

# Support for Instream Flow Advisory Group

Legal Mechanisms for ISF Protection

How do other states handle instream flow permitting, water rights, and administration?

# Input from ISF Advisory Group orientation workshop

- ISF program could impact existing water allocations: future and existing permits
- Different mechanisms are used in states with ISF programs to address water rights

# Scope

- States with prior appropriation doctrine
- De jure ISF laws v. de facto ISF protection
- ISF Protection – how administered:
  - With consumptive rights
  - During drought
  - With unappropriated water
- Provide examples

# Terminology

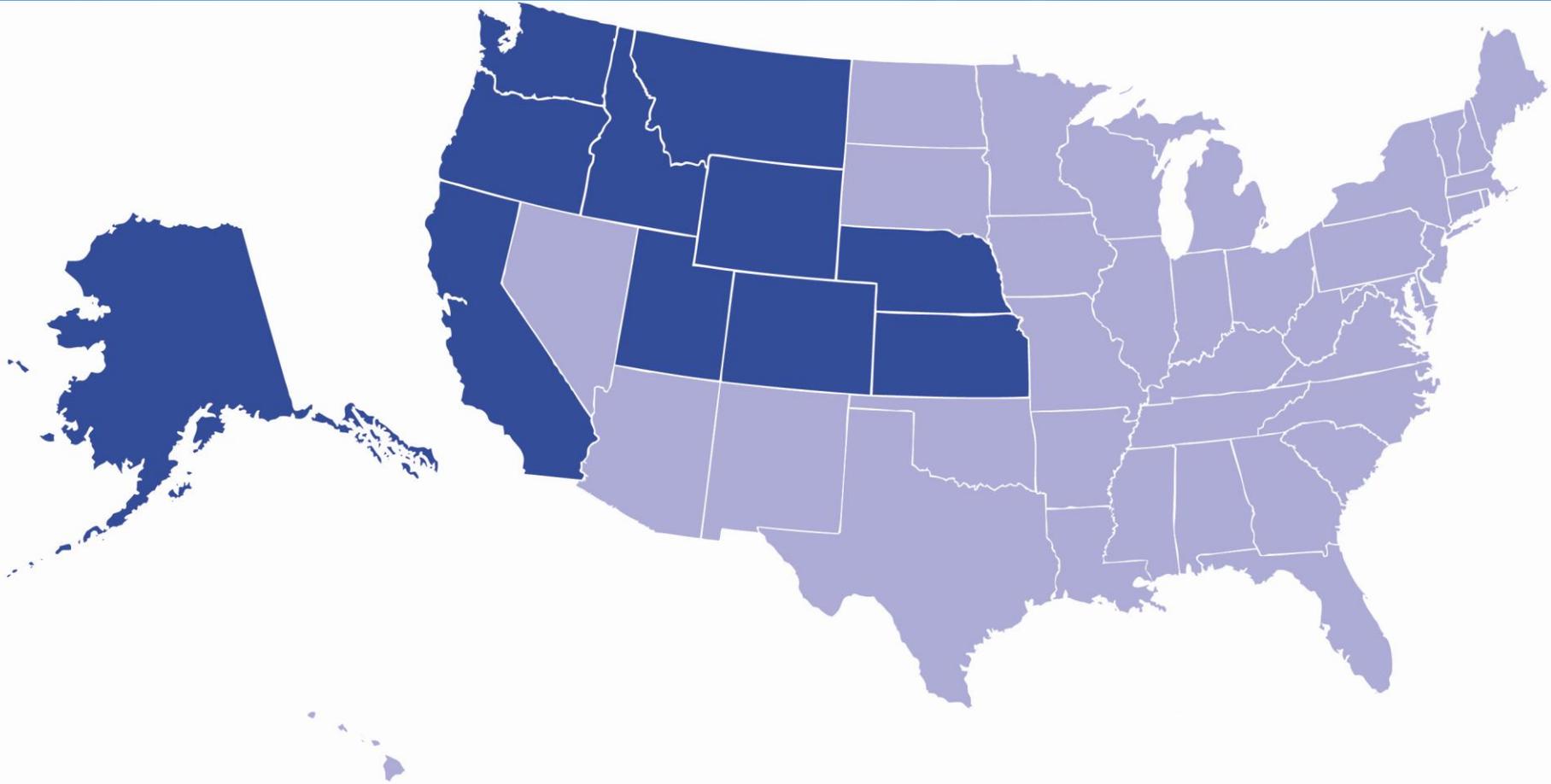
- Consumptive
- Nonconsumptive
- Prior appropriation doctrine
- Instream flow
- Environmental flow
- Minimum desirable stream (MDS) flow

# Drivers and considerations in other states

- Drivers (internal and external)
  - Recreational uses
  - Interest of general public (social, economic, and environmental values)
  - Aesthetics
  - Water quality
  - Maintenance of riparian areas
  - Maintenance of fish and wildlife
  - Legal compliance (external): ESA, CWA, FERC, USBR, USACE

# Drivers and considerations

- Considerations:
  - Interstate compacts
  - State laws:
    - No-injury rule
    - Use it or lose it
  - Federal reservoir purpose/authorization and water management decisions
  - Economics
  - Incidental ISF protection and “other” water sources: baseflow, runoff, reservoir releases



LEGEND

 Explicitly Permit the Appropriation and/or Transfer of Instream Flows Through Statute

# Legal mechanisms for ISF protection

- Water quality standards: Section 401 certification, water quality criteria
- Minimum flows: Necessary flow regimes, stream segment designations, biologically-based flow standards, and/or target flows

# Legal mechanisms for ISF protection

- Other states manage ISF programs by governor-appointed ISF boards, state agencies for water, wildlife and parks, and special water courts
- ISF recommendations, study plans, requests and prioritization
- Through state legislation:
  - Evaluate and review permits
    - Physical protection (stream gauges)
    - Legal protection (water appropriations)
  - Approve or deny

# Legal mechanisms for ISF protection

- Senior rights:
  - ISF rights have no priority status over other uses (all states)
  - New ISF appropriations do not affect senior surface water appropriations (all states)
  - Priority date for MDS flow will be junior to permits previously issued (KS)

# Legal mechanisms for ISF protection

## ■ Junior rights:

- Can be called on to lower their diversion if ISFs fall below the MDS flow (KS) or ISF appropriation (CO, MT)
- Future water reservations for consumptive use and ISF (MT): priority date later will become an appropriation date
- ISF transfers: consumptive to ISF
  - Specific use: fisheries (MT)
  - Appropriation date and priority remain intact

# Legal mechanisms for ISF protection

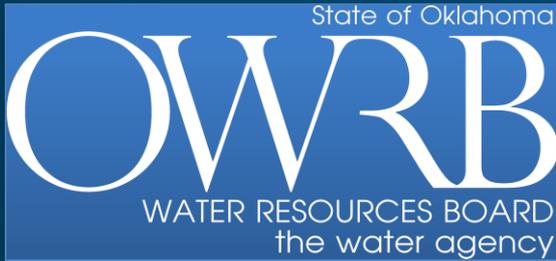
- Water rights and ISF:
  - Water right owners can temporarily loan water to administrative agency without judicial approval (CO)
  - Junior water rights diverting out-of-priority can be restricted (CO, MT)
  - No special regard to appropriations and ISF during drought. MDS program applies only to other appropriations (KS)
- Releases from state-owned reservoirs (KS)

# Legal mechanisms for ISF protection

- ISF water is unappropriated water only (NE, AK, ID)
  - Unappropriated water available is to provide ISF rates at least 20 percent of the time requested in NE
- Water conservation and doctrine of forfeiture: (use it, or lose it)
  - Some states protect conserved water from forfeiture or abandonment (CA, CO, UT)

# Overview

- Explicit rules define the implementation of ISF programs in other states
- Target flows or minimum flows are the focus of ISF programs
- Senior water rights are a priority and protected
- ISF rights can be acquired, amended, and transferred, either permanently or temporarily



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