



A Legacy is born Wood rivers targeted by innovative water legislation

by GREG STAHL

Due to concerns expressed by irrigators in the Bellevue Triangle, key components of the Wood River Legacy Project legislation were changed midstream. Under the most significant of these changes, most of the water that does get donated will now flow to Silver Creek. Farmers and ranchers argued that the original plan to place donated water into the Big Wood River would diminish their water supplies and reduce flows in Silver Creek. Photo by Mountain Express

The Big Wood River is a working river, but the way it works is soon going to change.

There was little fanfare March 29 when Idaho Gov. C.L. "Butch" Otter signed the Wood River Legacy Project into law, but the statute has potential to have wide-ranging influence on the politics of one of Idaho's most longstanding institutions: prior appropriation water law.

"Other Western states do have the opportunity to put water back in the stream. It's fairly common in some Western states, but Idaho is an exception in that way," said Dave Tuthill, interim director of the Idaho Department of Water Resources. "In that sense, this is a step toward where other Western states have already gone relative to putting water back in the streams."

It works a little differently in each Western state, but the gist of prior appropriation water law remains. Water is a publicly held commodity that is distributed to water users based on priority dates. The older the date, the higher the priority; and irrigators with more recent dates—junior irrigators—can have their water turned off when there isn't enough to go around. If an irrigator does not use that water, the right to use it can be revoked.

It's pretty complex, and water law textbooks can easily exceed 1,000 pages. But in a nutshell what the Legacy Project will do is enable irrigators to voluntarily leave some or all of their water in the Big Wood River and in the District 45 Canal, which stems from

the Big Wood. The canal supplies water to fields that ultimately feed the aquifer that supplies Silver Creek, which flows into the Little Wood River below Carey.

Hailey resident Rich McIntyre launched the project more than 18 months ago with the backing of Idaho Rivers United. It originally sought to add flows just to the Big Wood River—specifically a 12-mile stretch south of Bellevue that is nothing more than a cobbled sink awash in recumbent cottonwood trees most of the year.

As first proposed, however, the bill upset farmers and ranchers in the Bellevue Triangle who claimed they were invited late to the grassroots consensus-building process that gave birth to the measure. They argued the legislation would diminish their water supplies and reduce flows in Silver Creek. Compounding the irrigators' concerns was suspicion over the intentions of some of the project's backers. Under pressure from the Triangle irrigators, the bill underwent a series of major revisions, and the concerns were largely alleviated by the time it was presented to the state Legislature, where it passed both the House and Senate unanimously.

"There is a move in the Western United States—where we have the appropriation doctrine—to evolving uses of water," Tuthill said. "Some say that the appropriation doctrine is not acceptable for water delivery in the future. My view is that it has been shown to be adaptable, and this is an example of an adaptation of the appropriation doctrine to evolving water needs."

Where the water flowed

The concept of allowing water to remain in-stream is not entirely new. Oregon established minimum streamflows in 1955, but fish are still frequently at the mercy of senior appropriators, whose rights often carry a much earlier priority date.

"Indeed, none of the instream rights established by state agencies or legislatures in the Northwest carry a priority date earlier than 1925, and the vast majority postdate 1955," writes Jack Sterne in a 1997 legal analysis called "Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest."

The prospect of in-stream appropriations has created disquiet in many states. The basic concern is that recognition of in-stream rights would result in insufficient supplies of water to meet future demand, whether municipal, agricultural or industrial.

In Idaho, state-specified minimum streamflows have been subordinated to future stock watering rights, unrecorded rights, junior rights and future development. Essentially, water is required to stay in the stream unless any form of consumptive need comes along.

"These problems with publicly held instream rights suggest that revisions to state water laws to allow private parties to hold those rights may be appropriate ...," Sterne writes. "Opposition is a function of three main concerns: 1) the fear that in-stream rights will harm ... current consumptive rights by reducing the amount of water available in return flows; 2) the fear that in-stream rights will hamper future economic growth; and 3) the basic belief that water should be used 'on the land.'"

But concerns go farther than that.

Others worry that privately held in-stream rights might open the door to speculation in water and that the risk to the public trust is too high. If in-stream rights can be appropriated and transferred like consumptive rights, developers might file for in-stream rights and convert them to consumptive uses when development opportunities arise. Such a speculator is likely to be much less concerned about illegal consumptive use of the in-stream right than is a party who holds the right for public benefit.

Concerns that recognition of in-stream rights would result in insufficient supplies of water to meet future demand surfaced with the Legacy Project, which underwent substantial revisions to avoid the potential loss of water to irrigators in the Bellevue Triangle.

An issue of precedent

While the Legacy Project is innovative in Idaho, it is not without precedent. In 2001, the Legislature enacted a law enabling the federal government to purchase water from irrigators in the Lemhi River Basin to enhance river flows for outgoing migration of salmon and steelhead to the Pacific Ocean.

"The Lemhi legislation for anadromous fisheries is intended to modify the hydrograph to alleviate shortfalls during critical times of the year for anadromous fisheries," Tuthill said. "One unique aspect of the Wood River legislation is the ability for individuals to put water into the Big Wood or Little Wood systems on a permanent basis for actual retirement of existing water rights for in-stream flow purposes.

"The Lemhi process enables the use of the water supply. The Big Wood process was a step beyond that to enable the actual conversion of rights from irrigation or other consumptive uses to actual in-stream flow uses."

One of the things that makes the Legacy Project palatable for Idaho water users and lawmakers is that water rights reserved for in-stream use in the Big or Little Wood basins will become available to downstream users. Water left in the Lemhi does not enhance downstream irrigation opportunities. Another thing making it more palatable is a five-

year sunset clause. The Legislature will review the measure in five years and has the option of not renewing it.

"In the Wood River situation, it actually does enhance irrigation downstream," Tuthill said.

But the adjustment to Idaho water law in the Big Wood and Lemhi basins begs questions about the applicability of such measures in other parts of the state, and both Tuthill and Blaine County Commissioner Larry Schoen agree that, while the Big and Little Wood scenario is unique, it may be a model that could work elsewhere.

"The specific example that we find in the Big Wood is rare," Tuthill said. "While some of the elements of this legislation are unique, the applicability through most of the state would be rare. The opportunity for application in this exact same way would be rare. However, elements of the Lemhi model were used in this legislation, and elements of this could be used elsewhere."

Schoen put it this way.

"I think it's part of the changing West."

He said legislation of the Legacy Project's flavor may be even better suited to Idaho basins that have less of a direct connection between surface water and groundwater.

"It's a tool that can be used elsewhere," he said. "That's what's important about this."

One nearby river basin in particular could be a likely candidate for such an effort, Schoen surmised.

"It could be right next door in the Little Wood where this bill could be used next."

Next Wednesday: Localizing the issue with how the Big and Little Wood rivers are interconnected and why not everyone thinks the Legacy Project is a good idea.