

A CRITICAL LOOK AT WYOMING WATER LAW

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## A Critical Look at Wyoming Water Law\*

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## INTRODUCTION

From its earliest history Wyoming has used the prior appropriation doctrine to allocate water rights. Over time, Wyoming water law has evolved to accommodate changing needs and values, but the basic scheme established by the first state legislature for allocating water rights remains intact. Indeed, so innovative was Wyoming's water allocation system when first adopted that it was soon emulated by other western states. This article offers a comprehensive overview of Wyoming water law. Potential problems with the law are also identified and analyzed. Some of these problems are individually significant, and though the Wyoming water law system remains fundamentally sound, selective changes to the state's laws or regulations will be necessary if Wyoming is to maintain its leadership role in western water law.

## II. HISTORICAL BACKGROUND

Wyoming's first territorial legislature enacted laws regulating the initiation of water rights, the construction of ditches, and the incorporation of ditch companies in 1869. Although this legislation seemed to apply the prior appropriation doctrine, it did not expressly use that term.<sup>1</sup> The Irri-

1. 1869 Wyo. Terr. Sess. Laws, ch. 8, tit. 1, §§ 28, 29; ch. 22, §§ 15 to 18. (The law provided in relevant part that "the water of any stream [shall not] be directed from its original channel to the detriment of any miners, mill-men, or others along the line of said stream who may have a priority of right, and there shall be at all times left sufficient water in said stream for the use of miners and agriculturists who may have a prior right to such water along said stream." *Id.* at ch. 8, tit. 1 § 29.)

gation Act of 1886 erased any doubt which may have existed from this early legislation by expressly recognizing that prior appropriators of water held the better right.<sup>2</sup> The Irrigation Act declared that unappropriated water belongs to the public, and provided for establishment of water districts, the appointment of water commissioners, and the regulation, registration and adjudication of irrigation rights.<sup>3</sup>

Wyoming gained statehood in 1890, and the new state's constitution recognized the central role that water would hold for the state's development. Article VIII, Section 1, declares that "[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state . . . [is] the property of the state." Under Article VIII, Section 3 "[p]riority of appropriation for beneficial uses . . . give[s] the better right," and no appropriation may be denied, "except when such denial is demanded by the public interests."<sup>4</sup>

Shortly after Wyoming was admitted to the Union in 1890, the first Wyoming legislature enacted comprehensive water rights legislation which, to this day, serves as the cornerstone of Wyoming water law.<sup>5</sup> The principal architect of these measures was Elwood Mead,<sup>6</sup> who became the Territorial Engineer when that office was created in 1888 and became the first State Engineer upon statehood.<sup>7</sup>

### III. ADMINISTRATION OF WATER RIGHTS

#### A. Board of Control

The Wyoming Constitution establishes a Board of Control, which together with the State Engineer administers water rights in the state.<sup>8</sup> The Board is comprised of the State Engineer, who serves as its presi-

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2. 1886 Wyo. Terr. Sess. Laws, ch. 61.

3. *Id.*

4. WYO. CONST. art. VIII, §§ 1, 3. Neither the constitution, the statutes nor Wyoming case law, however, define the term "public interest."

5. 1890 Wyo. Sess. Laws, ch. 8.

6. Elwood Mead came to Wyoming from Fort Collins, Colorado where he served as both Assistant State Engineer and Professor of Irrigation Engineering at Colorado State Agricultural College. (Mead was reputedly the first person in the United States to hold the title of professor of irrigation engineering.) One year after Mead assumed his duties as Territorial Engineer, the newly appointed Governor of the Wyoming Territory, Frances Warren, called for a constitutional convention to draft a state constitution. Working behind the scenes with members of the convention, Mead drafted the progressive water provisions which to this day form the basis of Wyoming water law. When Wyoming gained statehood in 1890, Mead set to work devising a comprehensive water code that was approved by the first Wyoming legislature. With Mead's oversight, Wyoming's new laws brought order to the chaos that had previously characterized the state's water allocation system. Mead remained in Wyoming as its state engineer until 1899 when he left for Washington, D.C. to work for the Department of Agriculture. After interim stops in Australia and California, Mead returned to Washington in 1924 as the Commissioner of Reclamation. Mead died in 1936, and shortly thereafter Secretary of the Interior Harold Ickes announced that the reservoir behind Boulder Dam would be named Lake Mead in honor of a man whose remarkable vision had helped shape the development of the West. For further information about Mead, see J. R. KLUGER, *Elwood Mead: Irrigation Engineer and Social Planner* (1970 and photo. reprint 1984) (unpublished dissertation available at the Universities of Arizona and Wyoming).

7. *Id.*

8. WYO. CONST. art. VIII, §§ 2, 5; WYO. STAT. § 41-4-201 (1977).

dent, and the superintendents of each of the four water divisions established for the four major drainage basins in the state.<sup>9</sup> The constitution requires the Board to supervise "the waters of the state . . . their appropriation, distribution and diversion, and . . . the various officers connected therewith."<sup>10</sup>

### *B. State Engineer*

The Wyoming Constitution calls for a State Engineer, who is qualified by "theoretical knowledge" and "practical experience," to be appointed by the Governor and confirmed by the state senate for a six-year term.<sup>11</sup> The State Engineer is the chief water official in the state. His responsibilities derive both from state statutes and the state constitution. Among other things, the State Engineer is responsible for measuring streams, collecting information for construction of water projects, advising the state on water needs, and suggesting amendments to the state's water laws.<sup>12</sup> The State Engineer is required to maintain on behalf of the state complete records of his work, and he may appear on behalf of the State of Wyoming in any proceeding or hearing relating to water. The State Engineer's role in the administration of Wyoming water rights is further described in pertinent sections of this article.

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9. The water divisions are described by statute as follows:

Water Division No. 1—all lands drained by the North Platte River and its tributaries, the South Platte River, Snake River (a tributary of the Green River) and its tributaries, and Running Water Creek and its tributaries.

Water Division No. 2—all lands drained by the tributaries of the Yellowstone and Missouri Rivers north of the watershed of the North Platte River and Running Water Creek, and east of the summit of the Big Horn Mountains.

Water Division No. 3—all lands drained by the Big Horn River and its tributaries, and by Clark's Fork and its tributaries.

Water Division No. 4—all lands drained by the Green, Bear and Snake Rivers and their tributaries, except that portion of the Snake River already placed in Water Division No. 1. WYO. STAT. § 41-3-501 (1977).

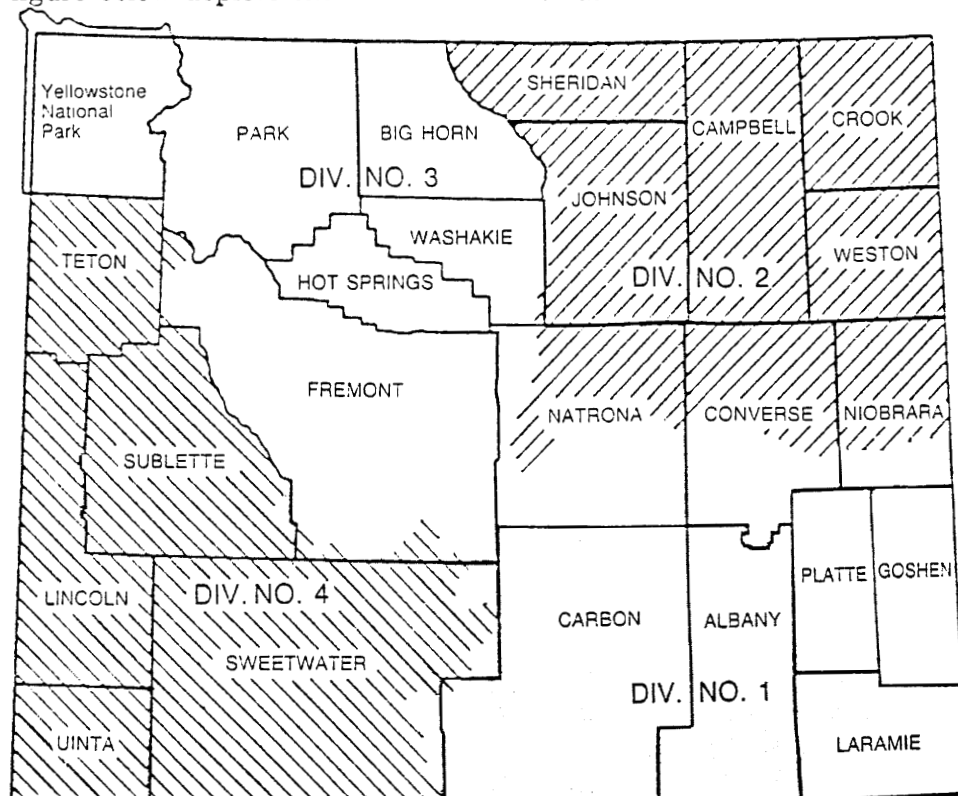
10. WYO. CONST. art. VIII, § 2. *See also* WYO. STAT. §§ 41-4-201 to 41-4-211 (1977 & Cum. Supp. 1988). By statute, a majority of all the Board members will constitute a quorum to transact business, with meetings required each quarter. The Board sets its own schedule, and special meetings may be called by the president if a special meeting is requested by a party seeking Board action that cannot be accommodated at a regular meeting. A party making this request will be responsible for costs pursuant to the special meeting. WYO. STAT. § 41-4-201 (1977 & Cum. Supp. 1988).

11. WYO. CONST. art. VIII, § 5. The Wyoming statutes further require that the State Engineer be a professional engineer and have at least two years' engineering practice and experience *in the state*. WYO. STAT. § 9-1-901 (1977). Curiously, when the 1987 state legislature changed the requirements for the State Engineer, eliminating the requirement that the State Engineer be a land surveyor and reducing the experience necessary from five years, it did not reduce the qualifications for the Deputy and First Assistant State Engineers. Both of these individuals were required to have more experience than the State Engineer: the Deputy was required to have five years' experience and the First Assistant is required to have three years experience. WYO. STAT. § 9-1-903 (1977). In 1987, the legislature repealed the requirement to appoint a Deputy and Assistant State Engineer. *See Act To Amend Wyo. STAT. § 41-4-402 and Repeal Wyo. STAT. § 9-1-103. Effective June 8, 1989.*

12. WYO. STAT. § 9-1-902 (1977, Rev. 1987). *See also* John Meier & Son v. Horse Creek Conserv. Dist., 603 P.2d 1283, 1288 (Wyo. 1979).

### C. Water Divisions

As noted above, Wyoming is divided into four water divisions which correspond roughly with the major drainage basins in the state.<sup>13</sup> The figure below depicts the location of these divisions.



*Wyoming Water Divisions*

Each division is headed by a Superintendent, who is appointed by the Governor and serves at the Governor's pleasure.<sup>14</sup> The Governor may appoint a superintendent from among those qualified by "training and experience."<sup>15</sup> Such qualifications are determined by examination in the areas of irrigation laws and their administration, measurement of flowing water, evaporation, seepage, drainage, and the hydrographic features of his water division.<sup>16</sup> The Superintendent regulates all water usage within his division.<sup>17</sup>

### D. Water Districts

For administrative convenience, water divisions may be further divided by the Board of Control into water districts.<sup>18</sup> The Governor may

13. See *supra* note 9. See also WYO. CONST. art. VIII, § 8; WYO. STAT. § 41-4-501 (1977).

14. WYO. STAT. § 41-3-502 (1977 & Cum. Supp. 1988).

15. WYO. STAT. § 41-3-502 (1977 & Cum. Supp. 1988).

16. WYO. STAT. § 41-3-502 (1977 & Cum. Supp. 1988). The State Engineer administers the examination and makes recommendations to the Governor.

17. WYO. STAT. § 41-3-503 (1977).

18. WYO. STAT. § 41-3-601 (1977).

appoint a Commissioner for each district, or he may appoint a Commissioner to more than one district on the recommendation of the Superintendent.<sup>19</sup> The Commissioner and his deputies are the "ditch riders" for Wyoming, and are responsible for distributing water according to priorities.

Separate groundwater districts must be created by the State Engineer within a division from the boundaries of underlying aquifers.<sup>20</sup> These districts may be divided into subdistricts by the State Engineer "when parts of an aquifer require or may require separate regulations from the rest."<sup>21</sup>

Although Water Commissioners are charged with administering state law, and serve under the direction of the State Engineer, they are paid primarily by the counties which they serve.<sup>22</sup> This system has worked reasonably well in the past, but problems inevitably arise where an employee is paid by one entity or political body yet responsible to another. To correct this problem, the statute should be amended to provide a state funded program for all Water Commissioners. The statute currently authorizes state funded Water Commissioner positions under the special title of Hydrographer Water Commissioners, but the primary responsibility for regulating water rights remains in the hands of those Commissioners who are paid by the counties.<sup>23</sup>

#### *E. Water Distribution Organizations*

Wyoming hosts a variety of public and private water distribution organizations. The most common organizations are mutual ditch companies, irrigation districts, and water conservancy districts.<sup>24</sup> Each of these is described briefly below.

##### *1. Mutual ditch companies*

Mutual ditch companies are private, nonprofit companies which are organized under special incorporation statutes.<sup>25</sup> Individuals hold shares in the company which generally represent a proportionate interest in the water works. In many western states, legal title to the water rights themselves is retained by the mutual ditch company, although the stockholder may hold equitable title to those rights.<sup>26</sup> Mutual ditch companies in Wyoming may take on a variety of forms, but the Wyoming Supreme Court has recognized the propriety of allowing shareholders of the ditch company to retain legal title to their own water rights.<sup>27</sup>

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19. WYO. STAT. §§ 41-3-602, 41-3-603 (1977 & Cum. Supp. 1988).

20. WYO. STAT. § 41-3-910 (1977).

21. WYO. STAT. § 41-3-910 (1977).

22. WYO. STAT. § 41-3-607 (1977).

23. WYO. STAT. §§ 41-3-602(c), 41-3-607 (1977 & Cum. Supp. 1988).

24. Other water organizations authorized by law include irrigation and drainage districts (WYO. STAT. §§ 41-6-101 to 41-6-507 (1977 & Cum. Supp. 1988)), public irrigation and power districts (WYO. STAT. §§ 41-7-801 to 41-7-865 (1977 & Cum. Supp. 1988)), watershed improvement districts (WYO. STAT. §§ 41-8-101 to 41-8-126 (1977 & Cum. Supp. 1988)), and drainage districts (WYO. STAT. §§ 41-9-101 to 41-9-606 (1977 & Cum. Supp. 1988)).

25. WYO. STAT. §§ 17-12-101 to 17-12-105 (1977, Rev. 1987).

26. See 4 CLARK, WATERS AND WATER RIGHTS, § 342.5 (1970).

27. *Big Goose and Beaver Ditch Co. v. Wallop*, 382 P.2d 388, 393 (Wyo. 1963).

## 2. Irrigation districts

Irrigation districts are public entities which are organized by filing a petition in the appropriate district court.<sup>28</sup> The petition must be signed either by a majority of landowners who own or control at least one third of the lands in the district, or by persons who own or control at least one half the land in the district.<sup>29</sup> A hearing is held on the petition, during which persons may move to have land included or excluded from the district.<sup>30</sup> Lands may be included in the district (including lands within the boundaries of a city or town), so long as the benefits to those lands exceed the costs.<sup>31</sup> Lands within irrigation districts may be levied assessments based on the amount of water received,<sup>32</sup> except that a minimum assessment may be imposed on all lands within the district.<sup>33</sup> Commissioners to govern the district are first appointed by the district court following a favorable ruling on a petition, and are then elected by the landowners who receive one vote for each irrigable acre of land within the district.<sup>34</sup>

Districts are generally organized to promote the development and operation of various kinds of water development and delivery projects, often spurred by the prospect of obtaining state or federal funding.<sup>35</sup> Most districts own reservoirs and thus are the legal owners of the primary water rights to be used by the landowners in the district.<sup>36</sup> Generally, the ulti-

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28. WYO. STAT. § 41-7-201 (1977). The Wyoming Supreme Court has sustained the irrigation law against a constitutional challenge by a landowner within a district. *Sullivan v. Blakesley*, 35 Wyo. 73, 246 P. 918 (1926). In so doing, the court held that irrigation districts were public corporations, but "not municipal corporations as generally understood," due to their limited powers. The court further found that the assessments levied against land were distinguishable from taxes because they are levied "in proportion to the peculiar advantages accruing to each parcel therein." *Id.* at 84-85, 246 P. at 922.

29. WYO. STAT. § 41-7-201 (1977). Persons controlling such land include entrymen on public lands.

30. WYO. STAT. §§ 41-7-204, 41-7-208 (1977).

31. WYO. STAT. § 41-7-203 (1977). *See also* *In re Organization of Third Division Irrigation Dist.*, 78 Wyo. 449, 329 P.2d 807 (1958). "The provision means merely that each part [of the irrigation district] must be benefited by the proposed work and that the benefit must exceed the cost . . . . The exact amount of benefit . . . cannot very well be determined until the district is organized." *Id.* at 464, 329 P.2d at 813.

32. The statute actually provides that assessments are based on "irrigable acreage." The statute goes on to indicate, however, that such assessments "shall be uniform as to irrigable lands receiving the maximum apportionment of water" and proportionately less for lands receiving less water. In essence then, assessments are based on amount of water received. WYO. STAT. § 41-7-403 (1977).

33. WYO. STAT. § 41-7-403 (1977). *See also* *Casper-Alcova Irrigation Dist. v. Irving*, 584 P.2d 1064 (Wyo. 1978). The court held that "the 1953 amendment gave to the district commissioners a discretion to fix some minimum charge that would be paid by all water users without such apportionment." *Id.* at 1066.

34. WYO. STAT. § 41-7-210 (1977 & Cum. Supp. 1988); WYO. STAT. § 41-7-317 (1977). The voting procedure used in Wyoming conforms with that used in most states and has been upheld against claims that it violates the equal protection clause of the U.S. Constitution. *Salzer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). (Douglas, Brennan and Marshall, J. J. dissenting). *See also* *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973) (Douglas, Brennan and Marshall, J. J. dissenting) (involving a Wyoming special purpose district).

35. Federal reclamation projects frequently require the formation of a special water district to contract with the government on the project. *See* J. LESHY, *Special Water Districts: The Historical Background*, in *SPECIAL WATER DISTRICTS: CHALLENGE FOR THE FUTURE* at 19-20 (J. Corbridge ed. 1983).

36. WYO. STAT. §§ 41-3-301, 41-3-302, 41-3-323 (1977 & Cum. Supp. 1988).



mate consumer obtains a secondary water right to use water from the district's reservoir, as explained in greater detail below. Irrigation districts have eminent domain authority, the power to levy assessments, to make contracts with the state and federal governments, and the power to issue bonds.<sup>37</sup> An irrigation district may also be converted to an irrigation and power district, which allows the district to produce and distribute electricity upon approval of a resolution by the district's commissioners, a petition to the district court, and approval of the petition after a hearing by the court.<sup>38</sup> Irrigation districts are among the most popular forms of special purpose districts in Wyoming.<sup>39</sup>

### 3. Water conservancy districts

Water conservancy districts are organized much like irrigation districts and have similar powers, but they are generally established for broader purposes.<sup>40</sup> Conservancy districts may be organized to supply domestic and industrial water in addition to agricultural water. Water conservancy districts also have broader taxing powers than irrigation districts. Unlike irrigation districts, conservancy districts can impose ad valorem taxes which are based on property values of land within the district.<sup>41</sup> Voting rights in conservancy districts are essentially the same as those for irrigation districts.<sup>42</sup> Conservancy districts have not proved to be as popular as irrigation districts in Wyoming and as of 1989 only a handful of conservancy districts had been formed.

## F. Public Rights to Water

Wyoming water rights are subject to the right of the public to float on the surface of water bodies for recreational purposes.<sup>43</sup> The seminal

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37. WYO. STATS. § 41-7-303, 41-7-404 (1977 & Cum. Supp. 1988); WYO. STAT. § 41-7-808 (1977).

38. WYO. STAT. §§ 41-7-850 to 41-7-859 (1977 & Cum. Supp. 1988). Likewise, an irrigation and power district may be changed to an irrigation district, though the procedures for doing so differ. WYO. STAT. §§ 41-7-830 to 41-7-835 (1977 & Cum. Supp. 1988).

39. As of 1988, approximately 54 irrigation districts had been organized in Wyoming.

40. Water Conservancy Act, ch. 101 (1957) (codified as WYO. STAT. §§ 41-3-701 to 41-3-779 (1977)). Conservancy districts, however, require a smaller percentage of landowners to file a petition. Twenty-five percent of the landowners, or landowners or entrymen holding 25% or more of the land may file a petition to establish a water conservancy district. WYO. STAT. § 41-3-721 (1977 & Cum. Supp. 1988).

41. WYO. STAT. §§ 41-3-770 to 41-3-779 (1977).

42. WYO. STAT. §§ 41-3-740, 41-3-744 (1977). The voting procedures for conservancy districts have not been challenged in the federal courts but would seem to pose a more difficult constitutional question than that posed by irrigation districts where assessments roughly correspond with benefits received. See *Casper-Alcova Irrigation Dist.*, 584 P.2d 1064.

43. Some states have recognized public rights to water under the public trust doctrine. See, e.g., *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984); *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709 (1983). These decisions impose upon their states a trust responsibility "to protect the people's common heritage of streams, lakes, marshlands and tidelands . . ." 658 P.2d at 361. Though this particular theory has not been applied in Wyoming, it logically follows from the State Engineer's obligation to deny an appropriation of water "when such denial is demanded by the public interest." WYO. CONST. art. VIII, § 1. The breadth of this obligation is, of course, dependent on the meaning one ascribes to the phrase "public interest." As noted below, Wyoming has not yet seen fit to define this phrase. See *infra*, text accompanying notes 88 and 89.

case in Wyoming is *Day v. Armstrong*.<sup>44</sup> In *Day*, the Wyoming Supreme Court held that the state constitution's provision for state ownership of all water in the state guaranteed the public's right to float on that water. This right included any incidental contact with the land necessary to move a craft around shoals or obstructions.<sup>45</sup> Unlike courts in other jurisdictions, the Wyoming court did not rely directly on the navigability of the water to support the public's right. Rather, the public's right is an incident of the state's ownership of the water, and it is the utility of the water for flotation which alone limits the public's right.<sup>46</sup>

One question left unanswered by *Day v. Armstrong* is whether the public's rights extend to private structures such as reservoirs and irrigation ditches. On the one hand it can be argued that the water remains a public resource until it is actually put to a beneficial use.<sup>47</sup>

The argument that reservoir water remains public property finds support in the language of the Wyoming Constitution itself which declares that "[t]he water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."<sup>48</sup> It might be countered, however, that the constitutional language was intended to refer only to natural water bodies.<sup>49</sup> Thus, the lawful diversion of water from a natural stream for storage in a reservoir reduces that water to the owner's possession, at which time it loses its status as a public resource to which public rights attach.

Perhaps the best result would be a middle ground position which recognizes the public's right to use water held in private structures but only

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44. 362 P.2d 137 (Wyo. 1961).

45. The court made clear, however, that wading or walking on a private streambed for purposes other than floating a craft would be deemed an actionable trespass. *Id.* at 146.

46. *Id.* at 143, 145. All states recognize the public's right to use the surface of water of lakes or streams that are navigable under the federal test for ownership of title to the bed of the lake or stream. Under this test, water was deemed navigable if it was usable in its natural and ordinary condition for customary modes of trade and travel when the state was admitted to the Union. See Johnson and Austen, *Recreational Rights and Titles to the Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1, 24-25 (1967). Most states have gone further, however, and guaranteed the public's right to use the surface of waters that would not be considered navigable under the federal test. Many of these states have reached this result by adopting a state test for navigability that is considerably broader than the federal test. Thus, any water body that can float a saw log or a pleasure boat may satisfy the test. See, e.g., *Arkansas v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980), *cert. denied*, 449 U.S. 843 (1980); *Kelley ex rel. MacMullan v. Hallden*, 51 Mich. App. 176, 214 N.W.2d 856, 864 (1974). The analysis used by the Wyoming Supreme Court reaches essentially the same result, but relies on the fact of state ownership of the water, rather than navigability of the water body.

47. Professor Getches argues that "[w]ater ordinarily should not be considered personal property while it is in canals, conduits, reservoirs and the like. When put into containers or held in swimming pools after being delivered to consumers, however, water may properly be treated as personal property." D. GETCHES, *WATER LAW IN A NUTSHELL*, 87 (West, 1984). See also *John Meier & Son v. Horse Creek Conservation Dist.*, 603 P.2d 1283 at 1291 ("Storage is not itself an end constituting beneficial use.") (McClintock, J., specially concurring); Wyo. STAT. 41-3-401(a) (1977 & Cum. Supp. 1988).

48. WYO. CONST. art. VIII, § 1 (emphasis added).

49. One might argue that the phrase "other collections of still water" should be construed *ejusdem generis* to apply only to natural water bodies. See SUTHERLAND, *STATUTORY CONSTRUCTION*, § 47.17.

insofar as such use can be conducted without unreasonably interfering with the primary purposes for which the structures were built.

### *G. Instream Flows*

In 1986, Wyoming passed legislation allowing the state to acquire rights to instream flows to establish or maintain fisheries.<sup>50</sup> Under this law, only the State of Wyoming may acquire and hold an instream flow right, although such rights are held by the Game and Fish Commission for the State.<sup>51</sup>

Two aspects of the Wyoming instream flow law seriously undermine its utility. First, the statute appears to allow appropriations of direct flows *only* if providing instream flow from storage water is not feasible. The statute provides in relevant part that "[i]f the water development commission 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 [for instream flows.]"<sup>52</sup> The statute thus implies that the State Engineer may *not* act on an application *unless* the above showing is made. The reasons for this requirement are unclear. Perhaps it was intended to generate support from fishermen for storage projects. Ironically, those very streams threatened by a storage project are the same streams most likely in need of instream flow protection.<sup>53</sup>

The second problem is potentially even more serious. Under the law, the State Engineer may not issue an instream flow permit "where the

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50. Instream Flow Act of 1986, ch. 76, § 1 (codified as WYO. STAT. §§ 41-3-1001 to 41-3-1014 (1977 & Cum. Supp. 1988)).

51. WYO. STAT. § 41-3-1002(e) (1977 & Cum. Supp. 1988). Although the Wyoming Water Development Commission actually files the water right application, such applications are made strictly on the recommendation of the Game and Fish Commission. WYO. STAT. § 41-3-1003(c) (1977 & Cum. Supp. 1988). Further, only Game and Fish may petition for a change of use on an instream flow right. WYO. STAT. § 41-3-1007(a) (1977 & Cum. Supp. 1988). In addition to the instream flow procedure, the State of Wyoming may acquire water rights by transfer or gift. WYO. STAT. § 41-3-1007 (1977 & Cum. Supp. 1988); *see also* WYO. STAT. § 23-1-302(a)(iii) (1977 & Cum. Supp. 1988). Astute conservationists should take particular note of the possibility for obtaining donations at the time of a water transfer. Suppose, for example, that a municipality purchases an irrigation water right and proposes to take the water into another drainage basin. The amount of water available for transfer is limited to the historic consumptive use. WYO. STAT. § 41-3-104 (1977 & Cum. Supp. 1988). Thus, if 50% of the water was returned to the stream as an instream flow, only 50% of the water right may be transferred to the municipality. Usually, the transaction ends at this point and the original irrigator no longer has a water right. The irrigator could just as easily comply with the Wyoming transfer statute if he decided to sell 50% of his water to the municipality (the consumptive share) and donate the remaining 50% to Game and Fish (the nonconsumptive share). The irrigator and the municipality lose no money in this transaction, but instream flow rights may be gained.

52. WYO. STAT. § 41-3-1006(b) (1977 & Cum. Supp. 1988). *See also* WYO. STAT. § 41-3-1005 (1977 & Cum. Supp. 1988), which provides that "[i]f the water development commission determines that storage of water to provide instream flow is feasible and in the interest of the State of Wyoming, it shall request authority from the state legislature with . . . facilities . . . for such purposes. . . ."

53. Notwithstanding the above requirement of the law, the State Engineer did not require that the statutory showing be made before approving the petition in the Clark's Fork case. It remains to be seen whether his failure to demand compliance with this provision will render his decision vulnerable to a legal assault.

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."<sup>54</sup> The problem this provision presents can best be illustrated by example. Consider a river which flows from Wyoming to Montana and is divided equally between the states by compact. Assume that Wyoming is consuming less than it is entitled to consume under the compact. A segment of that river has been given instream flow protection by mandating that certain minimum flows be maintained. Subsequently, an upstream landowner applies for a water right out of the same river system. The Board of Control determines that the proposed water right will interfere with the minimum flows guaranteed by the instream flow designation. But as the applicant correctly points out, Wyoming is not consuming its full share of the water in the river as allowed in the compact with Montana. Thus, arguably, the instream flow includes a portion of Wyoming's consumptive share allocated by compact and the Board cannot deny the junior applicant's priority over the instream flow right. If the Board must accept the junior applicant's priority under the terms of the law, then the only apparent advantage to designating an instream flow on a stream which has been apportioned between two states may be to prevent transfers of existing water rights which might impair the protected stream segment.<sup>55</sup>

The initial application for an instream flow right involved the Clark's Fork River in northwestern Wyoming, which happens to be a stream subject to an interstate compact with Montana. In his decision granting the application, the State Engineer recognized the problem hypothesized here by suggesting that, as a result of the instream flow designation, new water rights *above* the segment designated for instream flow protection would not be granted, at least to the extent that they interfered with the instream flow right. Thus, the share of water to which Wyoming is entitled by compact can only be satisfied by appropriations *below* the stream segment designated for instream flow protection. A condition was imposed on the right, however, which requires the State Engineer to reconsider his decision in ten years.<sup>56</sup> As a result, the protection afforded by the instream flow designation on Clark's Fork remains uncertain.

The State Engineer's decision was a laudable attempt to deal with the problem created by the statute, but it is not clear whether it will pass judicial muster.<sup>57</sup> Furthermore, such a solution is only possible on a stream

54. WYO. STAT. § 41-3-1006(g); *see also*, §§ 41-3-1006(h), 41-3-1014 (1977 & Cum. Supp. 1988).

55. While this protection may be important in isolated circumstances, it pales when compared with advantages of a fully protected instream flow water appropriation.

56. The condition states: "This permit shall be reviewed prior to December 31, 1998 for continuation as an instream flow appropriation considering need and availability of and demands for water allocated to the State of Wyoming under the Yellowstone River Compact and other relevant matters. (§ 41-3-1006(e).) Proof of appropriation shall not be submitted until after this time of review." Clark's Fork River—Instream Flow Segment 1 Permit Application (approved May 6, 1988).

57. Any person seeking a water right above the instream flow designation has a credible argument that the right must be granted if it is part of Wyoming's consumptive share of the stream, even if granting the right may impair the senior instream flow right.

segment that is a sufficient distance from the state border to allow downstream appropriations.<sup>58</sup>

The best solution to the problems identified here would be for the legislature to clarify its intent by amending the statute. Short of that, the State Engineer should promulgate regulations that explain how he interprets and intends to apply the statute. For example, regarding his authority to approve instream flows only where providing the instream flow through storage water is infeasible, the State Engineer could provide by rule that the storage water option will not be deemed feasible unless sufficient storage water is available from existing or approved storage projects. This would prevent denial of an instream flow application on the grounds that a storage project which is unlikely to be built would nonetheless provide a feasible source of water for the instream flow right.

Regarding interstate compact waters, the State Engineer might adopt rules which provide that an instream flow right will not be deemed a portion of Wyoming's share of the river system so long as Wyoming's allocation can practicably be satisfied by appropriations below the instream flow segment. Under this rule, downstream appropriations should be deemed practicable so long as water can be diverted from the stream and transported at a reasonable cost to a place where it might reasonably be put to a beneficial use. A downstream appropriation should not be deemed impractical merely because it does not represent the least expensive alternative for using that water.

The procedure for acquiring an instream flow right begins with the Game and Fish Commission reporting annually on stream segments that it considers to have the most critical need for instream flows.<sup>59</sup> Following this report, the Water Development Commission (WDC) is required to file a permit application with the State Engineer for any stream segment recommended for instream flow protection by Game and Fish.<sup>60</sup> The WDC then conducts a feasibility study of the instream flow proposal.<sup>61</sup> After filing with the State Engineer, the WDC publishes a notice of application and hearing in a newspaper of general circulation in the vicinity of the proposed reservoir site or stream segment.<sup>62</sup> The Game and Fish Commission may also conduct any relevant studies at this time.<sup>63</sup> At the completion of the WDC study, the WDC must report to the Game and Fish Commission and the Wyoming legislature outlining its findings.<sup>64</sup> Finally, the State Engineer may conduct further relevant studies, and must hold

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58. The statute expressly allows appropriations of instream flows for other purposes where such appropriations are made within one mile upstream from the point where the stream crosses the state line. WYO. STAT. § 41-3-1002(d)(i) (1977 & Cum. Supp. 1988).

59. WYO. STAT. § 41-3-1003(b) (1977 & Cum. Supp. 1988).

60. WYO. STAT. § 41-3-1003(c) (1977 & Cum. Supp. 1988).

61. WYO. STAT. § 41-3-1004(a) (1977 & Cum. Supp. 1988).

62. WYO. STAT. § 41-3-1006(d) (1977 & Cum. Supp. 1988).

63. WYO. STAT. § 41-3-1006(c) (1977 & Cum. Supp. 1988).

64. WYO. STAT. § 41-3-1004(b) (1977 & Cum. Supp. 1988). Although the statute does not say so specifically, the WDC report is also transmitted to the State Engineer, who is responsible for taking the final action on the recommendation.

a public hearing. At this time the Game and Fish presents its studies and other interested parties may present their views on the proposal.<sup>65</sup> If the State Engineer approves an instream flow application, it is assumed that the water has been put to a beneficial use thirty days after approval. Proof of appropriation may not be submitted until three years later.<sup>66</sup>

#### IV. DISTINCTIONS AMONG TYPES OF RIGHTS

This discussion divides Wyoming water rights into four categories: (1) surface water; (2) groundwater; (3) storage water; and (4) miscellaneous sources. The surface rights discussion includes both water from a watercourse and diffused surface water. The groundwater discussion encompasses more traditional notions of that resource as well as by-product water,<sup>67</sup> and geothermal resources. Storage water is addressed separately because Wyoming law treats such rights differently from other water rights. The miscellaneous category includes imported water, foreign water, and water appropriated for use outside the state.

While each of these categories is examined separately, much of the ensuing discussion will focus on surface rights because the law has developed more fully for surface rights than for other Wyoming water rights. Similarities between the surface water system and other water categories will be noted without extended discussion.

##### A. Surface Water

###### 1. Nature of an appropriative water right

Under the state constitution, "the water of all natural streams, springs, lakes, or other collections of still water within the boundaries of the state are . . . declared to be the property of the state."<sup>68</sup> Under Wyoming case law, this provision limits the state's power to grant water rights to those collections of water referenced in the constitution. Thus, for exam-

65. WYO. STAT. § 41-3-1006(e) (1977 & Cum. Supp. 1988).

66. WYO. STAT. § 41-3-1006(f) (1977 & Cum. Supp. 1988). In the Clark's Fork case, the State Engineer apparently construed this provision as allowing final proof of appropriation well beyond the three-year time frame suggested by the statute. Indeed, under the language of his decision, no proof of appropriation will be submitted at all before the ten-year period when review of his decision will take place. This aspect of the decision may run afoul of WYO. STAT. § 41-4-506 (1977 & Cum. Supp. 1988) which requires final proof of appropriation to be submitted within five years from the date that the water is put to a beneficial use, unless that period is extended by the State Engineer for good cause shown. By law, beneficial use for instream flow appropriations occurs 30 days after the appropriation is approved. WYO. STAT. § 41-3-1006(f) (1977 & Cum. Supp. 1988). Perhaps the State Engineer's conditional decision can be treated as implicitly authorizing an extension of the time for submitting proof of appropriation under the statute. In any event, the failure to comply with the proof of appropriation deadline does not appear to give rise to a private complaint for forfeiture or abandonment. Rather, the State Engineer alone has the authority to cancel a permit under such circumstance. WYO. STAT. § 41-4-506 (1977 & Cum. Supp. 1988). Thus the tentative nature of the State Engineer's decision does not seem vulnerable to attack.

67. By-product water is defined by law to mean "water which has not been put to prior beneficial use, and which is a by-product of some nonwater related economic activity and has been developed only as a result of such activity. By-product water includes, but is not limited to, water resulting from the operation of oil well separator systems or mining activities such as dewatering of mines." WYO. STAT. § 41-3-903 (1977).

68. WYO. CONST. art. VIII, § 1.

ple, diffused surface water which does not form a natural stream is not subject to appropriation under state law.<sup>69</sup> By contrast, the Wyoming Supreme Court has sustained an appropriation of water that had seeped onto private land from an irrigation canal and that was collected by the landowner in a ditch.<sup>70</sup> The court made clear, however, that the appropriator had no right to demand that the seepage water be continuously made available to him. Accordingly, the irrigation company had the right to "abandon its canal, relocate it, or line it with an impervious substance so that seepage ceases."<sup>71</sup> A water right gives the owner a right to use state water for beneficial purposes.<sup>72</sup> Further, water rights are appurtenant to the land, and cannot be transferred to other lands without the approval of the Board of Control.<sup>73</sup> Finally, "[p]riority of appropriation . . . shall give the better right."<sup>74</sup>

A water right is a real property interest, which Wyoming case law notes may be sold and conveyed separately from the land to which it was first applied.<sup>75</sup> Nonetheless, because a direct flow irrigation water right is appurtenant to the land, any conveyance of the land without a specific devise of the water right conveys the appurtenant water right.<sup>76</sup>

A Wyoming water right may protect water quality as well as quantity. In *Sussex Land & Livestock Co. v. Midwest Refining Co.*,<sup>77</sup> a federal appeals court held that a Wyoming oil producer had no right to deteriorate the water quality in a stream as against senior appropriators downstream, even though there was no negligence and every known method and device was used to prevent the loss of oil, which in this case was polluting the stream. In support of its decision, the court cited an earlier decision of the United States Supreme Court denying an upstream Arizona

69. *State v. Hiber*, 48 Wyo. 172, 44 P.2d 1005 (1935).

70. *Bower v. Big Horn Canal Association*, 77 Wyo. 80, 101, 307 P.2d 593, 601 (1957).

71. *Id.*

72. "Beneficial use shall be the basis, the measure and limit of the right to use water at all times. . . ." WYO. STAT. § 41-3-101 (1977 & Cum. Supp. 1988). In addition to requiring that water be applied to a beneficial use, some courts have required that the water be diverted out of the stream. *See, e.g., Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590 (1979); *D. GETCHES, supra* note 47 at 96-97. The Wyoming Supreme Court has suggested that a "diversion" may be required for an appropriation. *Moyer v. Preston*, 6 Wyo. 308, 44 P. 845 (1896), but no Wyoming case has clearly ruled that an actual diversion is required. If a diversion is required those employing natural overflow or percolation irrigation techniques will be especially affected. *See, e.g., Hardy v. Beaver County Irrigation Co.*, 65 Utah 28, 234 P. 524 (1924); *Walsh v. Wallace*, 26 Nev. 299, 67 P. 914 (1902). Instream flows for fisheries should not pose a problem in Wyoming because they are expressly allowed under the law. WYO. STAT. §§ 41-3-1001 to 41-3-1014 (1977 & Cum. Supp. 1988).

73. WYO. STAT. §§ 41-3-101, 41-3-104 (1977 & Cum. Supp. 1988). *But see* WYO. STAT. § 41-3-323 (1977 & Cum. Supp. 1988) regarding reservoir water rights which "shall not attach to any particular lands except by deed, or other sufficient instrument. . . ."

74. WYO. CONST. art. VIII, § 3; WYO. STAT. § 41-3-101 (1977 & Cum. Supp. 1988). Priority is determined from the date of the application for the water right.

75. *Johnston v. Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 227, 79 P. 22, 24 (1904).

76. *Frank v. Hicks*, 4 Wyo. 502, 526, 35 P. 475, 483 (1894); *Little Horse Creek Irrigating Co.*, 13 Wyo. at 227, 79 P. at 24.

77. 294 F. 597, 603 (8th Cir. 1923). *But see* *A-B Cattle Co. v. United States*, 196 Colo. 539, 539 P.2d 57 (1978) where the Colorado Supreme Court held that the holder of a water right does not have a right to receive water of the same quality including the silt content thereof, as has historically been received under the right.

mining company the right to pollute water later used by an Arizona irrigator.<sup>78</sup> Although the decisions of these courts do not bind the Wyoming Supreme Court when it interprets state law, they are persuasive authority. The policy of limiting appropriations to beneficial uses and its corollary of discouraging waste of water resources surely encompass waste that results from pollution as well as waste that results from excessive use.

## 2. Perfecting a surface water right

All new water users are required to obtain a permit.<sup>79</sup> Permit applications are made to the State Engineer on a prescribed form.<sup>80</sup> The State Engineer dates and records receipt of all applications, and returns defective applications to the applicant for correction.<sup>81</sup> To avoid losing priority, the applicant must return a corrected application to the State Engineer within the time specified, which will not be less than ninety days.<sup>82</sup> If a corrected application is not timely received, it is the duty of the State Engineer to cancel the filing covered by the application.<sup>83</sup> The State Engineer may require an applicant to furnish information in addition to that required on the standardized form, such as particularized maps, cross section plans, reservoir specifications, and other material that will enable him to protect the public good and determine whether to accept or reject an application.<sup>84</sup>

A permit application may be denied for one of three reasons: (1) no unappropriated water is available to the applicant; (2) the proposed use conflicts with existing water rights; or (3) the proposed use threatens to

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78. In *Arizona Copper Co. v. Gillespie*, 230 U.S. 46 (1913), the Court explained the rights of water users under the Arizona appropriation system as follows:

The Arizona statute places a water user for mining purposes upon no higher plane than a user for irrigation. The suggestion that the right to use for mining and reduction purposes cannot be exercised without polluting the streams with waste material, tailings, etc., and that the lower user cannot, therefore, complain of the necessary consequences of the legal right conferred by statute, is without force. The only subordination of one water user to another is the right of the first appropriator to a sufficiency of water for his necessary uses. That includes the quality as well as the quantity. What deterioration in the quality of the water will constitute an invasion of the rights of the lower appropriator will depend upon the facts and circumstances of each case, with reference to the use to which the water is applied.

*Id.* at 56-57.

79. WYO. STAT. § 41-4-501 (1977). The 1890 requirement that appropriators obtain a permit was sustained against a claim that it was inconsistent with the constitutional requirement that "priority of appropriation . . . shall give the better right." WYO. CONST. art. VIII, § 3. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 35, 236 P. 764, 770 (1925).

80. WYO. STAT. §§ 41-3-301, 41-4-501 (1977 & Cum. Supp. 1988); Regulations and Instructions, Part I, State Engineer's Office. Ch. III, § 2 (1974).

81. WYO. STAT. § 41-4-502 (1977 & Cum. Supp. 1988).

82. Requests may be made for a further extension, though extensions will not be granted for requests made after the expiration of the time period the applicant seeks to extend. WYO. STAT. § 41-4-502 (1977 & Cum. Supp. 1988).

83. WYO. STAT. § 41-4-502 (1977 & Cum. Supp. 1988).

84. WYO. STAT. §§ 41-4-505 to 41-4-510 (1977 & Cum. Supp. 1988).



prove detrimental to the public interest.<sup>85</sup> The first ground for denial should only be exercised when approval of a new water right invites conflict. In most circumstances the prior appropriation doctrine itself will satisfactorily resolve situations where water is unavailable.<sup>86</sup> The second ground should rarely arise since any potential conflicts with existing water rights will be resolved in favor of the senior user.<sup>87</sup> The final ground, the public interest provision, derives from the Wyoming Constitution, and appears to afford the State Engineer broad discretion.<sup>88</sup> Over the years neither the Wyoming courts nor the legislature has had occasion to define the phrase "public interest" in the context of the administration of water rights. The State Engineer should fill the void by promulgating regulations. Such rules should explain to the public the criteria that the State Engineer will use in exercising his discretion.<sup>89</sup> Public interest criteria might, for example, include: (1) the value to both the individual and the community of the use proposed for the water; (2) the extent to which the use represents efficient use of water resources; (3) the extent and value of other uses which may be precluded by the proposed use; (4) the impact of the appropriation on fish and wildlife; (5) the impact of the appropriation on water quality; and (6) the extent to which the appropriation interferes with compliance with local, state, and federal laws.<sup>90</sup> If a water right is finally granted, its priority date is the date the permit application is filed.<sup>91</sup>

85. WYO. STAT. § 41-4-503 (1977 & Cum. Supp. 1988). Professor Battle recounts at least one instance where the State Engineer denied an application on public interest grounds but failed to explain what particular public interest was at stake. See Battle, *Paper Clouds Over the Waters: Shelf Filings and Hyperextended Permits in Wyoming*, 22 LAND & WATER L. REV. 673, 679 (1987).

86. Compare *Lower Colorado River Authority v. Texas Department of Natural Resources*, 689 S.W.2d 873 (Tex. 1984), with *Little Cottonwood Water Co. v. Sandy City*, 123 Utah 242, 258 P.2d 440 (1953) and *Ernst v. Superior Court*, 82 Ariz. 17, 307 P.2d 911 (1957).

87. Arguably this provision would allow the State Engineer to deny a water right the use of which would unduly degrade the quality of the water available to downstream users. See *supra* text accompanying notes 70, 71.

88. WYO. CONST. art. VIII, § 3. "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

89. The Alaska water statute sets eight criteria for determining the public interest: (1) the benefit to the applicant resulting from the proposed application; (2) the effect of the economic activity resulting from the proposed appropriation; (3) the effect on fish and game resources and on public recreational opportunities; (4) the effect on public health; (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation; (6) harm to other persons resulting from the proposed appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect upon access to navigable or public water. ALASKA STAT. § 46.15.080(b) (1987). These criteria should provide some focus for the State Engineer. It is worth noting that the principal architect of the Alaska water code was Frank Trelease, former dean and professor of law at the University of Wyoming College of Law. Mr. Trelease was recognized as one of the foremost authorities on water law, and his work continues to exert a significant influence on water law and policy. See also Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917 (1977).

90. This last issue promises to raise future legal questions even if the State Engineer fails to promulgate regulations. For example, if a state water appropriation harms the critical habitat of an endangered species listed under the federal Endangered Species Act, 16 U.S.C. §§ 1531-43 (1982), it may have violated the law. Cf. *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988). See also *Riverside Irrigation Dist. v. Andrews*, 753 F.2d 508 (10th Cir. 1985).

91. WYO. STAT. § 41-4-512 (1977).

Once a permit application is granted, the applicant may proceed with the project.<sup>92</sup> If the application is rejected, the applicant may appeal the decision to the Board of Control. An unfavorable determination by the Board of Control may be appealed to the state district courts.<sup>93</sup>

Construction of any water works necessary to appropriate the water must commence and be completed within the time specified by the permit. The total time may not exceed five years, unless extended for good cause shown.<sup>94</sup> Final proof of appropriation must be filed within five years after the water is put to beneficial use, again subject to extensions for good cause.<sup>95</sup> An applicant's failure to meet any of these deadlines may result in cancellation of the permit.<sup>96</sup>

The extreme result for failing to meet the deadlines is mitigated by a liberal extension policy. As noted above, all of these deadlines may be extended for "good cause shown." In *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*,<sup>97</sup> the Wyoming Supreme Court indicated that good cause for an extension exists when an applicant can show that he has pursued the project with reasonable diligence. Reasonable diligence must be determined from the circumstances of each case.<sup>98</sup>

When the project is completed and the water applied to a beneficial use, the permittee submits final proof of appropriation to the water division Superintendent. The Superintendent advertises receipt of such proof in a newspaper of general circulation and the proof is open for public inspection. Other appropriators from the streams involved may contest the proof in a hearing held for that purpose. The proof is then forwarded to the Board of Control. If the Board is satisfied that the appropriation has been perfected, it issues a certificate of appropriation, and the permittee receives an adjudicated water right.<sup>99</sup> These rights are then added to the data base of adjudicated water rights which is maintained for each of the four water divisions.

### 3. Beneficial use

"Beneficial use [is] the basis, the measure and limit of the right to use water . . . ."<sup>100</sup> The earliest Wyoming decisions established that no appropri-

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92. WYO. STAT. § 41-4-504 (1977).

93. WYO. STAT. § 41-4-517 (1977 & Cum. Supp. 1988).

94. WYO. STAT. § 41-4-506 (1977). Applications for a ditch permit must also contain a deadline for the application of the water to a beneficial use.

95. WYO. STAT. § 41-4-506 (1977).

96. WYO. STAT. § 41-4-506 (1977). The statute provides: "Default by the holder of the permit in any of the specified requirements *shall work a forfeiture of the water right involved*. The state engineer *may* upon such default cancel the permit." (emphasis added) The statute is not clear as to the effect of the forfeiture where the State Engineer fails to cancel the permit. Perhaps it can be revived prior to cancellation through late compliance, though this construction seems inconsistent with the plain meaning of the word "forfeit."

97. 578 P.2d 1359, 1365-66 (Wyo. 1978).

98. *Id.* at 1366. For example, in *Associated Enterprises* the court held that litigation which causes delay is a good cause for extension. *Id.* See also *Denius v. T R Twelve, Inc.*, 589 P.2d 374 (Wyo. 1979).

99. WYO. STAT. § 41-4-511 (1977 & Cum. Supp. 1988).

100. WYO. STAT. § 41-3-101 (1977 & Cum. Supp. 1988).

ation is complete until the water is put to a beneficial use.<sup>101</sup> Further, whatever the amount of an adjudicated water right, the true measure of the right is the amount of water put to beneficial use.<sup>102</sup> With such a great emphasis placed on the beneficial use standard, it may seem surprising that the term has not been defined by the Wyoming courts or legislature, or even by the State Engineer. Nonetheless, beneficial use is generally understood to concern the social and economic value of the use, its efficiency, and whether or not the use is wasteful.<sup>103</sup> Just how these concepts are applied in a given case, however, remains a mystery and, as with the term "public interest," the State Engineer should explain in rulemaking proceedings how the beneficial use concept will be applied. For example, the State Engineer might determine that certain kinds of irrigation practices or water conveyance methods are *prima facie* wasteful, thus creating a rebuttable presumption that water rights being used in such fashion are not beneficially used. Alternatively, the State Engineer might decide that a use is not beneficial if a significantly more efficient means of using the water is readily available and commonly in use.

Generally, the State Engineer does not question the beneficial use of water usage which complies with the terms of the statute. Thus, for example, irrigators are allotted one cubic foot per second (cfs) for each seventy acres of irrigable land, and it is generally assumed that an irrigator who diverts that much water for irrigation purposes is applying that water to a beneficial use.<sup>104</sup> This policy does not necessarily protect such irrigators, however, since competing water users may seek abandonment of water rights that are not being used beneficially.<sup>105</sup>

#### 4. Stream adjudications

The Wyoming statutes establish a scheme for adjudicating all water rights on a given stream system.<sup>106</sup> All of Wyoming's streams were adjudicated under these laws between 1892 and 1922.<sup>107</sup> Presumably, the

101. *Moyer*, 6 Wyo. 308, 44 P. 845.

102. *Basin Electric Power Cooperative v. State Bd. of Control*, 578 P.2d 557 (Wyo. 1978).

103. See, e.g., *Nichols v. Hufford*, 21 Wyo. 477, 489, 133 P. 1084, 1087 (1913), wherein the Wyoming Supreme Court noted "a gradual and persistent tendency to restrict the appropriation and use to an amount reasonably necessary when properly applied."

104. WYO. STAT. § 41-4-317 (1977). The Wyoming surplus and excess water laws, described in greater detail below, allow most irrigators to appropriate an additional one cfs for each 70 acres of irrigated land. WYO. STAT. §§ 41-4-318 to 41-4-324; 41-4-329 to 41-4-331 (1977 & Cum. Supp. 1988). The Wyoming Supreme Court has made clear, however, that the statutory right to use up to two cfs for each 70 acres of irrigable land does not necessarily support a claim that the water has been beneficially used. *Budd v. Bishop*, 543 P.2d 368, 373 (Wyo. 1975). But see *Cremer v. State Bd. of Control*, 675 P.2d 250 (Wyo. 1984). The *Cremer* case suggests that a surplus water right may not be abandoned without abandoning the water right on which it depends. *Id.* at 257. This appears to be dictum and does not seem consistent with the general notion that water rights are subject to partial abandonment in proceedings brought by private parties. See *infra* Part IV. A.6. One way around the *Cremer* dictum would be to file for partial abandonment of the underlying right which would result in partial loss of the surplus right as well.

105. See discussion of abandonment, *infra* Part IV. A.6.

106. WYO. STAT. §§ 41-4-301 to 41-4-331 (1977 & Cum. Supp. 1988).

107. Trelease & Gould, *WATER LAW: CASES AND MATERIALS* 174 (4th ed. 1986). Individual adjudication of water rights, of course, continues to this day, and the State Engineer's Office constantly updates its records to reflect the new appropriations and changes in existing appropriations.

authority used to adjudicate these streams could be used to readjudicate them, and some have argued that such a readjudication is needed to ensure that the state's records accurately reflect water use patterns.<sup>108</sup>

The Wyoming stream adjudication procedure is unique in its provision for a wholly administrative process.<sup>109</sup> The division Superintendents are required to gather evidence for submission to the Board of Control,<sup>110</sup> which then adjudicates all rights on the stream. The Board's decision is subject to review in the state district courts.<sup>111</sup> Wyoming has enacted a separate statute to provide for judicial adjudication of federal reserved rights in accordance with the McCarran Amendment.<sup>112</sup>

#### 5. Preferred uses

Under Wyoming law, preferred uses, which are described by statute, have a right of condemnation over non-preferred uses or uses with a lower preference than the use for which condemnation is sought.<sup>113</sup> The statute sets the order of preference as: (1) drinking water for human and stock consumption; (2) water for municipal purposes; (3) water for the use of steam engines and for general railway use; water for culinary, laundry, bathing, refrigerating (including ice making), for steam and hot water heating plants, and steam power plants; and (4) water for industrial purposes. Despite their inclusion in the preference statute, steam generators and industrial facilities are expressly precluded from exercising eminent domain power.<sup>114</sup>

The Wyoming Constitution also authorizes municipalities to acquire water rights either as an appropriator or by eminent domain "from prior appropriators upon the payment of just compensation. [The municipality may condemn] such water as may be necessary for the well being thereof and for domestic uses."<sup>115</sup>

#### 6. Surplus and excess water

The surplus and excess water statutes were enacted in response to concerns among Wyoming farmers that additional water resources were needed to compensate for the short growing season that exists in many parts of the state. They also represent, in part at least, a legislative policy to encourage greater consumption of Wyoming water within the state. Despite periodic shortages that exist in many parts of the state during the late summer months, much of the water allocated to Wyoming by inter-

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108. See McIntire, *The Disparity Between State Water Rights Records and Actual Water Use Patterns*, 5 LAND & WATER L. REV. 22, 35 (1970).

109. WYO. STAT. §§ 41-4-206, 41-4-301 (1977).

110. WYO. STAT. §§ 41-4-302 to 41-4-310 (1977).

111. WYO. CONST. art. VIII, § 2.

112. WYO. STAT. § 1-37-106 (1977). See *infra* text accompanying notes 177-83.

113. WYO. STAT. § 41-3-102(a) (1977). Surprisingly, however, such condemnation actions are exceedingly rare. Indeed, no instance has been found where the condemnation right has ever been exercised. Conversation with Frank Carr, State Engineer's Office.

114. WYO. STAT. § 41-3-102(c) (1977).

115. WYO. CONST. art. XIII, § 5. See also WYO. STAT. §§ 1-26-503 to 1-26-513 (1977) which describe the general process for condemnation by municipalities.

state compact currently flows out of the state unused. No doubt, greater consumption in the state may deter downstream states from relying on Wyoming water which heretofore flowed into their states. Whatever the justification for these laws, two dates well-known to Wyoming farmers must be remembered—March 1, 1945 and March 1, 1985.

Under the surplus water law, appropriators of irrigation water with priority dates before March 1, 1945 are entitled to an additional one cfs per seventy acres, before post-1945 appropriators get any water.<sup>116</sup> If insufficient water is available in the stream for all appropriators to take the second full cfs, then the remaining water is divided in proportion to the acreage covered by the permits.<sup>117</sup> Surplus water is thus shared *pro rata* with a common March 1, 1945 priority date.<sup>118</sup>

Similar to the surplus water statute is the excess water law.<sup>119</sup> Water rights with a priority date after March 1, 1945 but before March 1, 1985 are entitled to an additional one cfs through a distribution analogous to the surplus water law, but with a March 1, 1985 priority date.<sup>120</sup> Post-March 1, 1985 appropriators are also allowed to share proportionately in any remaining water that is available, but they have no vested right to such water.<sup>121</sup> Thus, unlike surplus and excess water holders, post-March 1, 1985 appropriators may lose their additional water rights over one cfs per seventy acres if new appropriators appear on the stream.<sup>122</sup>

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116. WYO. STAT. §§ 41-4-318 to 41-4-324 (1977). The result of this rule is that persons with priority dates earlier than March 1, 1945 receive 2 cfs for each 70 acres of land before later appropriators receive any water.

117. Thus, for example, if one pre-'45 irrigation appropriator owns 70 acres and another pre-'45 appropriator 210 acres, and one cfs of surplus water is available to be divided between these two appropriators, the first will receive .25 cfs and the second .75. It does not matter whether the first appropriator has an earlier appropriation date than the second appropriator.

118. In *Budd v. Bishop*, 543 P.2d 368, Dan Budd, a Wyoming rancher and state legislator, challenged the constitutionality of the surplus water law. Budd held a post-'45 water right and accordingly was denied any water until all pre-'45 water users had received two cfs for each 70 acres of land. The court refused to address the constitutional questions raised by Budd, holding instead that Budd lacked standing to raise the issue. Nonetheless, the court sets out a detailed and informative description of the surplus water law.

119. WYO. STAT. §§ 41-4-329 to 41-4-331 (1977 & Cum. Supp. 1988). The excess water statute was introduced by Dan Budd, a state legislator who, as described in *supra*, note 118, was unsuccessful in his efforts to have the surplus water law declared unconstitutional.

120. WYO. STAT. §§ 41-4-329 to 41-4-331 (1977 & Cum. Supp. 1988).

121. WYO. STAT. § 41-4-317 (1977).

122. Since surplus and excess water rights are vested water rights they are subject to transfer by the owner. See discussion *infra* at V. Nonetheless, the process for transferring these water rights is unclear. As a practical matter, when the State Engineer considers a transfer application he generally does not distinguish between the original right and the surplus or excess right. Rather, he merely looks at the historic consumptive use and authorizes a transfer of that amount of water under the original priority date. Conversation with Jeff Fassett, Wyoming State Engineer, May 27, 1988. This generally should not pose any problems since the historic consumptive use by the transferor should reflect the fact that a portion of his right has a later priority date. Nonetheless, an appropriator along the stream might legitimately argue that such transfers should be treated as involving two separate water rights with two different priority dates. The transferee would thus acquire a water right with the original priority date and an additional right with the surplus or excess water right priority date. See WYO. STAT. §§ 41-4-320, 41-4-330 (1977 & Cum. Supp. 1988).

While the surplus and excess water laws may encourage wasteful water usage in some circumstances, they can perhaps be justified by Wyoming's climate and by the nature of water resources. Wyoming's climate limits its growing season,<sup>123</sup> and its high elevation headwaters assure enormous quantities of spring runoff but very limited supplies later in the summer. Thus, saturating the soil during the spring with copious quantities of water may better prepare the crops for drier conditions. Moreover, substantial spring consumption may have the salutary effect of storing return flows in the ground for use later in the year.<sup>124</sup> Finally, water use practices which are truly wasteful, even if within the scope of the surplus and excess water laws, can and should be addressed through the abandonment process described in subsection E. *infra*.<sup>125</sup>

### B. Groundwater

Groundwater rights in Wyoming are acquired in much the same manner as are surface rights.<sup>126</sup> As with surface water, priority of appropriation gives the better right.<sup>127</sup> Wyoming law expressly defines groundwater to include "hot water and geothermal steam."<sup>128</sup> It also encompasses by-product water which is water that is developed as a by-product of some non-water-related economic activity.<sup>129</sup> Any person desiring to use by-product water for beneficial purposes must file a groundwater application in accordance with the requirements of the statute.<sup>130</sup>

The nature of groundwater is such that the resource cannot be managed in exactly the same way as surface water. The most significant difference between surface and groundwater stems from the fact that an aquifer can be depleted beyond its recharge capacity, and eventually ren-

123. See F. Trelease, T. Swartz, P. Rechard & R. Burman, *Consumptive Use Of Irrigation Water In Wyoming*, Water Resources Series No. 19, 8-9 (1970) which estimates an average growing season in Wyoming of 200 days. For purposes of this study, which was concerned primarily with forage crops, the growing season was defined as the period when the mean daily temperature exceeded 40 degrees Fahrenheit. For certain crops that are more susceptible to frost damage the growing season will certainly be much shorter.

124. This fact, however, supports an argument that surplus and excess water rights should be limited to the early growing season. Allowing some farmers to take a full two cfs in July and August before other farmers get any water may lead to gross inequities.

125. See *Budd v. Bishop*, 543 P.2d at 373.

126. WYO. STAT. §§ 41-3-906, 41-3-935(c) (1977). See generally Wolfe & Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 LAND & WATER L. REV. 39 (1989).

127. See, e.g., WYO. STAT. § 41-3-915(a)(ii) (1977). Unlike surface rights, however, any complaint of interference with a groundwater right must be accompanied by a \$100 fee. WYO. STAT. § 41-3-911(b) (1977 & Cum. Supp. 1988). Because applications were not required for groundwater wells before 1958, however, the priority date is the date of well completion for pre-April 1, 1947 wells; the date of well registration for wells completed between April 1, 1947 and March 1, 1958; and the application date for post-March 1, 1958 wells. WYO. STAT. § 41-3-905, 41-3-930 (1977).

128. WYO. STAT. § 41-3-901(a)(ii) (1977).

129. WYO. STAT. § 41-3-903 (1977). Oil field discharges of water are the classic example of by-product water.

130. WYO. STAT. § 41-3-904 (1977). What is not clear is whether the person who develops the water as a by-product of some other activity must also file an application. By definition, that water has not been put to a beneficial use. WYO. STAT. § 41-3-903 (1977). Thus, it would not seem to qualify for appropriation under Wyoming's laws. Nonetheless, the State Engineer does require applications from companies developing by-product water, and claims to have been successful in obtaining compliance.

dered valueless. In addition, excessive depletion may cause subsidence damage, which reduces the recharge capacity of the aquifer. These problems may occur even where groundwater appears to be plentiful. To address these problems Wyoming provides for the establishment of "control areas," which are designated by the Board of Control where: (1) the use of groundwater is approaching the recharge rate; (2) groundwater levels are declining or have declined excessively; (3) conflicts between users are occurring or are foreseeable; (4) waste is occurring; or (5) other conditions exist which require regulation to protect the public interest.<sup>131</sup>

Once a control area is designated, a Control Area Advisory Board is elected from among persons owning land or groundwater rights within the area to advise the State Engineer about groundwater problems in the control area.<sup>132</sup> The State Engineer may impose certain corrective controls if immediate regulation is required. Generally, however, the State Engineer will await the adjudication of all groundwater rights in the area, which must be carried out by the division Superintendent. Following adjudication, the State Engineer may, on his own motion, or on the petition of a certain number of appropriators, impose corrective controls which may include: (1) closing the area to further appropriations; (2) requiring junior appropriators to cease or reduce withdrawals; (3) requiring a system of rotation for using groundwater in the area; (4) instituting well spacing requirements.<sup>133</sup>

In addition to these requirements, the law allows small domestic and stock users (less than twenty-five gallons/minute) to take groundwater from under their land without regard to priorities.<sup>134</sup> Where such domestic and stock uses interfere with existing uses, the existing user may, at his option and expense, furnish replacement water for such uses.<sup>135</sup>

Each of the four water divisions of the state has a division advisory committee appointed by the Governor which, among other things, advises the Board of Control and the State Engineer on groundwater problems in their division.

### *C. Storage Water*

Wyoming distinguishes between primary and secondary rights to storage water. Primary rights are the rights of the reservoir owner to appropriate the direct flow of a stream into a storage reservoir. For most purposes, primary rights are much like any other surface water right, except that they are not appurtenant to any particular lands,<sup>136</sup> and the water right is measured in acre-feet instead of cfs.

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131. WYO. STAT. § 41-3-912 (1977 & Cum. Supp. 1988).

132. WYO. STAT. § 41-3-913 (1977 & Cum. Supp. 1988).

133. WYO. STAT. § 41-3-915(a) (1977).

134. WYO. STAT. §§ 41-3-907, 41-3-930 (1977). These requirements apply whether or not the land has been designated a control area. Further, the water cannot be used on more than one acre of land.

135. WYO. STAT. § 41-3-911(a) (1977 & Cum. Supp. 1988).

136. WYO. STAT. § 41-3-323 (1977).

Secondary rights are those acquired by persons who receive water from the primary reservoir owner.<sup>137</sup> A secondary water right can be diverted directly from the reservoir or from other water works of the irrigation company such as a canal. The terms of this acquisition are a private matter between the reservoir owner and the secondary user,<sup>138</sup> even though the secondary user may apply for a surface water permit from the State Engineer. Once a reservoir owner has appropriated his water right in accordance with his priority, the prior appropriation scheme has been satisfied. Thus, secondary rights are not subject to the call of the river.

Despite the provision allowing secondary water users to apply for a permit,<sup>139</sup> the Board of Control does not require that they do so. Indeed, it seems that holding a permit may seriously handicap the secondary water user. Under the Board's policies, a secondary user who has not obtained a permit may transfer the use, place of use, or point of diversion of his water right without regard to the Wyoming water transfer statutes,<sup>140</sup> and subject only to his agreement with the primary right holder. By contrast, the secondary user with a permit must comply with the water transfer laws before changing the use, place of use or point of diversion of his water right. Moreover, because these laws are quite restrictive,<sup>141</sup> the secondary right permittee may very well be denied the right to complete a transfer that could have lawfully taken place without the Board's knowledge or approval had the user not obtained a permit.

Such a system makes little sense and may in fact run afoul of equal protection requirements. Accordingly, the Board should adopt procedures to ensure that all secondary users are treated alike. Since secondary users fall outside the appropriation system, there is no need for concern that internal transfers will adversely affect primary or direct flow users. Moreover, the statute expressly requires the reservoir owner to provide annual reports to the water Commissioner on the persons entitled to use water out of the reservoir.<sup>142</sup> Thus, a state record of all secondary users exists, and there is no need for secondary users to hold permits. Ideally then, the statute authorizing secondary permits<sup>143</sup> should be repealed. Short of that the Board should discourage persons from seeking permits. If a person needs proof of a secondary water right as collateral on a loan, a separate procedure might be established for recognizing those rights based on the information supplied by the reservoir owner.

The chief virtue of a reservoir is that it can be filled during times of the year when water is plentiful, usually the spring. In order to take full

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137. WYO. STAT. § 41-3-302 (1977).

138. WYO. STAT. § 41-3-303 (1977).

139. WYO. STAT. § 41-3-302 (1977).

140. WYO. STAT. §§ 41-3-104, 41-3-114 (1977 & Cum. Supp. 1988). *See also infra*, text accompanying notes 238-39.

141. For example, a change of use or place of use cannot be approved if such change would increase the consumptive use or decrease the amount of return flow, even where no one would be harmed by such changes. WYO. STAT. § 41-3-104 (1977).

142. WYO. STAT. § 41-3-322 (1977). Under this provision, the Superintendent from each water division must submit a report further enumerating "in detail" reservoir water users within his division.

143. WYO. STAT. § 41-3-302 (1977).



advantage of this virtue, the State Engineer may direct the reservoir owner when to fill his reservoir, and even if the reservoir owner fails to take the water at that time, the amount he could have taken will be allocated to his annual share.<sup>144</sup> Reservoirs in Wyoming are subject to the "one-filling" rule which means that the amount of water taken in any one year cannot exceed the capacity of the reservoir.<sup>145</sup> Furthermore, "carryover storage," i.e. water left over from the previous year, is counted against the reservoir owner's appropriation for the succeeding year.<sup>146</sup>

A reservoir owner with surplus water must furnish such water at reasonable rates to the landowners who desire to irrigate their land with water from that reservoir.<sup>147</sup> Furthermore, any water user who used water from the reservoir in any particular year has a preference to use the same amount of water the following year.<sup>148</sup>

#### *D. Miscellaneous Sources*

##### 1. Imported water

The term "imported water" is used in Wyoming to describe water which is imported from the basin of origin into another drainage basin. Wyoming treats this water right as if it were a one hundred percent consumptive use, as do most other prior appropriation states. As a result, a person holding a right to imported water can use and reuse that water without regard to others in that stream system who may have grown to depend on return flows.<sup>149</sup> It must be noted, however, that a person holding an imported water right does not necessarily have the right to transfer the entire water right to another use. The Wyoming Supreme Court has held in a similar context that water transfers are limited to the amount of water historically and *beneficially* used by the transferor.<sup>150</sup>

##### 2. Foreign water

"Foreign water" is defined by law as water which flows into the State of Wyoming from another state, but which has been determined to belong to that other state by compact or decree.<sup>151</sup> Such water is not subject to appropriation under Wyoming law, although it may be acquired for use in Wyoming under the laws of another state.<sup>152</sup> If, however, a person

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144. WYO. STAT. § 41-3-603(a) (1977 & Cum. Supp. 1988). Regulations and Instructions, Part IV, Board of Control, Ch. 1, § 7.a (1982).

145. *Wheatland Irrigation District v. Pioneer Canal Co.*, 464 P.2d 533, 540 (Wyo. 1970).

146. WYO. STAT. § 41-3-603(a) (1977 & Cum. Supp. 1988). Regulations and Instructions, Part IV, Board of Control, Ch. 1, § 7.b (1986).

147. WYO. STAT. § 41-3-325 (1977). The reader should be careful to distinguish between the use of the term "surplus" water in this section of the statute and the use of the term at WYO. STAT. § 41-4-318 (1977) which was described previously. See *Lake De Smet Reservoir Co. v. Kaufman*, 75 Wyo. 87, 292 P.2d 482 (1956) (definition of "surplus water" in Wyo. STAT. § 41-4-318 (1977 & Cum. Supp. 1988) does not apply to water impounded by reservoir owner in excess of that used for irrigation and other beneficial purposes).

148. WYO. STAT. § 41-3-325 (1977).

149. *Thayer v. City of Rawlins*, 594 P.2d 951 (Wyo. 1979).

150. *Basin Electric*, 578 P.2d at 563.

151. WYO. STAT. § 41-3-201 (1977).

152. WYO. STAT. §§ 41-3-202, 41-3-205 (1977).

desires to divert such foreign water from a point on a stream within the State of Wyoming, that person must obtain the approval of the Board of Control. The statute sets few standards for approving such applications, but it does provide that appropriations in excess of one cfs for seventy acres of irrigated land will not be allowed.<sup>153</sup>

### 3. Salvaged and recaptured water

The beneficial use requirement does not impose an obligation that water users employ the most efficient methods of use. Indeed, in many cases, the most efficient methods are neither practical nor cost effective. Nonetheless, given relatively scarce supplies, and the great expense associated with developing new sources of water, state law ought to encourage more efficient use whenever possible. Unfortunately, many of Wyoming's laws may do the exact opposite.<sup>154</sup>

Increasing the efficiency of water use can be accomplished in many different ways. Water distribution systems can be made more efficient by removing vegetation along the banks of ditches,<sup>155</sup> by lining those ditches with concrete or other impervious materials, or by conveying water through pipes. End uses can be made more efficient by installing pivot sprinklers or other modern irrigation devices, or by recapturing and reusing water before it returns to the stream system.

In some cases, of course, increasing efficiency at one site may reduce the amount of water available to downstream users who may rely on return flows from other users. State law, however, does not preclude more efficient uses merely because a downstream user may be injured<sup>156</sup> and it does not always allow such uses even where no one will be injured.<sup>157</sup> As a result, state law may, on the one hand, unnecessarily obstruct the goal of more efficient water usage, while on the other hand, fail to protect downstream users from some types of changes in consumptive use that deplete their supply.

The limits established by Wyoming law on the use of salvaged water<sup>158</sup> relate directly to the provisions regarding change of use and place of use.

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153. WYO. STAT. § 41-3-213 (1977).

154. See generally, Pring & Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MT. MIN. L. INST. 25-1 (1979).

155. Through the process of evapotranspiration, phreatophytes growing along streams take water from the ground and release it into the air. Removing these phreatophytes may save a substantial amount of water. See, e.g., *Southeastern Colorado Conservancy Dist. v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1966).

156. For example, a farmer who traditionally consumes only 50% of the water applied to his land is free to change his crop or method of applying water so as to increase his consumption to 60%, even where the resulting reduction in return flows injures a downstream user.

157. Under the Wyoming transfer laws, described *infra* text accompanying notes 198-235 a person may not use salvaged water on different lands or for a different purpose unless such changes are first approved by the Board of Control. Furthermore, the Board may not approve such changes if it will increase the historic rate of consumption or reduce the historic rate of return flows, *even if no one is injured by such changes*.

158. The term "salvaged water" is used here to describe that part of a water right that was previously lost to the system, but that can now be made available for consumption as a result of human effort.

These provisions are described in greater detail below.<sup>159</sup> For purposes of this discussion, however, it is sufficient to note that changes in use or place of use cannot be approved unless the proponent of the change can demonstrate, among other things, no increase in consumption and no decrease in return flows. These facts must be shown even if no one will be injured by the proposed changes. By restricting changes in use or place of use of water rights, even where no one will suffer injury, state law needlessly discourages water users from adopting more efficient practices that might make water resources available for use on other lands and for other purposes.<sup>160</sup>

Wyoming court decisions on recapture and reuse of water impose the same barriers to efficient use as does the change of use statute. In *Binning v. Miller*,<sup>161</sup> the court affirmed the right of a water user to recapture and reuse water on the same lands for which it was appropriated, without regard to historic use patterns. But, in *Fuss v. Franks*,<sup>162</sup> the court made clear that recapture efforts must occur on the land of the original appropriator, and that such water can only be used on the lands for which the water was originally appropriated.<sup>163</sup>

Although Wyoming's position on recapture and reuse, and on salvaged water generally, tracks the law in many other western states,<sup>164</sup> it destroys the incentive for Wyoming water users to conserve their resource, and to find ways to operate more efficiently. The laws should be changed to encourage more efficient uses by granting the person who salvages the water the right to use that water on other land, or transfer that water to another use. The only limitation on such transfers should be injury to existing users, and even here the law should be construed in a manner that will encourage more efficient uses of water.

#### 4. Supplemental water rights

Supplemental water rights are defined by law as a water right "from a new source of supply for application to lands for which an appropriation of water from a primary source already exists."<sup>165</sup> Such water rights are intended to augment an unreliable or insufficient primary supply source so as to enable the appropriator to obtain the full extent of his right. Supplemental rights may not be used until the rights from the primary source have been exhausted.<sup>166</sup> Moreover, water diverted for

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159. See *infra* text accompanying notes 200-37.

160. If such changes were allowed, water users would be attracted to more efficient uses by the prospect of being able to irrigate new lands or, alternatively, by the prospect of being able to sell the excess water rights to another user.

161. 55 Wyo. 451, 469-70, 102 P.2d 54, 61 (1940).

162. 610 P.2d 17 (Wyo. 1980).

163. *Id.* at 20-21.

164. See, e.g., *Cleaver v. Judd*, 393 P.2d 193 (Or. 1964); D. GETCHES, *supra* note 47 at 118-119, 135.

For an interesting article on the shortcomings of the prior appropriation system, and the system's failure to encourage conservation, see Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND & WATER L. REV. 1 (1989).

165. WYO. STAT. § 41-3-113 (1977).

166. Regulations and Instructions, Part IV, Board of Control, Ch. 1, § 10 (1986).

agricultural purposes may not exceed the statutory amount of water authorized for such purposes.<sup>167</sup>

#### 5. Appropriations for use outside the state

In *Sporhase v. Nebraska*, the Supreme Court held that water was an article of commerce that must be available to residents of the various states on essentially the same terms as it is available to the residents of the state of origin.<sup>168</sup> A state statute which regulates evenhandedly, however, to effectuate a legitimate local interest, will be sustained unless it imposes more than incidental burdens on commerce.<sup>169</sup>

In 1983, Wyoming adopted legislation for using water outside the state which appears to have been aimed, at least in part, towards meeting the criteria in *Sporhase*.<sup>170</sup> Under this provision, appropriations or transfers of water from Wyoming to another state are subject to prior legislative approval.<sup>171</sup> The legislature's decision is made following the State Engineer's recommendation on an application for an out-of-state water right. Both the State Engineer and the legislature are required to consider ten criteria before acting. By and large these criteria concern the impacts of the appropriation on the water resources and economic well-being of the State of Wyoming.<sup>172</sup> Most of these factors are not considered by the Board when reviewing an in-state application.<sup>173</sup>

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167. Generally, the laws allow diversion of one cfs for each 70 acres of irrigable land, plus one additional cfs for lands that qualify under the surplus and excess water statutes. WYO. STAT. §§ 41-3-318 to 41-3-324, 41-3-329 to 41-3-331, and 41-4-317 (1977 & Cum. Supp. 1988). Unfortunately, the supplemental water rights statute was not amended in 1985 when the excess water law was passed. Thus, it can be argued that persons with post-1945 water rights are not eligible for supplemental water rights beyond one cfs for each 70 acres of irrigable land. See the discussion of surplus and excess water rights, *supra* text accompanying notes 113-123.

168. 458 U.S. 941, 954, 956-58 (1982). The holding in this case casts serious doubt on the vitality of Wyoming's assertion to "ownership" of the water flowing in the state. WYO. CONST. art. VIII, § 1.

169. *Sporhase*, 458 U.S. at 954, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Court suggests that a balancing test must be employed to determine the legality of the statute. If a legitimate public purpose is found, the court should look at the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities. *Id.*

170. 1983 Wyo. Sess. Laws, ch. 167, § 1; WYO. STAT. § 41-3-115 (1977 & Cum. Supp. 1988).

171. It is unclear whether the statute applies to appropriations of less than 1,000 acre-feet. Subsection (b) concerns appropriations of water for mineral transport purposes but contains general language suggesting that legislative approval is not needed for appropriations under 1,000 acre-feet. Subsection (c) of that same provision suggests that legislative approval is required for all uses of Wyoming water outside the state. The Wyoming Supreme Court has yet to resolve this apparent inconsistency.

172. WYO. STAT. § 41-3-115(o), (r) (1977 & Cum. Supp. 1988). The factors to be considered include: (1) the amount of water and proposed use; (2) the amount of water available from the proposed source; (3) the benefits to Wyoming from the proposed appropriation; (4) the benefits to Wyoming that will be foregone by the proposed appropriation; (5) the benefits from return flows which will be eliminated by the proposed use; (6) the injury to existing water rights from the proposed use; (7) whether the use is consistent with Wyoming's water development and water resources policies; (8) whether the use will significantly impair the state's ability to preserve and conserve water for reasonably foreseeable in-state uses; (9) whether the proposed use will adversely affect the quantity or quality of water available for domestic or municipal use; and (10) whether the correlation between the proposed use and associated surface or groundwater supplies has been determined to avoid injury.

173. Compare WYO. STAT. § 41-4-503 (1977).

Wyoming's statute may face some difficulty surviving a commerce clause challenge. The most serious problem with the statute appears to be the process for approving an application. The requirement for legislative approval of out-of-state water rights arguably imposes an unreasonable burden not faced by in-state applicants. Not only would this approval process entail considerable delay; it would also impose a second tier of review, in a highly politicized environment.<sup>174</sup> It might thus be viewed as not regulating "evenhandedly" to effectuate a legitimate local public interest.<sup>175</sup>

The substantive criteria used to assess out-of-state applications might also raise problems for the state. In *Sporhase*, the Court appeared to accept as appropriate "measures taken by a state to conserve and preserve for its own citizens this vital resource [water] in times of severe shortage."<sup>176</sup> Thus, the state has some discretion to discriminate in favor of its citizens when allocating water resources.<sup>177</sup> But, the Court was quick to distinguish between "economic protectionism on the one hand, and health and safety regulation, on the other."<sup>178</sup> Only in the latter case will state regulations which discriminate against nonresidents be upheld. Although most of the criteria adopted by the legislature for reviewing out-of-state applications are, arguably at least, measures designed to protect public health and welfare, some might be perceived as efforts to protect the state's economic base. Thus, for example, the criteria which require consideration of "[t]he economic . . . benefits to be derived by the state from the proposed appropriation" and "[t]he benefits to the state . . . that will be foregone by the proposed appropriation" may not survive judicial scrutiny.<sup>179</sup>

## 6. Indian reserved water rights

Indian reserved water rights for the Arapahoe and Shoshone Indians of the Wind River Reservation in central Wyoming have recently been quantified as part of the general adjudication of the Big Horn River under the McCarran Amendment.<sup>180</sup> The court awarded to the Tribes reserved

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174. The provision for legislative approval might also run afoul of the doctrine of separation of powers unless it is construed to require approval by both the Senate and the House, and unless it is subject to veto by the Governor. See WYO. CONST. art. II, § 1; See also Chadha v. Immigration and Naturalization Service, 462 U.S. 919 (1983).

175. See *Pike v. Bruce Church*, 397 U.S. at 142.

176. *Sporhase*, 458 U.S. at 956.

177. The scope of the state's discretion in this matter is the subject of considerable debate. In *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984) the court struck down legislation that required the State Engineer to consider the interests of conservation of water and the public welfare of New Mexico citizens only when acting on export applications. *Id.* at 703-04. In addition, the court rejected a statute imposing a two-year moratorium on new groundwater appropriations out of the basin from which El Paso sought water, as a protectionist measure. *Id.* at 705-07. The *El Paso* decision (as well as the *Sporhase* decision) is criticized by Professor Trelease in his final article, published after his death. Trelease, *Interstate Use of Water—Sporhase v. El Paso, Pike and Vermejo*, 22 LAND AND WATER L. REV. 315 (1987).

178. *Sporhase*, 458 U.S. at 956.

179. See *supra* note 167 and accompanying text.

180. In *Re The General Adjudication of all rights to use water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), cert. granted, sub. nom. Wyoming v. United States.

water rights with an 1868 priority date (the year the reservation was established) for agricultural and related purposes, including domestic purposes. The court, however, denied water rights claimed by the Tribes for fisheries, mineral and industrial purposes, and wildlife and aesthetic purposes.<sup>181</sup> The court also held that the reserved water rights doctrine does not apply to groundwater.<sup>182</sup> Assuming, however, that the Tribes can satisfy their full rights through surface water appropriations this finding should not affect the Tribes significantly.

Regarding the claimed agricultural rights, the Wyoming Supreme Court accepted most of the recommendations of the district court and awarded approximately 480,000 acre-feet of water to the Tribes for nearly 103,000 "practically irrigable acres."<sup>183</sup> It refused, however, to rule on the legality of a statement made by the district court which limited the authority of the Tribes to sell or lease the water to lands within the reservation. The court determined that no ruling was needed because "[t]he Tribes did not seek permission to export reserved water, and the United States concedes that no federal law permits the sale of reserved water to non-Indians off the reservation."<sup>184</sup> The ultimate resolution of this question may have a significant impact on the water rights of upstream as well as downstream appropriations on the Big Horn River system.

### *E. Loss of Water Rights*

Most states distinguish abandonment from forfeiture by holding that abandonment requires a specific intent to abandon, while forfeiture occurs

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— U.S. \_\_\_, 102 L. Ed. 2d 987 (1989) (certiorari granted on the narrow question of whether reserved water rights may be obtained for practicably irrigable acreage which cannot presently be irrigated because of a lack of a water delivery system).

181. *Id.* at 98.

182. *Id.* at 99. *But see* Cappaert v. United States, 426 U.S. 128, 143 (1976) (holding that "since the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the federal reservation . . . the United States can protect its water from subsequent diversion, *whether the diversion is of surface or ground water*") (emphasis added). Thus, the Wyoming court's holding on this issue seems suspect. The court cites no authority to support its holding, although it does discuss several cases which arguably address the relation between reserved rights and groundwater. The essence of the reserved rights doctrine is the notion that when Congress set aside reservations it implicitly reserved sufficient water to fulfill the purposes of that reservation. *United States v. Winters*, 207 U.S. 564 (1908). Thus, the *source* of the water does not seem relevant to the application of the doctrine. (Compare Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND AND WATER L. REV. 377 (1978) with Abrams, *Implied Reservation of Water Rights in the Aftermath of Cappaert*, 7 ENV. L. REP. 50,043 (1977)).

183. The award encompassed 48,097 acres of practically irrigable lands for five future water projects, and 54,216 acres of land which currently and/or historically had been irrigated. *Big Horn*, 753 P.2d at 101, 106. Additional acres for two future projects were denied on grounds of economic infeasibility. *Id.* at 106. The parties had agreed that the term "practically irrigable acreage" should be construed to mean "those acres susceptible to sustained irrigation at reasonable costs." *Id.* at 101.

184. *Id.* at 100. Two judges dissented from this holding. Justice Thomas would have affirmed the district court's holding that reserved water rights must be used on the reservation. *Id.* at 119 (Thomas, J., dissenting). District Judge Hanscum, sitting by designation, would have reversed the district court's holding and allowed water marketing off the reservation. *Id.* at 135 (Hanscum, J., dissenting).

automatically following a period of nonuse specified by statute.<sup>185</sup> Wyoming does not follow this pattern. Rather, Wyoming distinguishes abandonment from forfeiture based on who may bring the proceeding.<sup>186</sup> Furthermore, neither abandonment nor forfeiture requires a specific intent to abandon, and loss of the water right occurs only after appropriate proceedings are completed.

### 1. Abandonment

Under Wyoming law, if an appropriator fails, either intentionally or unintentionally, to use water for beneficial purposes for five consecutive years, the water right is deemed abandoned.<sup>187</sup> Although the statute is silent, Wyoming case law suggests that reuse after the five-year period precludes an abandonment action.<sup>188</sup> No intent to abandon need be shown. The total absence of water to divert tolls the five-year period of nonuse required for abandonment. Thus, the failure to use the water must be "voluntary" for abandonment to occur.<sup>189</sup> Abandonment proceedings are initiated by filing a written request for a declaration of abandonment with the Board of Control.<sup>190</sup> If the allegations appear to justify the claim, the Board must refer the matter to the Superintendent of the appropriate water division. The Superintendent must then notify the holders of all water rights for which abandonment is sought by certified mail.<sup>191</sup> A formal hearing must then be held in accordance with the contested case procedures of the Wyoming Administrative Procedure Act.<sup>192</sup> Following the hearing, the Superintendent transmits his report to the Board which decides at its next meeting whether or not to declare a total or partial abandonment.<sup>193</sup> Any water user who might benefit from a declaration of abandonment of existing water rights or who might be injured by the reactivation of the water right can bring an action for abandonment under this section.<sup>194</sup>

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185. D. GETCHES, *supra* note 47 at 179-82.

186. Actually, the State Engineer's Office describes all such proceedings as abandonment proceedings. The statute, however, refers specifically to forfeiture proceedings only in the context of the agency initiated proceedings. Compare WYO. STAT. § 41-3-401 (1977 & Cum. Supp. 1988) with WYO. STAT. § 41-3-402 (1977 & Cum. Supp. 1988).

187. WYO. STAT. § 41-3-401 (1977 & Cum. Supp. 1988).

188. *Laramie Rivers Co. v. Wheatland Irrigation District*, 708 P.2d 20, 31 (Wyo. 1985). But see discussion at text accompanying notes 191 through 192. Undertaking repairs on a water delivery system preparatory to reuse will not, however, prevent abandonment. The water itself must be used. *Wheatland Irrigation Dist. v. Laramie Rivers Co.*, 659 P.2d 561, 567 (Wyo. 1983).

189. *Ramsey v. Gottsche*, 51 Wyo. 516, 532, 69 P.2d 535, 540-41 (1937) (quoting *Morris v. Bean*, 146 F. 423, 434 (D. Mont. 1906), *aff'd*, 159 F. 651 (9th Cir. 1908), *aff'd*, 221 U.S. 485 (1911)).

190. WYO. STAT. § 41-3-401(b) (1977 & Cum. Supp. 1988).

191. WYO. STAT. § 41-3-401(c) (1977 & Cum. Supp. 1988). If notice cannot be accomplished by mail, the statute provides for advertising in a local newspaper.

192. WYO. STAT. §§ 16-3-101 to 16-3-115 (1977 & Cum. Supp. 1988).

193. WYO. STAT. § 41-3-401(d), (e) (1977 & Cum. Supp. 1988).

194. WYO. STAT. § 41-3-401(b) (1977 & Cum. Supp. 1988). In *Cremer*, 675 P.2d 250, the Wyoming Supreme Court held that a person had standing to maintain an abandonment action only if he could show injury. The fact that he might be benefited by a declaration of abandonment was held insufficient to confer standing. The Wyoming legislature amended the abandonment statute in 1985 to overturn *Cremer*, thus making Wyoming law consistent with traditional notions of standing, at least insofar as abandonment is concerned.

## 2. Forfeiture

A separate section of the Wyoming statute authorizes the State Engineer to initiate forfeiture proceedings against an appropriator under language that roughly parallels the language of the abandonment statute.<sup>195</sup> Two significant differences between the two provisions must be noted. First, the forfeiture section specifically provides that the State Engineer may not initiate forfeiture proceedings after the holder of the water right has resumed use of the water right.<sup>196</sup> No parallel provision appears in the abandonment section. Thus, it might reasonably be argued that this restriction does not apply to private abandonment actions. Nonetheless, the common law in Wyoming before the enactment of this abandonment statute in 1973 expressly denied the right to initiate abandonment proceedings after reuse had begun, and the Wyoming Supreme Court has continued to adhere to this precedent without discussing the implications of the 1973 legislation.<sup>197</sup>

A second distinction between abandonment and forfeiture is that the forfeiture section contains language which has been construed by the State Engineer to preclude actions for a partial forfeiture.<sup>198</sup> This interpretation severely limits the State Engineer's authority to reclaim unused water rights. In fact, the Wyoming statute contains contradictory language. Subsection (a) of Section 402 specifically authorizes the State Engineer to initiate forfeiture proceedings "[w]hen any appropriator has failed . . . to use *any portion* of surface, underground or reservoir water appropriated by him . . ." (emphasis added). Subsection (j), however, states that "[n]othing in this section shall be construed to allow the State Engineer to initiate forfeiture proceedings against water rights which are being put to beneficial use, *wholly or in part*." (emphasis added). To avoid legal problems, the State Engineer appears to have resolved this matter informally in favor of subsection (j). This result seems neither necessary nor desirable. Given the apparent ambiguity, most courts would likely defer to an agency's interpretation of its statute.<sup>199</sup> Moreover, the State Engineer could bolster his position in any litigation over such an interpretation by announcing his interpretation through rulemaking proceedings. Finally, given the nature and value of water rights, the opportunities for

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195. WYO. STAT. § 41-3-402 (1977). This discussion refers to abandonment as an action initiated by another water user; forfeiture proceedings refer to actions initiated by the State Engineer. In fact, however, the Wyoming State Engineer refers to both as abandonment proceedings.

196. WYO. STAT. § 41-3-402(f) (1977).

197. In *Laramie Rivers v. Wheatland Irrigation*, 708 P.2d 20, the court held that a private person cannot maintain an abandonment action after reuse has commenced. No mention is made of the implications of the 1973 law. Instead, the court relies exclusively on two pre-1973 decisions to support this conclusion. *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, 464 P.2d 533 (Wyo. 1970), and *Sturgeon v. Brooks*, 73 Wyo. 436, 281 P.2d 675 (1955).

198. Conversation with Jeff Fassett, Wyoming State Engineer, October 23, 1987. See WYO. STAT. § 41-3-402(a), (j) (1977).

199. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 745 (10th Cir. 1982); *Matter of Hasser*, 647 P.2d 66, 69 (Wyo. 1982).



partial forfeitures are likely to be much greater than for forfeitures of entire water rights, and partial forfeitures could do much to release unneeded water resources to areas with high water demand.

### 3. Prescriptive rights

Wyoming, like most prior appropriation states, does not recognize prescriptive rights to water.<sup>200</sup> Any other rule would unduly interfere with the adjudication system, and might unfairly allow a person without prior water rights on a stream to obtain rights by adverse possession that were senior to those of many other users who had been appropriating water from that stream for many years.

## V. WATER TRANSFERS

Wyoming adheres to a conservative policy regarding transfers of water rights. This policy had its genesis in Wyoming's early statutes which forbade all transfers,<sup>201</sup> and in its more recent laws which restrict transfers beyond the common law "no injury" rule. These statutes further afford the State Engineer broad discretion to deny transfers even where the statutory standards are met. Despite Wyoming's restrictive transfer policies, competition for water supplies has been less keen in Wyoming than in other western states, and the state's transfer policy does not appear to have hindered the availability of water in any substantial way. Nonetheless, the dearth of water transfer activity may ultimately force the state toward further water development projects to supply water that might have been supplied at a much lower cost by encouraging more efficient use of existing supplies.<sup>202</sup>

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200. *Lewis v. Board of Control*, 699 P.2d 822, 825 (Wyo. 1985). Other states which adhere to the Wyoming view include California (*People v. Shirokow*, 26 Cal. 3d 301, 605 P.2d 859 (1980)); Alaska (ALASKA STAT. § 46.15.040(a)(1987)); Idaho (IDAHO CODE § 42-607 (1949)); Kansas (KANSAS STAT. ANN. § 82a-705 (1984)); Montana (MONTANA CODE ANN. § 85-2-301(3) (1987)); and Utah (UTAH CODE ANN. § 73-3-1 (1953)). Colorado apparently continues to recognize prescriptive water rights. See, e.g., *Application of Water Rights of V-Heart Ranch*, 690 P.2d 1271 (Colo. 1984).

201. In 1909 the Wyoming legislature enacted a statute which provided that "[w]ater rights cannot be detached from the lands, place or purpose for which they were acquired without loss of priority." 1909 Wyo. Sess. Laws., Ch. 68, § 1. Although this language has undergone some changes it has never been amended to recognize the change in use provisions of WYO. STAT. § 41-3-104 (1977) enacted by the legislature in 1973. See WYO. STAT. § 41-3-101 (1977 & Cum. Supp. 1988). Despite the unequivocal language of the 1909 law, many exceptions were recognized even before the 1973 law. Most significantly, pre-1909 water rights were generally thought not to be subject to the no transfer law. *Hughes v. Lincoln Land Co.*, 27 F. Supp. 972 (D. Wyo. 1939). For an extended discussion of Wyoming water transfer laws before 1973 see Trelease & Lee, *Priority and Progress - Case Studies of the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 7-21 (1966).

202. The dean of Wyoming water law, Frank Trelease, recognized this possibility more than 20 years ago in an article which appeared in the premier issue of the LAND & WATER L. REV. Trelease & Lee, *supra* note 201 at 3 ("If the West is to continue to gain and is to consolidate its past gains, its water law must allow and encourage water to be shifted to more efficient uses, and to be used more efficiently in present uses.") See also Gould, *Conversion of Agriculture Water Rights to Industrial Use*, 27 ROCKY MT. MIN. L. INST. 791 (1982).

Wyoming water transfers fit into five categories: (1) change in use or place of use; (2) exchanges; (3) changes in the point of diversion; (4) changes in location of wells; and (5) temporary changes.<sup>203</sup> Because state law establishes no different standards for transfers within irrigation and conservancy districts, such transfers should fit within one of the five categories described above. Some transfers do, however, take place within these special purpose districts which are not expressly authorized by law and which are not approved by either the State Engineer or the Board of Control. Accordingly, these transfers are described here separately.

#### *A. Change in Use and Place of Use*

As noted previously, direct flow water rights are appurtenant to the land, and by the terms of an early state statute "cannot be detached from the lands, place or purpose for which they were acquired."<sup>204</sup> Although this statute has never been repealed, it has been superseded by a 1973 law expressly authorizing changes in use and place of use for water rights.<sup>205</sup> Such changes are the most common type of water transfer in Wyoming. They are initiated by filing a petition with the Board of Control.<sup>206</sup> The petition must set forth information about the existing use and the proposed change in use, and the Board may require that the petitioner hold one or more public hearings at the petitioner's expense.<sup>207</sup> The decision to grant or deny the petition is based on a statutory modification of the common law "no injury" rule.<sup>208</sup> The Board may not grant a petition unless the following requirements are met:

(1) The quantity of water transferred does not exceed the amount of water historically diverted;<sup>209</sup>

(2) The proposed new use will not divert water at a higher rate than the historic rate of diversion;<sup>210</sup>

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203. State law does not expressly require approval for changes in the point of discharge. In *Thayer v. City of Rawlins*, 594 P.2d 95, the plaintiff claimed that the City was obliged to obtain approval for a change of the point of discharge under the general change of use statute. The court declined to reach the issue, holding instead that because the water involved was imported water, the City had an unrestricted right to dispose of those waters as it saw fit.

204. WYO. STAT. § 41-3-101 (1977 & Cum. Supp. 1988). The statute, however, expressly recognizes exceptions to this policy for preferred uses and for amendments to existing water rights.

205. WYO. STAT. § 41-3-104 (1977).

206. WYO. STAT. § 41-3-104(a) (1977). A sample petition appears in the Board of Control's regulations, Regulations and Instructions, Part IV, Board of Control, Ch. VI, § 15 (1982).

207. *Id.* The Board's regulations set out detailed requirements for such petitions. Among other things, such petitions must include a map certified by a professional engineer or land surveyor licensed to practice in Wyoming. The rules also contain examples of petitions which are helpful in complying with the law. Regulations and Instructions, Part IV, Board of Control, Ch. V (1986).

208. See D. GETCHES, *supra* note 47 at 165-67.

209. Thus, for example, the fact that an appropriator has the right to divert 10 acre-feet per year does not guarantee the right to transfer that amount unless, historically, that full amount was diverted.

210. If, for example, the existing water right authorizes diversions at the rate of two cfs, but only one cfs was historically diverted, the new use is limited to that historic rate.

(3) The proposed new use will not consume more water than was historically consumed by the existing use;<sup>211</sup> and

(4) The proposed new use will not decrease the historic amount of return flow, nor change the place of return flow so as to injure another water user, nor cause any other injury to a lawful appropriator.<sup>212</sup>

In addition to the above requirements, the Board may consider other factors unrelated to other water users. These include:

(1) The economic loss to the community and the state if the use from which the water right is transferred is discontinued;

(2) The extent to which the economic loss will be offset by the new use;

(3) Whether other sources are available for the new use.<sup>213</sup>

Arguably, the Board of Control may also deny a transfer where demanded by the public interest, under its general constitutional authority to deny original applications on public interest grounds.<sup>214</sup>

It may be necessary for the Board to retain some discretion to deny water transfers that are not in the public interest. Indeed, the discretionary criteria set forth in the statute should be considered by the Board before water transfers are approved. Other factors, such as the potential impact of the transfer on water quality, should also be considered. Prohibiting all transfers, however, which may lead to an increase in the rate of diversion<sup>215</sup> or consumptive use, or decline in return flows makes little sense unless another user will be injured by such changes.<sup>216</sup> In particu-

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211. As a result of the Wyoming Supreme Court's decision in *Basin Electric*, 578 P.2d 557, Wyoming water transfers are also limited by the amount of water "beneficially" consumed. In *Basin Electric*, the transferor was using water for agricultural purposes. The transferee, Basin Electric, proposed to use the water for power production in another watershed. Thus, the amount of water available to be transferred was limited to that amount of water that was consumed by the transferor in his agricultural use. The dispute in this case centered on the amount consumed. A portion of the water used by the transferor was returned to the stream as irrigation return flows. No one disputed that these return flows could not be transferred. Because of the configuration of the land, however, another portion of the irrigation runoff was captured in a closed basin where it eventually evaporated. Because this water was essentially lost to the water system under the existing use, Basin Electric argued that this water was "consumed" and should be available for transfer. The court disagreed, holding that the legislature intended to limit water transfers to the amount of water "beneficially" consumed.

212. The Board of Control's regulations require that a petition include a comparison, in the form of a study on return flows, of the proposed use with the historic use of the water right. Regulations and Instructions, Part IV, Board of Control, Ch. V, § 15(c) Item 6. The Board's stated policy is to "disfavor" petitions for change of use where at least five years of historic use cannot be documented. *Id.* at Ch. V, § 15(f).

213. WYO. STAT. § 41-3-104(a) (1977).

214. WYO. CONST. art. VIII, § 3. See also *Bonham v. Morgan*, No. 88-0143, slip op. (Utah, Feb. 23, 1989) where the Utah Supreme Court held that the Utah State Engineer must consider the public welfare criteria set out in the Utah appropriation statute when ruling on a change in use application. The case is also important for its recognition that persons who are not water users but whose other interest may be adversely affected by a change application, have standing to challenge the proposed change.

215. Indeed, allowing an increase in the rate of diversion during the spring may be highly desirable since it will leave more water in the stream during the drier summer and fall months.

216. One difficulty with applying a strict "no injury" rule to water transfers is that an

lar, the *Basin Electric* decision which limits transfers to that water which is historically and beneficially consumed, should be overturned. Whatever merit the decision may have under the letter of the law, it makes little practical sense since it destroys the incentive to market that water which, by definition, is being consumed but not used beneficially.

The right to permanently change the use of water is limited to those with an adjudicated water right. In *Green River Development Co. v. FMC Corp.*,<sup>217</sup> the Wyoming Supreme Court distinguished a "water permit" which gives the permittee a right to apply water to a beneficial use for a particular purpose, from a "water right," which attaches to water applied to a beneficial use, and for which a certificate of appropriation has been issued. The statutory provisions for change in use and place of use were held applicable only to "water rights." Furthermore, the court expressly held that the statutory provision which authorizes the State Engineer "to amend any water permit . . . prior to adjudication . . . for the purpose of correcting errors or otherwise, when in his judgment such amendment seems desirable or necessary,"<sup>218</sup> did not authorize the State Engineer to approve a change in use or place of use of a water permit.<sup>219</sup> Following the decision in *Green River*, the Wyoming legislature amended the law to authorize limited changes of the place of use for a water permit.<sup>220</sup> Changes in use of unadjudicated water permits, however, are not allowed.<sup>221</sup>

### B. Exchanges

The Wyoming statutes encourage interested parties to effect an exchange of water resources to better conserve and utilize the state's water.<sup>222</sup> Unlike other forms of permanent changes which must be approved by the Board of Control, exchanges need only be approved by the State Engineer.<sup>223</sup> Exchanges may be authorized for "any combination of direct flow, storage, and groundwater rights."<sup>224</sup> Exchanges are, of course, subject to the general "no injury" rule, and are subject to the requirements of "beneficial use and equality of water exchanged."<sup>225</sup> In making this latter determination, the State Engineer may consider relative consumptive uses and transmission losses. The statute, however, fails to address how the State Engineer should consider any disparity between the priority dates of the rights that are involved. This disparity may very

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expert's prediction on the effect of a transfer on other water users may not be accurate. Such difficulties should not be allowed to obstruct transfers which are otherwise sound. Instead, the state should consider legislation which would allow a preliminary transfer of water over a short period of time (e.g., 2-3 years) to determine its effect. A final decision could then be made based upon actual experience with the transfer.

217. 660 P.2d 339 (Wyo. 1983).

218. WYO. STAT. § 41-4-514(a) (1977 & Cum. Supp. 1988) (emphasis added).

219. *Green River*, 660 P.2d at 349, 351-55.

220. WYO. STAT. § 41-4-514(a) (1977 & Cum. Supp. 1988). Such changes must be within the same area and concept as described in the original permit.

221. The only exception to this rule is for temporary changes. See *infra* text accompanying notes 229-35.

222. WYO. STAT. § 41-3-106(d) (1977 & Cum. Supp. 1988).

223. WYO. STAT. § 41-3-106(c) (1977 & Cum. Supp. 1988).

224. WYO. STAT. § 41-3-106(b) (1977 & Cum. Supp. 1988).

225. WYO. STAT. § 41-3-106(d) (1977 & Cum. Supp. 1988).

well affect the value of the water right and the availability of the water during given times of the year. Perhaps the State Engineer should consider this factor in determining the "equality" of the water rights to be exchanged.<sup>226</sup>

### C. *Change in the Point of Diversion*

Any person desiring to change the point of diversion of his water right must file a petition with either the Board of Control or the State Engineer, depending on whether the right has been adjudicated.<sup>227</sup> If the right has not been adjudicated a change in the point of diversion may only be approved if it is in the vicinity of the original diversion, the water is being diverted from the same source of supply, and the change does not alter the original project concept.<sup>228</sup> The statute also sets detailed filing requirements and provides for a public hearing before the petition may be granted. As with other transfers, no change of point of diversion may be granted if "other appropriators will be injuriously affected."<sup>229</sup>

### D. *Change in Location of Wells*

Changes in well location to a point within the same aquifer and in the vicinity of the original well may be made without loss of priority if approved by the Board of Control.<sup>230</sup> The Board is authorized to grant changes in location of unadjudicated groundwater rights if the applicant can demonstrate that the water has been applied to a beneficial use. Curiously, the State Engineer may approve a change of well location of unadjudicated water rights which have *not* been applied to a beneficial use, including domestic or stock water wells. Presumably no loss of priority occurs in changes of well location approved by the State Engineer, but the statute is silent on this issue. New well locations are limited to the total amount of water appropriated in the original permit. A petition to change a well location is, of course, subject to the "no injury" rule.<sup>231</sup>

### E. *Temporary Changes*

In addition to the other change provisions, Wyoming authorizes temporary changes of both adjudicated and valid but unadjudicated water

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226. Regulations explaining how the State Engineer will take priority into account in determining equality would be most helpful.

227. WYO. STAT. § 41-3-114 (1977 & Cum. Supp. 1988). Petitions on adjudicated rights are filed with the Board of Control.

228. WYO. STAT. § 41-1-114(a)(ii) (1977). This provision was adopted after the Wyoming Supreme Court's decision in *Green River*, 660 P.2d 339, and authorizes an extremely limited exception to the supreme court's decision that unadjudicated water rights are not subject to transfer.

229. WYO. STAT. § 41-3-114(f) (1977 & Cum. Supp. 1988). See Regulations and Instructions, Board of Control, Part IV, Ch. V, § 12-13 for further information regarding petitions for changing the point of diversion. Additional standards apply to a change in the point of diversion of a reservoir. WYO. STAT. § 41-3-329 (1977 & Cum. Supp. 1988). It should further be noted that changes in the point of diversion of foreign water (i.e. water belonging to another state) which occur in the state of Wyoming are subject to approval by the Board of Control. WYO. STAT. §§ 41-3-209 to 41-3-215 (1977).

230. WYO. STAT. § 41-3-917 (1977 & Cum. Supp. 1988).

231. WYO. STAT. § 41-3-917 (1977 & Cum. Supp. 1988).

rights.<sup>232</sup> Temporary changes of water rights may not exceed two years and may be acquired by purchase, gift or lease.<sup>233</sup> Temporary changes are subject to the prior approval of the State Engineer and are limited to the historic consumptive use and by the "no injury" rule.<sup>234</sup> The statute allows the State Engineer to assume fifty percent return flow for temporary changes of direct flow irrigation rights, although he may adjust that figure, in his discretion if such figure would be "significantly in error."<sup>235</sup> When a temporary change is approved, the State Engineer enters an order designating the method, place and period of use.<sup>236</sup> During the period of the approved temporary change, the original owner suffers no impairment of his right and when the period ends he is automatically reinvested with the same rights previously held.<sup>237</sup> Thus, temporary changes can be used to toll the period for abandonment of water rights. A serious disadvantage of temporary water rights is that they are wholly subordinate to permanent water rights, even those with a later priority date.<sup>238</sup> This is unfortunate since it undoubtedly limits the utility of temporary changes, which could otherwise help ensure efficient use of water resources.

#### *F. Transfers Within Special Purpose Districts*<sup>239</sup>

No special provisions have been adopted by the legislature, Board of Control or State Engineer for transferring water held by an irrigation or water conservancy district. Thus, theoretically, all water transfers within such districts must adhere to the water transfer standards that apply to all other water rights. All significant transfers involving special purpose district water, in fact, do appear to follow state transfer policy. Many other transfers, however, which collectively may affect substantial water rights are carried out every year with the acquiescence of the State Engineer but without review or approval by any state agency. The types of transfers that fall outside the state system can be quite easily identified. Generally, they do not involve either temporary or permanent transfers to other (non-agricultural) uses.<sup>240</sup> Nor do they involve permanent transfers of agricultural water to another agricultural user. Rather, they appear limited to temporary transfers during the latter part of the growing season in districts where water is relatively scarce. Thus, if some farmers have

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232. WYO. STAT. § 41-3-110 (1977 & Cum. Supp. 1988).

233. WYO. STAT. § 41-3-110(a) (1977 & Cum. Supp. 1988).

234. WYO. STAT. § 41-3-110(a), (c) (1977 & Cum. Supp. 1988).

235. WYO. STAT. § 41-3-110(c) (1977 & Cum. Supp. 1988). The statute makes clear, however, that the 50% assumption shall have no application to any other provision of Wyoming law.

236. WYO. STAT. § 41-3-110(b) (1977 & Cum. Supp. 1988).

237. WYO. STAT. § 41-3-110(b) (1977 & Cum. Supp. 1988).

238. WYO. STAT. § 41-3-111 (1977).

239. The information set forth in this section was obtained from surveys conducted by the author during the summer and fall of 1988. Because some of the transfer activities described are arguably unlawful, the names of the particular irrigation districts involved in these activities have not been used. The need for changes to existing law as supported by this section does not depend on identifying the districts involved in extralegal transfers. See, e.g., WYO. STAT. §§ 41-3-323, 41-7-807(a)(iv) (1977).

240. A few instances have been found in which temporary transfers were authorized by an irrigation district without following the statutory procedures at WYO. STAT. § 41-3-110 (1977 & Cum. Supp. 1988).

excess water and others insufficient water the district allows the water to be reallocated to the farmers who need it. The procedures for bringing about these transfers are largely informal, and they are not uniform among the districts. Some districts allow individual farmers to arrange their own deal. In this manner the seller can command the best price that the market will bear. The district's involvement is limited to a requirement that the parties notify the district of the change so that the ditch riders know how much water each user is to receive.

Other districts have evolved more sophisticated practices. For example, one district sends a letter to each farmer around the middle of August asking whether he would like to sell or buy water. If more water is available for sale than there are purchasers, each seller is allowed to sell a *pro rata* amount to each buyer.<sup>241</sup> Conversely, if there are more buyers than sellers, the buyers receive a *pro rata* share of that available for sale. All such transfers are limited to the current growing season, and the price paid is set at the normal price established by the district for its water.

While the informal systems appear to work reasonably well, they are technically not authorized by the statute.<sup>242</sup> Moreover, inequities and other problems may surface. For example, the opportunity to sell water at a price above that charged by the irrigation district may lead some farmers to speculate with their water rights. Furthermore, unlike water rights which are temporarily transferred under the provisions of Wyoming law, informal transfers do not toll the period for abandonment. Thus, if a farmer ceases to use a water right every year on August 15 for five consecutive years because he has transferred that water to another user, he may be deemed to have abandoned any water rights after August 15.<sup>243</sup>

Despite potential problems with these informal transfers, they do encourage more efficient use of water and the state should consider legislation confirming the right of irrigation districts to establish procedures to bring about these transfers.<sup>244</sup> Some restrictions could be imposed to protect farmers from speculation and to ensure that all irrigators are treated fairly. For example, the State Engineer should be required to review and approve any program proposed for a district. The program might be required to establish the price for each share of water which should exceed the normal price charged to irrigators only insofar as neces-

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241. For example, if 10 farmers each want to sell one share of water but buyers want only five shares, each farmer is allowed to sell one half a share.

242. Indeed, some of the programs may run afoul of the requirements of Wyo. STAT. § 41-3-325 (1977), which requires the reservoir owner to make available at reasonable rates any water that the individual landowners cannot beneficially use on their own lands.

243. By contrast, the period of abandonment is tolled for temporary transfers that are carried out under the terms of the statute, Wyo. STAT. § 41-3-111 (1977).

244. Other states have adopted such legislation. For example, Idaho provides for short-term marketing of stored water between consenting buyers and sellers. IDAHO CODE § 42-1765 (1977 & Cum. Supp. 1988). Under the authority of this provision Idaho has established local water banks within irrigation projects to facilitate this process. Under the Boise Water Bank water from the federal Boise Project is sold at a price slightly above the price that contractors pay the United States for the water. Purchases are good only for one irrigation season. See 2 Water Market Update, No. 6, p. 5 (June, 1988).

sary to cover the administrative costs of the program.<sup>245</sup> These administrative costs could then be recovered by the district. The program should also establish some mechanism for fairly determining who can buy and who can sell water. The *pro rata* scheme used by at least one district in Wyoming seems the most fair. Further, a priority should perhaps be accorded existing shareholders within the district.

## VI. FORMAL REVIEW OF AGENCY ACTION

### A. State Engineer Decisions

As described previously some water right decisions are made initially by the State Engineer rather than the Board of Control. Such decisions include actions on petitions to exchange water<sup>246</sup> or to change the point of diversion of an unadjudicated water right,<sup>247</sup> and actions on petitions to amend or correct existing permits.<sup>248</sup> Somewhat surprisingly, no provision has been made for administrative appeal of decisions to exchange water. Thus, initial review would appear to be available in the state district court.<sup>249</sup> Administrative proceedings have been established, however, for changes in points of diversion of unadjudicated water rights and for permit amendments. In both cases an appeal may be taken to the Board of Control.<sup>250</sup> For permit amendments, the Board is expressly required to conduct a contested case hearing<sup>251</sup> in accordance with requirements of the Wyoming Administrative Procedure Act,<sup>252</sup> though such a process should probably be followed in either case.<sup>253</sup> Judicial review of the agency's decision following the contested case process is available in the appropriate district court,<sup>254</sup> and from there to the Wyoming Supreme Court.<sup>255</sup>

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245. Economists might argue that the free market should determine the price for such water since this will help insure its most efficient use. The short term nature of the transfer, however, and the preference accorded to shareholders within districts suggest that the market is not entirely "free." Furthermore, a market approach may actually hinder transfer activity by increasing transaction costs or depriving buyers and sellers of information regarding the availability of water for purchase.

246. WYO. STAT. § 41-3-106 (1977 & Cum. Supp. 1988).

247. WYO. STAT. § 41-3-114(a)(ii) (1977 & Cum. Supp. 1988).

248. WYO. STAT. § 41-4-514(a) (1977 & Cum. Supp. 1988).

249. See WYO. R. APP. P. 12. The State Engineer might, in his discretion, offer interested parties the right to a contested case hearing and thus perhaps avoid such parties' claims to a right to trial de novo. See *id.* at Rules 12.03, 12.08.

250. WYO. STAT. § 41-3-114(g) (1977 & Cum. Supp. 1988).

251. WYO. STAT. § 41-4-514(c) (1977 & Cum. Supp. 1988).

252. WYO. STAT. § 16-3-107 (1977 & Cum. Supp. 1988).

253. The Wyoming Administrative Procedure Act defines a "contested case" as "a proceeding . . . in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity to a hearing." WYO. STAT. § 16-3-101(b)(ii) (1977). Since proceedings to change a point of diversion involve property rights, and since due process of law requires a hearing before any action can probably be taken to affect those rights, the contested case provisions would seem to apply, *cf.* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

254. WYO. R. APP. P. 12.03. Review of such actions should generally be on the record made before the agency. Rule 12.07. *But see id.* at Rule 12.08. The agency's action must be upheld unless it is "unsupported by substantial evidence." WYO. STAT. § 16-3-114(c)(ii)(E) (1977).

255. WYO. R. APP. P. 1.04, 12.11.



*B. Board of Control Decisions*

All actions of the Board of Control wherein adverse parties appear are subject to the contested case process.<sup>256</sup> Such actions include, for example, decisions approving or denying initial water right applications<sup>257</sup> or approving or denying any of the various water transfer that are subject to Board of Control approval.<sup>258</sup> As with State Engineer decisions involving contested cases, judicial review is available in the appropriate district court, and ultimately in the Supreme Court.

## VII. CONCLUSION

Throughout its history Wyoming's water law has worked reasonably well and Wyoming justifiably takes pride in its success. Over the years, the state legislature has adjusted the law to reflect current values and to correct perceived errors in interpretation by the courts. But the basic scheme for water allocation remains as it was when the state's first water laws were enacted in 1890. No significant changes are needed now. But several problems appear on the horizon that can and should be avoided through selective changes to the state laws and, where appropriate, state regulations.<sup>259</sup> Such changes will help ensure Wyoming's continuing role as a leader in western water law.

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256. Regulations and Instructions, Part IV, Board of Control, Ch. VI, § 1 (1982). *See also* § 41-4-517 (1977 & Cum. Supp. 1988).

257. WYO. STAT. §§ 41-4-502, 41-4-503 (1977 & Cum. Supp. 1988).

258. WYO. STAT. §§ 41-3-104, 41-3-114(a)(i) (1977 & Cum. Supp. 1988).

259. This article has suggested the following changes to Wyoming water law: (1) pay water commissioners out of state funds to avoid possible conflicts of interest (Part III. D.); (2) allow direct instream flow designations even where such flows could feasibly be provided from storage water (Part III. G.); (3) make clear that instream flow rights need not give way to subsequent upstream appropriators even on interstate compact or judicially apportioned streams (Part III. G.); (4) define the terms "public interest" and "beneficial use" as used in the Wyoming Constitution and Statute (*See, e.g.,* WYO. CONST. art. VIII, § 2; WYO. STAT. § 41-4-503) (1977 & Cum. Supp. 1988) so as to apprise the public how the State Engineer and Board of Control will exercise their discretion to interpret these phrases (Part IV. A.2., and A.3.); (5) clarify the right of a surplus or excess water user to transfer such rights (Part IV. A.6.); (6) encourage more efficient uses of water by allowing transfers of salvaged or recaptured water except when someone will be injured by such transfers (Part IV. D.3.); (7) clarify the right of private persons to bring an abandonment action after reuse has commenced (Part IV. E.2.); (8) clarify the right of the State Engineer to seek partial forfeiture of water rights (Part IV. E.2.); (9) amend the general statutory provision on temporary transfers so that they take priority over junior water rights to the same extent as if they were held by the transferor; (10) eliminate unnecessary restrictions on water transfers so as to encourage economically efficient transfers while protecting other users and the public interest; and (11) establish procedures for temporary transfers within special purpose districts to encourage such transfers when they can be carried out fairly (Part V. F.).