1991

# One Hundred Years of Wyoming Water Law

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LAND AND WATER
LAW REVIEW

VOLUME XXVI 1991 NUMBER 1

# ONE HUNDRED YEARS OF WYOMING WATER LAW

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On most occasions when I have written about Wyoming water law I have served the role of a critic. I have criticized the State's instream flow law, its water transfer laws, and most recently, its handling of the dispute over Indian reserved water rights. I am pleased to use the occasion of Wyoming's centennial not to criticize Wyoming water law, but to praise it. The reasons for my praise stem from Wyoming's long and proud history as a leader in the development of water law and policy in the western United States. What I would like to do in this article is to briefly trace 100 years of Wyoming water law. Of necessity, I will avoid most of the nuances in the State's laws, but I do hope to convey a sense of its history and general meaning.[1]

Most of us, I suppose, intuitively associate the origins of western water law with the agriculture industry. In fact, however, our system of prior appropriation owes its beginnings to the mining camps that were established throughout the West in the mid-19th century.[2] The miners, of course, were trespassers on federal lands, but the government had seemingly acquiesced in their presence, and the only real problem facing the miners was resolving disputes that developed

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1. This article is merely intended to provide the reader with a broad overview of Wyoming's role in the development of western water law. Readers interested in a detailed legal analysis of Wyoming water law should examine Squillace, *Water Marketing in Wyoming*, 31 ARIZ. L. REV. 865 (1989) and Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307 (1989).

2. *See* McGowen, *The Development of Political Institutions on the Public Domain*, 11 WYO. L.J. 1, 14 (1956).

among them.[3] This was no small task in the wild West of the 1850's and 60's; but, contrary to popular belief, many of the miners of the early West were among the more respected and well-educated members of society.[4] It should not be surprising then that these people moved quickly to develop codes of conduct that would protect their interests. Fundamental among the standards established by these codes was the requirement that the person who first discovered a valuable mineral deposit had a prior right to develop those minerals over a limited extent of land as against all later discoverers.[5]

In many cases, these miners were operating placer mines which encompassed unconsolidated deposits of ore often in stream beds.[6] Processing the ore from these placer mines required substantial quantities of water. So, the mining camps established rules for acquisition of water rights that tracked their rules on the location of mining claims. The first person to appropriate water for a beneficial purpose was protected against later appropriators.

As the agricultural sector developed in the West, farmers soon realized that the system devised by the miners was better suited to the arid climate of the West than the rule of riparian law that applied in the more humid East. Prior appropriation allowed farmers and ranchers who were removed from the water source to divert the water so long as they put it to beneficial use. By contrast riparian law gave water rights only to those individuals who owned property along water courses without regard to need or prior use.

Some commentators argue that the two states most responsible for the development of our western style of water laws were Colorado and California. It is true that the earliest cases recognizing the doctrine of prior appropriation are from the courts in these states.[7] But in 1903, in his most famous work, *Irrigation Institutions*, Elwood Mead took issue with this point of view. Lawyers, in particular, should heed his words:

> Recently, [Mead noted,] two men were talking about the importance of irrigation in the different arid States. One said that

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3. United States v. Gear, 44 U.S. (3 How.) 120 (1845) was the first case making it a trespass to mine on public lands not authorized by Congress.

4. J. LESHY, THE MINING LAW, A STUDY IN PERPETUAL MOTION 13 (1987) (quoting D.D. JACKSON, GOLD DUST (1980)).

5. An outline of typical miners' rules is provided in J. LESHY, THE MINING LAW, A STUDY IN PERPETUAL MOTION, app. B (1987).

6. "A 'placer' is an alluvial or glacial deposit containing particles of gold. To extract the gold, a miner first removes the vegetation and surface soil. The gold-bearing soil (pay dirt) is then removed and put in a sluice box. A sluice box is a channel with intermittent dams. When water is run through the box, the lighter materials are flushed away while the gold remains." Sierra Club v. Penfold, 857 F.2d 1307, 1309 (9th Cir. 1988). *See also* 30 U.S.C. § 35 (1988).

7. The two cases most often cited as the earliest cases to support the prior appropriation doctrine are Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882) and Irwin v. Phillips, 5 Cal. 140 (1855).

> Colorado and California were the leading States, and that in these States about every question had been litigated and settled, so that irrigators knew what they were doing. The other asked why he did not include Wyoming, and was told that irrigation had not made much progress in Wyoming, that an investigation had shown that only two water-rights cases had ever been decided by the state supreme court. In the mind of the speaker, litigation went with irrigation, as fever with malaria, and a state with only two lawsuits was not worth notice.
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> Nevertheless, [Mead continued,] over nine thousand irrigators are taking water from over six hundred streams with a certainty as to their rights and an absence of friction in the protection of these rights, which is in such striking contrast with the situation in surrounding States as to make the methods by which this result was accomplished of unusual interest.[8]

Mead, of course, was not an unbiased observer. He had come to Wyoming in 1888 as its first Territorial Engineer; and when Wyoming was accepted into the Union in 1890, Mead was its first State Engineer. It was Mead's reputation and leadership that put Wyoming at the forefront of western water policy—for in Wyoming, Mead had designed the first comprehensive system of water laws to be used in a western state.[9]

Mead had come to Wyoming from Fort Collins, Colorado, where he had served both as the Assistant State Engineer and as a Professor of Irrigation Engineering at Colorado State University. (Mead was reputedly the first person in the country to hold the title of Professor of Irrigation Engineering.) One year after Mead assumed his duties as Territorial Engineer, the newly appointed Governor for the Wyoming Territory, Frances Warren, called for a constitutional convention to draft a state constitution. Working behind the scenes with several members of the convention, Mead drafted the progressive water provisions that to this day form the backbone of our State's water laws.[10] Article 8, section 1 of the state constitution declares that "the 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." Article 8, section 3 makes clear that in Wyoming, "priority of appropriation for beneficial uses shall give the better right" and "no appropriation shall be denied except when such denial is demanded by the public interest."

These two concepts—state ownership of water and prior appropriation for allocation of that water—thus serve as cornerstones for

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8. E. MEAD, IRRIGATION INSTITUTIONS, 247 (1903).
9. Act of Dec. 22, 1890, ch. 8, 1890-91 Wyo. Sess. Laws 91-106.
10. J. R. KLUGER, E. MEAD, IRRIGATION ENGINEER & SOCIAL PLANNER (1970 and photo reprint 1984) (unpublished dissertation available at the Universities of Arizona and Wyoming).

our modern water law.[11] But the constitution makes several other significant contributions to our system of water law. First, it establishes the office of the State Engineer with general supervision over the waters of the State.[12] Second, it provides for dividing the State into four water divisions which correspond to the four major water drainages in the State.[13] Third, it provides for appointment of supervisors for each of those water divisions.[14] And finally, it establishes the State Board of Control.[15] The Board of Control is comprised of the State Engineer who serves as its president and the superintendents of the four water divisions. The Board has authority under the law for promulgating appropriate regulations and for supervising the allocation and distribution of water throughout the State.[16]

Although the significance of these constitutional provisions can hardly be doubted, they are perhaps of less importance in establishing Wyoming's leadership in the field of water law than were the laws drafted by Elwood Mead and enacted by the first state legislature in the same year that Wyoming achieved statehood. The most important feature of those laws was the requirement that persons appropriating state water first obtain a permit from the State.[17] While such a requirement may seem unremarkable today, in its time it was exceptional. In most states, and in Wyoming before 1890, persons who wanted to appropriate water simply did so. The priority date for such a water right became the date that the appropriator could demonstrate some physical activity that evinced an intent to appropriate water. Various systems for recording these rights were often tried, but even these systems were flawed because, too often, the validity of the right did not depend upon a valid recording. Moreover, the date of appropriation, which depended on some vague notion of the appropriator's intent, was frequently in dispute.[18]

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11. The theory of state ownership, however, has received a few jolts in recent years, most notably as a result of the Wyoming Supreme Court's decision awarding 500,000 acre feet of water to the Wind River Indian Reservation tribes. *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988) *aff'd mem. sub nom.* Wyoming v. United States, 109 S. Ct. 2994 (1989). The court's award was based on the reserved water rights doctrine which holds that when Congress set aside Indian reservations it implicitly intended to reserve sufficient water to fulfill the purposes of the reservation. United States v. Winters, 207 U.S. 564 (1908). The Supreme Court delivered yet another jolt to state ownership of water in Sporhase v. Nebraska, 458 U.S. 941 (1982). In *Sporhase* the Court found water to be an article of commerce, thus limiting a state's authority to deny out-of-state water uses. *Sporhase*, 458 U.S. at 953-54.

12. WYO. CONST. art. VIII, § 5.

13. WYO. CONST. art. VIII, § 4; the four water divisions are described at WYO. STAT. § 41-3-501 (1977).

14. WYO. CONST. art. VIII § 4.

15. WYO. CONST. art. VIII, § 2.

16. *Id.*

17. Act of Dec. 22, 1890, ch. 8, § 34, 1890-91 Wyo. Sess. Laws 91, 100-02.

18. While the permitting system avoids many of these problems, as with any system it is only as effective as those administering it. In the past, Wyoming water permit applications have been "shelved" for indefinite periods of time. This allowed appropri-

Under Wyoming law, no appropriation after 1890 was valid without a permit. A person's priority date would relate back to the date of the permit application assuming that the application was eventually approved and that the applicant exercised diligence in applying the water to a beneficial use.[19] Wyoming's new scheme for acquiring water rights was not universally accepted, even in Wyoming. But in the famous *Wyoming Hereford Ranch* case, the Wyoming Supreme Court sustained the state permitting statute, holding that it had established the exclusive mechanism for acquiring water rights in Wyoming, and found that the Ranch's failure to obtain an appropriate permit was fatal to its claim to a valid water right.[20]

Although Wyoming was the first state to adopt a mandatory permit system, it did not apply retroactively to water rights acquired before 1890. Here too, Wyoming led the West. In the same 1890 legislation that required appropriators to obtain permits, Mead designed a system for adjudicating all of the water rights on every stream in the State.[21] Under the stream adjudication process, the owners of all water rights, including those that were acquired before 1890, were required to file their claim to such water rights with the State Board of Control. Any person who failed to file after the appropriate notice lost his right. As with the exclusive permitting laws, the stream adjudication laws were quickly challenged by an appropriator who had failed to file a proper claim. Once again, the Wyoming Supreme Court sustained the process, and by 1922, all of the streams in Wyoming had been adjudicated.[22] Wyoming's success with stream adjudications soon spread to other Western states, and virtually all of them eventually adopted a scheme for adjudicating the water rights along their streams that borrowed from the Wyoming experience.[23]

Mead remained in Wyoming as its State Engineer until 1899. In that year, he left Wyoming for Washington D.C. and in 1924, after interim stops in California and Australia, was named the Commissioner of the Bureau of Reclamation. Shortly after his death in 1936, Secretary of the Interior Harold Ickes paid tribute to Mead's distinguished public service career by naming the reservoir that was then

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ators to obtain early priority dates without putting the water to beneficial use within the required time period. *See* Battle, *Paper Clouds Over the Waters: Shelf Filings and Hyperextended Permits in Wyoming*, 22 LAND & WATER L. REV. 673 (1987).

19. *See generally* WYO. STAT. §§ 41-3-101, 41-4-501 to -517 (1977 & Supp. 1990). Beneficial use has never been defined by the Wyoming courts, legislature or State Engineer. However, it is generally understood to concern the social and economic value of the use, its efficiency, and whether or not the use is wasteful. *See, e.g.*, Nichols v. Hufford, 21 Wyo. 477, 489, 133 P. 1084, 1087 (1913).

20. Wyoming Hereford Ranch v. Hammond Packaging Co., 33 Wyo. 14, 236 P. 764 (1925).

21. Act of Dec. 22, 1890, ch. 8, § 20, 1890-91 WYO. SESS. LAWS 91, 95-96.

22. Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900). *See also* WYO. STAT. §§ 41-4-301 to -317 (1977).

23. The variations on the Wyoming system are described in Stone, *Montana Water Rights—A New Opportunity*, 34 MONT. L. REV. 57, 70-71 (1973).

filling behind the Boulder Dam, Lake Mead.

Although the basic structure of Wyoming's water laws was put into place by Elwood Mead, those laws have not remained static. In particular, the past twenty years have brought several significant changes to our State water laws. In 1973, Wyoming took an important step towards increasing available water supplies by adopting laws which provide for the abandonment[24] and forfeiture[25] of unused water rights. In particular, abandonment actions can be initiated by other water users who stand to benefit from the proposed declaration of abandonment.[26]

Transferring water rights, i.e., changing a water right from one use such as agriculture, to another use such as municipal, has always been problematic in Wyoming due in large measure to Elwood Mead's early concerns that transfers were the result of persons speculating with the State's water.[27] Perhaps it is my affection for Mead that leads me to conclude that his views were indeed appropriate for the period of time when many valuable new water rights were being issued by the State. In any event, the most valuable water rights have now been allocated, and under appropriate standards, water transfers can help to achieve more efficient use of water resources. Wyoming took a somewhat timorous step in this direction in 1973 when it enacted legislation which for the first time plainly authorized the transfer of water rights from one use to another use.[28] That law, however, is subject to many significant constraints that appear to have limited its utility. In Wyoming, you cannot transfer a water right if the new use will exceed the historic rate of diversion, increase the historic beneficial consumptive use of the water right or decrease the historic amount of return flow, even if such changes would cause no injury to other water users along the stream.[29] While in many cases these restrictions are necessary to protect other users along a stream, in many other cases they are not. The State's imposition of such restrictions only serves to hamper the free marketability of water rights, thereby discouraging their most efficient use. Despite this problem, transfers are taking place in Wyoming, albeit at a much slower pace than are transfers in many of our neighboring states.[30]

Rules for the development of groundwater resources were first adopted by Wyoming in 1957 and were substantially modified in

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24. WYO. STAT. § 41-3-401 (Supp. 1990).
25. WYO. STAT. § 41-3-402 (1977 & Supp. 1990).
26. WYO. STAT. § 41-3-401 (Supp. 1990).
27. For an early study of Wyoming water rights transfers see Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1 (1966).
28. WYO. STAT. § 41-3-104 (1977 & Supp. 1990).
29. *Id. See also* Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978).
30. *See generally* Squillace, *Water Marketing in Wyoming*, 31 ARIZ. L. REV. 865 (1989).

1973.[31] Through these laws Wyoming has adopted a system of groundwater management that in large measure parallels its system of surface water management, but which adds important additional controls that reflect the unique aspects of groundwater management. In particular, Wyoming's laws discourage ground water mining, i.e., depleting the groundwater reservoirs beyond their rate of recharge.[32] They also provide for the establishment of control areas where groundwater depletions are approaching the rate of recharge.[33] The State Engineer is given broad authority to curtail withdrawals by junior appropriators where necessary to protect groundwater resources and the public interest.[34]

Here again, Wyoming has shown great leadership in protecting groundwater basins that are too often managed as relatively short-term (40-50 year) resources. Indeed, many western states, most prominently the states of Colorado, New Mexico, Texas and Arizona have, through their laws, allowed groundwater mining.[35] In some of these cases, groundwater resources have been irrevocably damaged, and damage is imminent in many other situations.[36]

A final significant area of change for Wyoming water law was the enactment of instream flow legislation in 1986.[37] Ironically, it was the state citizenry that led the political leadership on this issue, having collected enough signatures for the first successful ballot initiative in Wyoming's history. (The initiative was not actually included on the ballot because the Wyoming legislature subsequently adopted the legislation as its own in the legislative session following the successful initiative.)[38] The instream flow law is significant because, for the first time, it makes clear that Wyoming will treat instream flows as beneficial uses of water. As I have noted elsewhere, I perceive some significant problems with the current law, some of which may have simply been the result of poor drafting.[39] Nonetheless, I am encouraged by

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31. *See generally* WYO. STAT. §§ 41-3-901 to -938 (1977 & Supp. 1990); Wolfe & Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 LAND & WATER L. REV. 39 (1989).

32. WYO. STAT. § 41-3-912(a)(i) (1977 & Supp. 1990).

33. *Id.*

34. WYO. STAT. § 41-3-915 (1977 & Supp. 1990).

35. *See, e.g.*, Friendswood Dev. Co. v. Smith-Southwest Ind., Inc. 576 S.W.2d 21 (Tex. 1978); Fundingsland v. Colorado Ground Water Comm'n, 171 Colo. 487, 468 P.2d 835 (1970); Mathers v. Texaco, 77 N.M. 239, 421 P.2d 771 (1966); Comment, *Arizona's Coming Dilemma: Water Supply and Population Growth*, 2 ECOLOGY L.Q. 357 (1972).

36. For example in the San Joaquin Valley, California, there have been land drops of as much as twenty-eight feet. Pinal County, Arizona, saw its land subside up to seven and one-half feet along with earth fissures up to eight miles long. The Houston-Galveston area suffers approximately thirty-two million dollars per year in land subsidence damage. F. TRELEASE & G. GOULD, WATER LAW: CASES AND MATERIALS 454 n.1 (4th ed. 1986).

37. WYO. STAT. §§ 41-3-1001 to -1014 (Supp. 1990).

38. WYO. CONST. art. III, § 52.

39. Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307, 316-19 (1989).

our current State Engineer's efforts at implementing the law, and I remain optimistic about the long-term prospects for instream flow protection.[40]

Despite my praise for Wyoming water law, there is surely room for improvement. Let me offer a few thoughts. First and foremost, the State should focus less attention (and money) on new water development projects, and pay more attention to the potential for water savings that could be achieved by making more efficient use of existing resources. Liberalizing water transfer laws, especially as they relate to the temporary or short-term transfer of water resources, offers a potential market solution to the problem of inefficient use.

Second, the State should clarify ambiguities in the abandonment and instream flow laws in an effort to avoid current and possibly future problems with those laws. For example, under the abandonment statute, there is conflicting language regarding the State Engineer's authority to seek a partial abandonment of a water right.[41] The State Engineer's office has conservatively chosen to read the law as precluding partial abandonment actions by the State Engineer. Yet partial non-use is more common than total non-use, and this restriction seriously hampers the ability of the State Engineer to manage the State's water resources. Regarding the instream flow law, language in the statute appears to require a finding that providing an instream flow with storage water is not feasible before a designation can be made.[42]

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40. For example, in the State's first instream flow designation on the Clark's Fork River in northwestern Wyoming, the State Engineer ably addressed one of the more thorny problems under the law. The statute provides that instream flow designations shall not interfere with Wyoming's ability to use its consumptive share of waters allocated by compact or court decree. WYO. STAT. §§ 41-3-1006(g),(h) to -1014 (Supp. 1990). This might be construed to prevent the State from denying any water right that could be included as part of Wyoming's share of a stream, even if that right would interfere with the instream flow. In the Clark's Fork case, however, the State Engineer limited new water rights that might interfere with the instream flow to applications below the designated stream segment. Thus, so long as it is possible to satisfy Wyoming's share of compact water below the designated stream segment, upstream water rights can probably be denied without running afoul of the statute.

41. *Compare* WYO. STAT. § 41-3-402(a) (1977) which states "[w]hen any appropriator has failed, intentionally or unintentionally, to use *any portion* of . . . water appropriated by him . . . for a period of five successive years, the state engineer may initiate forfeiture proceedings . . . ." *with* WYO. STAT. § 41-3-402(j) (1977) which states "[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).

42. The statute appears to allow appropriations of direct flows *only* if providing instream flows from storage water is not feasible. WYO. STAT. § 41-3-1006(b) (Supp. 1990) states in relevant part "[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]." *See also* WYO. STAT. § 41-3-1005 (Supp. 1990), which provides that "[i]f the water development commission determines that storage of water to provide instream flows is feasible and in the interest of the state of Wyoming, it shall request authority from the legislature to proceed with . . . storage facilities . . . for such purposes."

Yet in many cases it might easily be found that providing instream flows with storage water is feasible, even though the provision of water for such flows is highly unlikely. In such cases, the law might be read to preclude any designation.

Third, Wyoming should amend its laws to encourage temporary water transfers. Current law authorizes transfer for periods not to exceed two years,[43] but appears to deny such temporary uses priority over junior water rights.[44] Moreover, the two year time limitation precludes both long-term leasing of water rights and water right options. Such authority might help to stimulate water markets in Wyoming. One particularly innovative idea that is currently unavailable in Wyoming is the "dry year option." Dry year options allow cities or other users in need of a guaranteed water supply to purchase an option to water rights which would only be exercised in those dry years when the users' permanent supplies are not fully available. The farmer from whom the option is purchased simply agrees to forego farming (or engage in dry land farming) during the years when the option is exercised. Typically, the farmer is compensated both for selling the option and for foregoing use in dry years although the terms of the transaction can be negotiated by the parties.

Finally, the State should offer the public a better idea of how it will use the broad discretionary powers that are afforded under current State water law. We know that under the constitution, water allocation decisions are supposed to be made only for beneficial uses and only where such allocation decisions are in the public interest. But we have never been told by our courts, our legislature, or our administrative agencies how they will interpret the "beneficial use" and "public interest" standards. Like our laws, these are not static concepts; but the fact that our ideas about beneficial use and the public interest may change over time does not justify the government's failure to adopt standards that reflect present values. Thus, the Board of Control should be encouraged to adopt regulations which define these important terms.

The history of Wyoming's water law is rich, and the State takes justifiable pride in the role that it has played in the development of the prior appropriation system. However, the ever-changing needs and values of our society require that lawmakers exercise constant vigilance to insure that our laws are best-suited to our present and future aspirations. This is not an easy task, and at least in the field of water law, I believe that Wyoming has performed its obligation well over the past 100 years. But, while we praise our past success Wyoming must continue to work for a better future.

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43. WYO. STAT. § 41-3-110 (1977 & Supp. 1990).
44. WYO. STAT. § 41-3-111 (1977 & Supp. 1990).

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LAND AND WATER
LAW REVIEW

VOLUME XXVI 1991 NUMBER 1

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