attorney fees, shall be borne by the holder of the instream flow right.

41-3-1011. Abandonment. No right to water for the purposes of providing instream flow may be acquired through the process of abandonment nor shall any beneficiary of instream flow rights granted under this act be qualified under W.S. 41-3-401 and 41-3-402 to file for abandonment.

41-3-1012. Ingress and egress. Nothing in this act shall grant, nor shall it be construed to grant the right of ingress or egress through or upon private property to reach streams where instream flows are maintained, nor shall it operate or be so construed as to grant any right of eminent domain to acquire the right of ingress or egress through private property to any waters so maintained.

41-3-1013. Condemnation. Notwithstanding W.S. 1-26-505, a city or town may condemn any portion of a water right authorized and acquired under this act for municipal water purposes in the manner provided by law.

41-3-1014. Interstate compact and United States supreme court decree. Nothing in this act shall be construed to supersede, impair or abrogate the right of the state of Wyoming to fully utilize and appropriate to consumptive beneficial use, those quantities of water allocated to the state of Wyoming by interstate compact or United States supreme court decree.

Section 2. This act is effective June 11, 1986.

Approved March 18, 1986.

CHAPTER 77

Original Senate File No. 89

INSURANCE PREMIUM TAX CREDIT OPTION

AN ACT to amend W.S. 15-5-202(b), 26-4-104 by creating a new subsection (c) and 35-9-604 relating to insurance premium tax; revising the method of deducting that portion of the premium tax distributed to firemen's pension funds; authorizing insurer credit against the premium tax based on investments in Wyoming; prohibiting duplicate credits for the same investment; specifying investment conditions; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 15-5-202(b), 26-4-104 by creating a new subsection (c) and 35-9-604 are amended to read:

15-5-202. Pension account; creation; purpose; administration; appropriation; gifts, etc.; investment; firemen's contingency account abolished; monies to be transferred.

(b) Fifty percent (50%) of the gross annual tax levied upon the fire insurance premiums paid to insurance companies for fire insurance within the state as provided by W.S. 26-4-103 is appropriated for the use and benefit of the account. The sum specified shall be calculated before giving effect to any premium tax credits which may otherwise be provided by law. The state treasurer, upon payment to him of the amount as calculated under this subsection by the insurance commissioner, shall credit that amount to the account.

26-4-104. Premium tax; reduced tax based on Wyoming investments.

(c) Any insurer may receive a credit against the tax liability under W.S. 26-4-103(b), subject to the following conditions:

(i) Any insurer may receive a credit of one dollar (\$1.00) for every five dollars (\$5.00) invested in Wyoming investments meeting the requirements of subsection (b) of this section and which shall first be approved as allowable investments for purposes of credit under this subsection by the economic development and stabilization board in accordance with rules and regulations the board adopts;

(ii) Investments shall be made not later than December 31 in any year in order for credit to be allowed against taxes due because of premiums written during that calendar year;

(iii) The maximum annual credit allowable for an insurer under this subsection shall not exceed twenty-five percent (25%) of its net tax otherwise due under this code;

(iv) Credit shall be allowed only once on any investment in any given security and only on the original issue of the security;

(v) No credit shall be allowed for any investment under this subsection if credit is allowed for that same investment under subsection (a) of this section, and if credit is allowed for an investment under this subsection, no other credit shall be allowed under this section for that same investment; and

(vi) The retaliatory provisions of W.S. 26-3-130 do not apply to investments and credits authorized under this subsection.

35-9-604. Transfer of tax on fire insurance premiums into account. On or about the first day of June of each year, the state treasurer shall transfer from the general fund a sum equal to the amount of forty percent (40%) of the gross annual tax levied upon the fire insurance premiums paid to insurance companies for fire insurance in the state of Wyoming for the then current fiscal year, as provided by W.S. 26-4-103. The sum specified shall be calculated before giving effect to any premium tax credits which may otherwise be provided by law.

Section 2. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

Approved March 18, 1986.

CHAPTER 78

Original Senate File No. 62

COUNTY ASSESSOR QUALIFICATIONS

AN ACT to amend W.S. 18-3-201 relating to qualifications of the county assessor; requiring education, training and certification for all property tax appraisers; providing a definition; providing penalties; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 18-3-201 is amended to read:

18-3-201. Qualifications; certification and education.

(a) There shall be elected in each county a county assessor as provided by the Wyoming Election Code of 1973 as amended, who shall be a qualified elector and own real property in the county in which he is elected.

(b) The state board of equalization, after consultation with the president of the county assessor's association, shall:

(i) Establish, implement and maintain a system of education and training for all property tax appraisers;

(ii) Establish standards and criteria for certification; and

(iii) Provide a temporary and permanent certification program based on education, relevant experience or examination.

(c) As used in this section "property tax appraiser" means any employee of the state or any county, including elected county assessors, who makes valuation judgments used as a basis for ad valorem taxation.

(d) No individual shall perform the duties or exercise the authority of a property tax appraiser unless the person is certified by the state board of equalization. No certificate shall be issued to any individual who has not demonstrated to the state board of equalization that the individual is competent to perform the necessary work or administer the necessary operation of an assessor's office. An individual may serve as county assessor without certification for one (1) elected term and the remainder of any unexpired term to which appointed. Individuals occupying the position of county assessor as of the effective date of this act shall be deemed certified until January 1, 1991.

(e) The director of the ad valorem tax division, under the direction of the state board of equalization, shall provide for examination of applicants for certificates and shall conduct or sponsor in-service or pre-entry training programs on the technical, legal and administrative aspects of the appraisal and assessment process. For this purpose, the director may cooperate with educational institutions, and regional, state or national appraisal and assessing organizations, and shall receive the advice of the president of the county assessor's association, to develop training programs.

(f) The director, upon appropriation by the legislature, shall also provide for the costs of obtaining and presenting schools including, but not limited to, normal costs of tuition, books and instructor expenses. The direct expenses related to students, such as travel, housing and meals while attending the schools, shall be the direct responsibility of each respective entity.

Section 2. This act is effective June 11, 1986.

Approved March 18, 1986.