

# Questions and Answers on Instream Flows

## **Q 1. What is an instream flow water right?**

- An instream flow water right is a surface water appropriation from the Department of Natural Resources (formerly the Department of Water Resources) for some specified amount of water to be left in a stream or river, or a segment thereof, for a particular purpose. In Nebraska, there are four legally recognized instream flow purposes: fish, wildlife, recreation, and for induced ground water recharge of public water supplies.

## **Q 2. How does it differ from other surface water rights?**

- An instream flow water right (appropriation) essentially protects specific flows to be left in a stream or river according to the first in time first in right doctrine. Historically, surface water rights essentially diverted water away from a stream for some another beneficial purpose (i.e., irrigation).

## **Q 3. Who can apply for an instream flow water right?**

- According to state law, the Nebraska Game and Parks Commission, Natural Resource Districts, and Public Water Suppliers may apply for instream flow rights (appropriations).

## **Q 4. What is the process for applying for instream flows?**

- Applicant conduct studies to quantify the instream flow need in the river or stream. Applicant provides public notice and a public hearing. Applicant files an official application/s including a detailed description of the amount of water necessary to provide adequate instream flows with the Department of Natural Resources. The Director of the Department of Natural Resources evaluates the application/s and publishes notice that anyone having an interest may in writing object to and request a hearing on the application.

## **Q 5. Does an instream flow water right reduce the amount of water available for other uses?**

- Yes and no. An instream flow water right has a priority date, just like any other surface water right, perfected under the Doctrine of Prior Appropriation. If an instream flow right is in priority, the State, via the Game and Parks Commission or a Natural Resource District, may call for water. A request for regulation to satisfy an instream flow water right may prevent an upstream junior user from reducing the stream flow and may limit upstream senior users to their statutory water rights (That is, to not take more than their legal limit).

## **Q 6. Will instream flows tie up all the remaining water in a stream?**

- It depends on the priority date, the amount of instream flow right and where the segment lies within any particular basin. Instream flow water rights are based on specific scientific studies that, according to the law, identify the minimum amount of water needed to maintain the designated purpose (fish, wildlife, recreation, or induced groundwater

recharge). It is important to recognize that appropriations to divert water away from Nebraska streams and rivers were in place for 89 years before an instream flow law was passed in 1984. Consequently, many streams and rivers are fully and/or over-appropriated. In addition, requests for instream flow appropriations may only go up to the 20% exceedence probability as defined in law.

**Q 7. Will instream flows prevent future water development?**

- Certainly not downstream of the instream flow segment. An instream flow water right, like any other surface water right for any other purpose, could limit future water development upstream in the drainage. In some cases, State-approved instream flow water rights can facilitate the Federal permitting process for a water development project. Such a development project generally must minimize or avoid environmental impacts which often means providing instream flows downstream of a project.

**Q 8. How many streams and rivers have been protected with instream flows in Nebraska to date?**

- Between 1984 and 2013, only segments of two have been protected - Long Pine Creek (Tributary to Niobrara, 8 miles) and the central and lower Platte River (277 miles). There are many other rivers and streams that have no instream flow protection (12,086 miles out of 12,371 miles (97.7 %) of fishable streams and rivers have no instream flow protection).

**Q 9. Of what value are instream flows to our society?**

- Streams and rivers provide ecosystem goods and services of tremendous value to the quality of life here in Nebraska. Examples include: agriculture, manufacturing, tourism and generating hydro-power, as well as being a source of cooling water for coal and gas-fired electric generating facilities. However, there is a limit to the amount of flow which can be diverted unless we as a society decide to lower our quality of life. Generally, the more affluent a society becomes, the more awareness there is of the need to manage natural resources for sustainability and future generations.

**Q 10. Why should instream flows be protected in streams and rivers of Nebraska?**

- Compared to many other states, Nebraska is blessed with an abundance of surface water as well as an abundance of ground water. As part of Nebraska's natural resources held in trust for the people, it is important that water be managed in the best interest of all citizens for the long term on a sustainable basis.

**For more information about the instream flow law or its application, contact:**

- Nebraska Department of Natural Resources 402 - 471- 2363
- Nebraska Game and Parks Commission 402 - 471- 0641

## Public Trust Doctrine



The *public trust doctrine* revolves around the concept that government owes its citizens special duties of stewardship regarding common property resources which **the state holds in trust for the public.** The public trust doctrine holds that **government must act as a fiduciary** (one to whom property or power is entrusted for the benefit of another) in its management of the trust resources. **The beneficiaries of this trust are the citizens of the state, including future generations.** Common property resources, including water, fish, wildlife, air, and land, are held by the states in their sovereign capacity and are subject to *the public trust.*

- ★ Greg Cooke, Environmental Law Attorney  
Juneau, Alaska

# Instream Flows in Nebraska

## The Law

Nebraska surface water law dates back to 1895 and is based on the “Doctrine of Prior Appropriation.” Under this Western Water Law doctrine, the first person to put water to use has the first right, or “first in time is first in right.” This means that the earliest dated, or senior water right user, is entitled to water before other junior water right holders can take advantage of it.

Prior to 1984, Nebraska surface water law required water in streams and rivers to be diverted from its natural channel, be conveyed to an off-stream location, and put to a beneficial use such as irrigation. In 1984, after 89 years of experience with the above doctrine, the Nebraska Legislature enacted an instream flow law. This expanded the first in time is first in right concept to allow the Nebraska Game and Parks Commission and/or any Natural Resources District) to hold a surface water right for instream flows. Essentially, this means leaving some quantity of flow in a stream or river for beneficial uses such as fish, wildlife, and/or recreation.

Instream flows benefit all Nebraska citizens in their quality of life either directly or indirectly and are important to the natural heritage of present and future Nebraska generations. Healthy streams and rivers not only support ecosystem flora and fauna, they benefit anglers, bird-watchers, sight-seers, hikers, backpackers, campers, swimmers/sun-bathers, canoers, boaters, hunters, bait dealers and commercial fishermen, as well as helping to maintain riparian property values and recharging groundwater levels. Instream flows are crucial to channel maintenance and other ecosystem functions, such as distribution of vital nutrients needed by aquatic food chains. Instream flows are also extremely important to local and municipal water users for maintaining water quality and recharging community water supplies. Flows in streams and rivers are also beneficial for livestock watering across the state.

## Fact Sheet on Instream Flows – A Little History

- **March 1, 1867** – Nebraska becomes the 37<sup>th</sup> state of the Union during President Andrew Johnson’s term of office. Public Trust responsibilities transferred from the federal government to state through state sovereignty.
- **1895** – Western Water Law or “The First in Time is First in Right” doctrine officially adopted in Nebraska for surface water diversion appropriations.
- **1984** – Nebraska Legislature passes instream flow legislation (LB 1106) after many years of public debate and completion of a Natural Resource Commission policy issue study on instream flows (1982). Fish, wildlife, and recreation recognized as beneficial uses.
- **December 14, 1989** – Nebraska’s first instream flow appropriation for public trust trout resources in Long Pine Creek (Tributary to Niobrara River) was granted to the Nebraska Game and Parks Commission by the Department of Water Resources. The effective instream flow priority date is April 29, 1988.
- **July 2, 1992** – Nebraska’s second instream flow appropriation for public trust fish and wildlife resources in the Lexington to Columbus reach of the Platte River was granted to the Central Platte Natural Resource District by the Department of Water Resources. The effective instream flow priority date is July 25, 1990.
- **1993.** Legislation authorized municipalities and other public water suppliers to apply for instream flows for the purpose of induced ground water recharge of well fields.
- **June 26, 1998** – Additional instream flow appropriations for public trust fish and wildlife resources dependent upon the central and lower Platte River were granted to the Nebraska Game and Parks Commission by the Department of Water Resources. The effective instream flow priority date is November 30, 1993.
- **2004.** In 2004, conjunctive use of surface and ground water was recognized (LB 962). Ground water development has been extensive because Nebraska has easy access, but impacts to streams and rivers could be extensive.
- **May 24, 2006** - Nebraska Game and Parks Commission, Board of Commissioners, pass a resolution directing staff to protect instream flows already granted and develop instream flow recommendations for the Niobrara River.
- **2011** – Nebraska Game and Parks Commission, Board of Commissioners approves third edition (1996, 2004, 2011) of its strategic plan “*Focus on the Future, 2011 – 2016, A Plan for Nebraska’s Fish, Wildlife, and Parkland Resources.*” All three editions contain instream flow strategies. Instream flows constitute an effort to protect the Public Trust.
- Only 285 miles (2.3 %) of Nebraska’s 12, 371 miles of fishable streams and rivers have instream flow protection to date.