



Wyoming Hydrogram

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Wyoming Water Research Center

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Wet Side Story

Steven P. Gloss
Director, WWRC

When you receive this issue of the "Hydrogram," Don Brosz, our Associate Director for Extension and Information Transfer, will have just begun a two-year assignment in Swaziland, Africa. Don's talents and reputation as an extension irrigation engineer at the University of Wyoming and the Water Research Center afforded him an opportunity to participate in a project funded by the United States Agency for International Development (USAID). Don and his wife, Pearl, left for Swaziland on July 20 and will return in the summer of 1991. We will certainly miss Don's work at the Water Center, but we are also pleased that he was able to take advantage of this great opportunity. A temporary replacement is being sought to fill Don's position for the next two years. More about Don's ac-

complishments at UW and his new address can be found in the *Wyoming Wet Ones* section of this "Hydrogram."

Summer may seem like a quiet time if you were to visit the UW campus and the Water Center. Believe me it is anything but quiet! Our staff and activities expand and shift into high gear during this period when much field research is conducted. Water Center faculty are also busy presenting talks and seminars at national and international meetings in places like Delaware, Montana, California, Canada and West Germany. We also continue to interact with our many state and federal agencies, provide services like the Water Resources Data System, and conduct teaching activities, e.g. our two-week Summer Water Institute for Teachers. In August, I will be attending the annual meeting of the Universities Council on Water Resources in Minneapolis where the theme will be "Facing the Water Prob-

lems of the Nineties." There will also be a special day-long session on communication of ground-water quality information to the public.

Speaking of meetings, I recently attended a workshop in Santa Fe on "Western Water Policy in Transition: Emerging Trends in Law, Economics, and Finance." This informative session explored many of the dynamic happenings in water law and water allocation in the west. Water law, like much other law, is something most people take for granted until it impacts their own lives in some way. We thought that this year's water shortages in some areas of our state provided a good opportunity to review the basics of "Wyoming's Water Law," the topic of the feature article in this issue. In addition, we are pleased that Gordon (Jeff) Fassett, Wyoming State Engineer, has written our guest editorial discussing some recent water law developments in Wyoming. □

My Sediments Exactly

Gordon W. (Jeff) Fassett
State Engineer

Western water law is fluid, and Wyoming's time-proven administrative permit system has flexed to serve and protect our state's most valuable resource. Built on a firm constitutional base, our water law framework sets forth sound guiding standards and principles, while allowing for interpretation and growth to meet the contemporary needs of our state's changing social, political and technical pressures for resources. Let me discuss two current issues.

Instream Flow

In 1986, a valuable addition to our statutes recognizing instream uses of water was enacted. This modification

primarily allows for the appropriation of water to "maintain or improve existing fisheries..." The law took these new beneficial uses and created a process that fits within the existing permit procedures. Since enactment, 12 instream flow applications for an appropriation of water have been filed with the State Engineer by the Wyoming Water Development Commission on behalf of the Wyoming Game & Fish Department. One water right permit has been issued for a 6-mile reach of the Clarks Fork River north of Cody, two applications await final action by the State Engineer, two more have the required technical studies complete and are scheduled for public hearing and the remaining seven are in various stages of analysis by the agencies involved.

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Mainstream

Wyoming Water Law

Wyoming water law dates back to territorial days and is based on the "doctrine of prior appropriation." Under this doctrine the first to put the water to *beneficial use* has the first right, or "first in time is first in right." Therefore, water rights in Wyoming, as in most western states, are regulated by priority. This means that during periods of limited supply, the earliest rights are entitled to water, while those with later rights may be denied water. Wyoming's first *surface water laws* were enacted in 1875. More comprehensive laws were adopted along with the state constitution in 1890. The Wyoming Constitution provides that water of all *Continued on Page 3*

Wyoming Wet Ones

Donald J. Brosz

Associate Director for Information and Extension, WWRC

"Don" has been a member of the University of Wyoming community since 1962 when he became UW's Extension Irrigation Engineer. Prior to coming to Wyoming, Don held similar positions at South Dakota State University and Kansas State University. He received both his B.S. and M.S. degrees in agricultural engineering from South Dakota State University.

During his 27-plus years at UW, Don has authored or co-authored over 40 technical and extension reports aimed primarily at improving irrigation efficiency and promoting water conservation. He has worked extensively with the agricultural community in educational activities to help

people understand Wyoming's water resources. Don was appointed Associate Director of the Water Research Center in 1985 and continued a one-half time appointment with Cooperative Extension Service until retiring from CES last year.

Don's efforts at the Water Center have included conducting several statewide conferences on topics like, "Streamside Zones" and "Wyoming's Water Resources." He has been instrumental in planning and conducting the last two Governor's Economic Development tours. Each year Don organizes a Water Resources and Law Seminar for the Wyoming Legislature to help ensure that members understand, and have timely information about, our water resources. Over the past two years, he has been an active member of the Governor's Task Force on selenium. Don has also been

working closely with the Wyoming Department of Environmental Quality on the development of "best management practice" for irrigated and non-irrigated cropland in relation to non-point source pollution. In short, if it has had to do with water in Wyoming, there is a strong chance that Don Brosz has been involved.

Don and his wife, Pearl, reside in Laramie where they have raised three daughters who are now married and residing out of state. Don is a golfer and avid booster of Cowboy athletics.

Don and Pearl Brosz began a two-year assignment in Swaziland, Africa, in July of this year where Don is working on an irrigation project for the U.S. Agency for International Development. They can be reached at USAID/Mbabane, Swaziland, Agency for International Development, Washington, DC 20523. □

Sediments cont.

While seemingly cumbersome, the compromise legal process of appropriation is working. Persons unfamiliar with the legal framework have criticized the slow pace of processing and approval. The author believes those involved are satisfied at this point, that the needed protection for these important uses is being provided by the prior appropriation permit system. A few corrections to the statutes are under consideration to fine tune the process and reduce risk to future legal challenge.

Reserved Rights

On June 24, 1989, the United States Supreme Court issued a disappointing 10-word decision bringing to a close 12 years of litigation concerning the quantification of Indian Reserved water rights for the Wind River Indian Reservation, (WRIR). While unsatisfying in some respects to all parties, this affirmation of the Wyoming Supreme Court decision on a 4-to-4 split vote, is a clear victory for the Tribes on the WRIR who received approximately 500,000 acre feet of water per year at an 1868 priority date. This surprising decision, while end-

ing the Wyoming litigation, left unsettled the PIA (practicable irrigable acreage) standard of quantification of reserved rights for other reservations across the country. The State of Wyoming has filed a petition for rehearing, in an effort to obtain guidance in this basin. These efforts were initiated prior to the June decision through the negotiation and approval of a 1-year interim agreement between the state and tribes. This historic document, signed by the Tribal Chairman and the Governor in February, put in place a renewed cooperative spirit and a process aimed at long-term resolution of the water related issues. This process is moving forward with joint technical work and advisory water user groups addressing distribution and administration issues this irrigation season.

While the Indian Reserved rights are evolving toward a second generation of questions and discussions in administration, a lot of work by the State Engineer's Office for the District Court remains in order to complete the General Adjudication process. Major tasks involve: (1) a determination of "Walton rights"

(reserved water rights for non-Indian successors) on the WRIR, (2) analysis and cancellation of state-awarded rights that overlap the reserved water rights, and (3) the adjudication of the remaining unadjudicated state issued permits in Water Division No. 3 (1100 of 4000), which was initiated in 1985.

For the most part Wyoming is experiencing its third consecutive year of below average snowpack and runoff. Need I say more to emphasize how the above matters, and many others keep life interesting, in our world of water resources and law. □

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Mainstream cont.

natural streams, springs, lakes or other collections of still water are state property. The first Wyoming *ground water laws* were enacted in 1945 and amended in 1947. A new ground water law went into effect March 1, 1958, repealing and replacing the 1945 and 1947 laws.

Water Administration

Wyoming is divided into four water divisions (see Fig. 1). Water Division 1 includes the North and South Platte river drainages, the Little Snake, and the Niobrara river drainages. Water Division 2 includes all drainages north of the Niobrara and North Platte river drainages and east of the Big Horn Mountains. Water Division 3 includes the Big Horn and Clarks Fork river drainages, and Water Division 4 includes the Green, Bear and Snake river drainages.

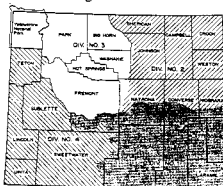


Figure 1 Wyoming Water Divisions

The chief Wyoming water administrator is the state engineer, while each water division is overseen by a superintendent who administers the water rights with assistance from water commissioners and hydrographer-commissioners. The four superintendents and the state engineer constitute the State Board of Control which meets quarterly to adjudicate or finalize water rights and to consider other matters pertaining to water rights, such as change in point of diversion or other amendments or corrections of water rights.

Prior to statehood in 1890, a water right could be established by a proce-

dure predicated on the use of water and the filing of a claim with territorial officials. Water rights with priority dates before 1890 are termed "territorial" water rights. Since statehood, the only way a water right can be acquired in Wyoming is by securing a permit from the state engineer. Water rights cannot be obtained by historic use or adverse possession in any case. Wyoming water law requires that you follow certain procedures to obtain a valid water right.

Preferred And Non-preferred Uses

Wyoming water law defines the preferred beneficial uses of both surface and ground water and lists them in the following order:

1. Drinking water for both humans and livestock
2. Water for municipal purposes
3. Water for steam engines and general railway use; water for cooking, laundries, bathing, and refrigeration (including the manufacture of ice); water for steam and hot-water heating plants and steam power plants
4. Water for industrial purposes

All uses of water other than those listed as preferred uses are considered non-preferred.

When the water supply is insufficient to meet all water use rights, rights with a preferred use do not take precedence over a non-preferred use. Rather, the priority date of a water right, not preferred or non-preferred use, determines who is entitled to water. The only way you can obtain a preferred right from a non-preferred prior right is by purchase or by condemnation through court action. The right of condemnation cannot be used by industrial concerns to obtain water rights. However, ground water wells yielding 25 gpm or less and used solely for domestic and stock purposes do have preferred right over wells for all other uses regardless of date of priority.

Keeping Water Rights Valid and Changes in Use

To keep a water right valid when changes are made in the point of diversion, in the location of a well, in the

location of an irrigation ditch, or similar circumstances, permission must be secured by petitioning the state board of control (if the water is adjudicated). If it is not adjudicated, petitions must be sent to the state engineer. The petition sets forth all pertinent facts about the existing use and the proposed change.

In most instances, obtaining permission for changes does not change the priority date of the water right but keeps the water right current and legal. Public hearings on the changes may be held at the petitioner's expense to ensure that no injury occurs to other water right holders because of the change.

Lands With Attached Water Rights

Wyoming law also provides that any time a parcel of land with water rights (the water right is good only on that parcel of land described in the right) is subdivided, the developer must dispose of the water rights in one of three ways:

1. Voluntarily abandon the water rights, removing them from the land forever
2. Transfer the water rights to other owned lands that have no other water right from the same source
3. Develop a subdivision irrigation plan showing which lands have the water right, amount of the water right, supply and waste ditches, and other information necessary for the protection of individual lot owners in retaining the water right on the land.

Water Right Abandonment

A right for surface or ground water not used for five successive years is considered abandoned, but a statutory procedure must be followed to bring about legal abandonment. The law provides a procedure for abandonment, but it must be brought about by an affected water user or by the state engineer. If a right is declared abandoned, the user forfeits all water rights, easements, ditch rights, and the like and the water again becomes subject to appropriation.

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Mainstream cont.

Basic Precepts of Wyoming Water Law

1. Beneficial use is the basis, measure, and limit to the right to use water at all times.

2. To bring about a more economical use of the available water supply, two or more water users may rotate the use of their combined water rights after obtaining permission of the water division superintendent or water commissioner.

3. Rights owners are responsible for maintenance of ditches so that water does not flood or damage the property of others

4. Rights owners are responsible for waste water.

5. In administering water to appropriations on a stream, the state is obligated to deliver the full amount of any appropriation in priority at its headgate out of the stream. Any ditch loss between the headgate and the appropriator's land is the responsibility of the appropriator.

6. Temporary uses of water, such as for oil well drilling, highway construction, etc., may be granted by the state engineer upon proper application.

7. In any case where a ditch was in place before any houses or other property, the property owners are com-

pelled to protect themselves from any damage created by seepage from the ditch.

Summary

A valid right to the use of water may be acquired only by following the procedures established by Wyoming state law for both surface and ground water. Water users should be sure of the status of their water rights. Check the records in the county clerk's office or the state engineer's office. Information is also available in each of the water division superintendent's office: Water Division 1 - Torrington; Water Division 2 - Sheridan; Water Division 3 - Riverton; Water Division 4 - Cokeville. Records indicate the appropriation amount, priority of the right, and how and where the water is to be used. Correspondence regarding Wyoming surface and ground water rights should be sent to: State Engineer's Office, Herschler Building, Cheyenne, Wyoming 82002.

A more detailed description of Wyoming water law and permitting procedures is available through the Wyoming Water Research Center or State Engineer's Office. □

Splash

State/Regional/Local News

○ The Ninth Circuit Court of Appeals has ruled that it is the federal

government, not the states that has the ultimate authority to determine what instream flows will be required of hydropower developers. The case has been closely watched by states throughout the West that have claimed that the Federal Energy Regulatory Commission (FERC) has wrongly usurped their power to control their own water. The matter has been festering for years but only came to a head in late 1987 when California challenged FERC over its right to impose stream flows on a small hydro project planned on the Rock Creek. Each side points to one section of the Federal Power Act, which created FERC to prove that Congress gave it the right to determine stream flows. In siding for the federal government in the Rock Creek case, the Ninth Circuit Court of Appeals said, "our reading of the FPA combined with the Supreme Court's teachings convince us that Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary rights remains in state hands."

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Splash cont.

○ A group of Colorado farmers have sued to divest themselves from water they once requested from the Dolores Water Conservancy District. The judge presiding over the case has recently ruled that the district had not properly locked the farmers into the water. Now they may be free to pull out of the project. In 1977, as project construction was underway, the farmers applied to the district for water to irrigate about 3,300 acres of land, about 12 per cent of the total project's acreage. However, due to construction delays, the death of a lawyer and other internal problems at the district, the applications languished for 10 years. The U.S. Bureau of Reclamation had estimated that it would cost about \$20 to \$25 to irrigate an acre. By the mid-1980s, that estimate had risen to about \$28 to \$30. Robert Young, a professor of natural resource economics at Colorado State University in Fort Collins, studied the impact of the increase and said, "It would be unlikely that it could be profitable if the farmers use the water at that cost." So the farmers told the district they were no longer interested in buying water.

○ Secretary of the Interior Manuel Lujan has ordered that new environmental impact statements (EIS) be drawn up to look into the proposed plans to sell 1.5 million acre feet of water from the federally owned Central Valley Project in California. Original EIS statements generated a storm of protests—over 2,000 comments—largely from enraged environmentalists. So Lujan ordered that they be revised and reissued. The Bureau of Reclamation had identified a demand for upwards of 3.4 million acre feet. But since only 1.5 million acre feet is available it tried to strike a balance between the needs of fish, wildlife, municipalities, industry and agriculture. "They're trying to strike a balance now, after fisheries have declined by 50 per cent to 95 per cent," said John Beutler, executive

director of United Anglers in Berkeley. Water users say that using the water exclusively for fish would be a waste.

○ Zach Willey has seen the future of the environmental movement, and he believes that it's ready to enter its third phase. According to Willey, senior economist for the Environmental Defense Fund, the future holds an increased focus on water acquisitions for public use. Willey noted that many uses of water, such as fish and wildlife protection, are presently managed by public agencies. However, these agencies have no water rights other than those resulting from regulatory or court proceedings. Mechanisms such as instream flow standards are a step in the right direction toward establishing such rights, he says, but conflicting priority dates can still make flows uncertain. "This uncertainty can be reduced considerably by outright acquisition of existing water rights and assignment of those rights to environmental uses such as instream flows or wetlands habitats," he said. Water marketing should be employed, he said, to find water from existing uses (such as agriculture) and put it to new uses. He said public agencies should take a lesson from the private sector and seek out water that they can acquire for their own uses.

○ In response to a report that looked at the best way for Nebraska to sell its abundant ground water, the state has now funded a new study that will examine ways it can protect itself from unwanted transfers of water to out-of-state users. The 1982 Sporhase ruling of the U.S. Supreme Court struck down Nebraska's water transfer laws, saying that these rules were so restrictive that they placed an unconstitutional burden on free interstate commerce. "The earlier study was devoted to finding ways to facilitate water transfers," says Norm Thorson, a professor of law at the University of Nebraska's Law College in Lincoln, who will oversee the new study. The new report will take a different perspective.

"It's designed to find the constitutional limits Sporhase imposed. How to protect water within the state is one aspect of that." The study should be ready late this year.

○ Society has put demands on the Colorado River never dreamed of when much of the river was first being developed. And though the plumbing has grown ever more complex, the organizations used to manage the river have not kept up with the problems. According to University of Colorado Professor of Law David Getches, it's time to take another look at the way the Colorado River is managed. He has called for creation of a basin-wide Colorado River Authority. "Drought in the basin," he says, "is inevitable. As the demands on the resource continue to grow, some kind of Colorado River Basin Authority is needed to distribute its water throughout the basin for broad public benefits." Currently, decision making within the Colorado River basin, which serves seven states and two countries, is based on a patchwork of interstate compacts, legislation, court decisions, contracts and a treaty with Mexico. Water in the river is regulated by an extensive plumbing system, constructed and operated primarily by the U.S.B.R. However, there is no formal mechanism outside of the courts to consider interstate problems, balance demands, resolve differences among users and anticipate future problems of river management. "It is insufficient to leave the resolution of river management decisions to ad hoc responses by the parties most interested in issues as they arise," Getches says. □

Interested in expressing your thoughts and views on a water issue or concern? The "Hydrogram" guest editorial, *My Sediments Exactly*, is available for that purpose. If interested, please contact Dr. Steven Gloss, Director, Wyoming Water Research Center, Box 3067, University of Wyoming, Laramie, Wyoming 82071. Telephone 307-766-2143.

STATE OF WYOMING

WYOMING
INDEX OF SURFACE WATER BASINS

