

COMMENT

**Capturing the Doctrine of Recapture:  
The Need to Clarify Wyoming’s Law of Recapture**

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I. INTRODUCTION

The present system of water rights [in the West] . . . provides little stimulus toward more efficient use of water, and, in fact, may promote inefficient and wasteful use of water. . . .<sup>1</sup>

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<sup>1</sup> George W. Pring & Karen A. Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1, pt. I (1979) (quoting S. REP. 86-29, at 54 (1961)). The Senate Select Committee report also stated that “[a]s the demands on the water resources of the West grow, it may well be an economic necessity for some of the Western states to review their water laws with a view to changes which will bring about more efficient use of water, or else a ceiling on their potential growth.” *Id.*

There is a continuing need within the Western states for more water to put to beneficial use, and addressing this need is a key issue in this region.<sup>2</sup> In the last few decades, demands for water, the region's scarcest resource, have increased dramatically.<sup>3</sup> These demands arise from increased mining, rapid development in the energy industry, population growth in the West, and increased instream flow reservations.<sup>4</sup> Despite these increased demands, the largest demand on water in the West is still irrigation for agricultural purposes.<sup>5</sup> Water shortages are leading water users to focus on recapture and reuse, which is the process of placing water already beneficially used to a subsequent use on the same land, as a potential water supply to develop in the future.<sup>6</sup> Further, in the context of irrigation, technological advancements have allowed water users to apply more water to their crops in its first use instead of returning to its source.<sup>7</sup> This increased consumption, whether

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<sup>2</sup> See generally Craig Bell, *Promoting Conservation by Law: Water Conservation and Western State Initiatives*, 10 U. DENV. WATER L. REV. 313, 313 (2007) (describing how water planners in Western states are constantly working to address increased demands on water); Pring, *supra* note 1, pt. I (stating that increased agriculture, mining, and energy development are creating increased demands of water).

<sup>3</sup> See Joe Norris, *Montana v. Wyoming: Is Water Conservation Drowning the Yellowstone River Compact?* 15 U. DENV. WATER L. REV. 189, 189 (2011) (describing the expanded demands on water).

<sup>4</sup> See Pring, *supra* note 1, pt. I. An instream flow reservation is a water right that permits a user to maintain a minimum flow in the stream from one particular point to another point downstream. See Michael F. Browning, *Instream Flow Water Rights in the Western States and Provinces*, 56 ROCKY MTN. MIN. L. INST. § 9.02 (2010). In Wyoming, only the State may hold an instream flow water right, and an instream flow right is available only to establish or maintain instream fisheries. See WYO. STAT. ANN. § 41-3-1001 (2013); see also Reed D. Benson, "Adequate Progress," or Rivers Left Behind? *Developments in Colorado and Wyoming Instream Flow Laws Since 2000*, 36 ENVTL. L. 1283, 1286-87 (2006).

<sup>5</sup> See Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 330-31 (1985) (stating that water withdrawals for agriculture in the Western states are approximately ninety percent of available water resources); see also Lawrence J. MacDonnell & Teresa A. Rice, *Moving Agricultural Water to Cities: The Search for Smarter Approaches*, 14 HASTINGS W-NW J. ENVTL. L. & POL'Y 105, 105-06 (2008) ("Even today, roughly eighty percent of all withdrawals of water from both surface and ground water resources are for irrigation use.").

<sup>6</sup> Although this definition of "reuse" water will be used throughout the paper, there are other ways the term is used. See James W. Johnson, Timothy Berg, & Douglas C. Northup, *Reuse of Water: Policy Conflicts and New Directions*, 38 ROCKY MTN. MIN. L. INST. § 23.01 (1992) (describing reuse as an exception to the rule of common supply, which requires water not consumed in the initial beneficial use to return to the common supply for the benefit of other water users); see also *City and Cnty. of Denver v. Fulton Irrigating Ditch Co.*, 506 P.2d 144, 146-47 (Colo. 1972) (defining reuse water in the context of imported water as a subsequent use of water for the same purpose as the original use). In *Fulton Irrigating*, the Colorado Supreme Court also distinguished reuse from "successive use," which was a subsequent use of water for a different purpose from the original use. *Id.* In Wyoming, reuse is not uncommon and is increasing, particularly when the water is "immediately reused for irrigation." See Nathan S. Bracken, *Water Reuse in the West: State Programs and Institutional Issues*, 18 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 451, 526 (2012).

<sup>7</sup> See First Interim Rep. of the Special Master at 55, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

from a more efficient first use or successive use, reduces the amount of water that returns to its source for other users to put to beneficial use.<sup>8</sup>

An important question in prior appropriation states is the extent to which water users can reuse water diverted under a water right when such reuse would adversely affect other downstream users by increasing the historical consumptive use of the water.<sup>9</sup> The United States Supreme Court addressed this question in *Montana v. Wyoming*. There, the Court concluded that Wyoming upstream water users could switch from flood irrigation to sprinkler irrigation and consume more water despite Montana users' reliance on the unconsumed irrigation water that returned to the water system.<sup>10</sup> The innovation of reuse, while leading to the more efficient use of water, has caused the doctrine of recapture to evolve.<sup>11</sup> This evolution creates challenging issues because the law of recapture fails to consider certain aspects of general prior appropriation law, particularly the limit of beneficial use and the no-injury rule.<sup>12</sup>

This comment argues that the doctrine of recapture needs expansion and clarification. First, this comment describes the general principles of water law and the doctrine of recapture.<sup>13</sup> Next, this comment discusses Wyoming's law of recapture.<sup>14</sup> The comment then discusses the United States Supreme Court's somewhat analogous application of Wyoming's (and Montana's) law of recapture in *Montana v. Wyoming*.<sup>15</sup> Following this, the comment asserts that Wyoming's recapture principles are correct, but need clarity.<sup>16</sup> Finally, this comment considers the legal tensions between basic, deep-rooted prior appropriation principles and the doctrine of recapture, as well as the need to balance economic and societal interests with the doctrine of recapture.<sup>17</sup>

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<sup>8</sup> See *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011).

<sup>9</sup> James C. Brockmann et al., *Water Use and Reuse: The New Hydrologic Cycle*, 57 ROCKY MTN. MIN. L. INST. § 29.01 (2011) ("The doctrine of prior appropriation poses unique challenges for those who wish to reuse water."). Most states in the West use prior appropriation to establish and order water rights. Under prior appropriation, the date of an appropriation determines the seniority of the right, and an appropriator's earlier right is considered more senior than those rights with a later appropriation date. See Norris, *supra* note 3, at 194.

<sup>10</sup> See *Montana v. Wyoming*, 131 S. Ct. at 1779 (holding that the doctrine of recapture allowed Wyoming upstream users to switch from flood irrigation to sprinkler systems, allowing those users to consume more water although less water would reach the downstream Montana users).

<sup>11</sup> See *id.*

<sup>12</sup> See Lawrence J. MacDonnell, *Montana v. Wyoming: Sprinklers, Irrigation Water Use Efficiency and the Doctrine of Recapture*, 5 GOLDEN GATE U. ENVTL. L. J. 265, 281–83 (2012).

<sup>13</sup> See *infra* notes 18–63 and accompanying text.

<sup>14</sup> See *infra* notes 64–100 and accompanying text.

<sup>15</sup> See *infra* notes 101–20 and accompanying text.

<sup>16</sup> See *infra* notes 124–76 and accompanying text.

<sup>17</sup> See *infra* notes 128–92 and accompanying text.

## II. BACKGROUND

### A. Principles of Reuse Water

#### 1. Prior Appropriation Law

The possibility for a water user to recapture and reuse water exists within the prior appropriation framework.<sup>18</sup> In order to obtain a right to use water in a prior appropriation state, there must be a diversion from a water source and application of that water to a beneficial use.<sup>19</sup> The key principle in prior appropriation is that the beneficial use is the basis, measure, and limit of a water right.<sup>20</sup> However, some scholars consider beneficial use to be a flexible concept where courts determine the limits of beneficial use.<sup>21</sup> Generally, because beneficial use serves as a measurement for and a limitation on water rights, no one should be able to waste water or use water in a way that would not serve the beneficial purpose for which it is appropriated.<sup>22</sup> If a water user wishes to make a change to his appropriative right (whether by changing the place or purpose of use, or the point of diversion), he has to demonstrate that such a change will not injure existing appropriators.<sup>23</sup>

#### 2. What is Reuse Water?

Diverted water that is unconsumed after application generally leaves (or flows) on the surface, follows gravity, and returns to a water source in the basin from which the water was diverted.<sup>24</sup> Broadly speaking, reuse water has been defined

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<sup>18</sup> See Mark Squillace, *Water Transfers for a Changing Climate*, 53 NAT. RESOURCES J. 55, 66–67 (2013) (describing how recapture is common within the priority system, albeit as a “minor departure”).

<sup>19</sup> See Pring, *supra* note 1, pt. III.

<sup>20</sup> WYO. STAT. ANN. § 41-3-101 (2013); *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 511 (Wyo. 1983) (“It is elementary water law that in Wyoming beneficial use is the basis, measure, and limit of a water right.”); Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today’s Western Water Law*, 83 U. COLO. L. REV. 675, 680 (2012). In the context of irrigation, Wyoming created a statutory measure and basis for the beneficial use of water. This is known as the “duty of water,” which is the amount of water necessary to grow the maximum amount of crops on a specific tract of land. In Wyoming, the duty of water is one cubic foot per second of water per seventy acres of land. See WYO. STAT. ANN. § 41-4-317 (2013).

<sup>21</sup> See Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 922 (1998) (“Beneficial use is in fact a fairly elastic concept . . . [that] allows water users considerable flexibility in the amount and method of use, and leaves line drawing to the courts.”).

<sup>22</sup> Benson, *supra* note 20, at 681; Neuman, *supra* note 21, at 933.

<sup>23</sup> See, e.g., WYO. STAT. ANN. § 41-3-104 (2013). This rule is commonly referred to as the “no-injury” rule in prior appropriation.

<sup>24</sup> See *Tonkin v. Winzell*, 73 P. 593, 595 (Nev. 1903) (describing how water leaves the land partly by seepage, and partly on the surface); see also P.M. Dwyer, Annotation, *Right of Appropriator of Water to Recapture Water Which Has Escaped or Is Otherwise No Longer Within His Immediate Possession*, 89. A.L.R. FED. 210 (1934).

as the multiple uses of water made by different diverters on a stream.<sup>25</sup> But reuse water can also be water placed to a second use after it has been appropriated and put to the original beneficial use in the same place.<sup>26</sup>

Reuse water has been called seepage water, waste water, or recaptured water.<sup>27</sup> Although some have used the terms interchangeably, the terms have distinct meanings.<sup>28</sup> Seepage water is water that collects in low spots below irrigation ditches and fields.<sup>29</sup> Seepage waters are sometimes considered as waste waters, but waste waters have also been narrowly defined to describe the discharge of water from wastewater or treatment plants.<sup>30</sup> In some states, the classification of water as seepage or waste has important implications.<sup>31</sup> If the water is seepage, the water may be subject to recapture by the original appropriator.<sup>32</sup> But if the water is classified as return flow water, it may be public and subject to appropriation.<sup>33</sup> Recaptured water is one way to define reuse water and refers to water repossessed after being placed to its intended, beneficial use for an additional, successive use.<sup>34</sup>

### 3. *Ways to Reuse Water*

There are various purposes for which water previously put to a beneficial use can be recaptured and put to subsequent use.<sup>35</sup> Water can be reclaimed and reused

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<sup>25</sup> See Brockmann et al., *supra* note 9, § 29.02. The use of water, after its diversion from a water course, is composed of two elements. First, the water is consumed for the beneficial use for which it was diverted. Second, the unconsumed portion, the “return flow,” is either returned back to the water source from which it was diverted or put to further consumption on the appropriator’s land. *Id.* § 29.03.

<sup>26</sup> *Id.* § 29.02. More narrowly, reuse water has been defined as water recycled and put to subsequent *consumptive* uses by the *same original user* or by some other entity. *Id.* (emphasis added).

<sup>27</sup> A. Dan Tarlock, *Waters Subject to Appropriation—Reused Water—Seepage Waters*, L. OF WATER RIGHTS AND RESOURCES § 5.17 (2012). The terms “seepage water,” “waste water,” and “return water” appear to be interchangeable. See, e.g., *Ramshorn Ditch Co. v. United States*, 269 F. 80, 85 (8th Cir. 1920) (describing when seepage *and* waste water is abandoned) (emphasis added); *Dep’t of Ecology v. U.S. Bureau of Reclamation*, 827 P.2d 275, 279 (Wash. 1992) (“The parties refer to this water as ‘waste, seepage, or return flow water.’”).

<sup>28</sup> See *infra* notes 29–34 and accompanying text (describing differences among seepage water, waste water, and recaptured water).

<sup>29</sup> See Tarlock, *supra* note 27, § 5.17; 1 CLESSON S. KINNEY, *LAW OF IRRIGATION AND WATER RIGHTS* 36 (2d ed. 1912).

<sup>30</sup> See Tarlock, *supra* note 27, § 5.17; Stuart L. Somach, *Who Owns Reclaimed Wastewater?* 25 PAC. L. J. 1087, 1087–89 (1994).

<sup>31</sup> See *infra* notes 32–33 and accompanying text.

<sup>32</sup> See Tarlock, *supra* note 27, § 5.17.

<sup>33</sup> *Id.*

<sup>34</sup> See MacDonnell, *supra* note 12, at 278; 94 C.J.S. *Waters* § 387 (2013).

<sup>35</sup> See *infra* notes 36–40 and accompanying text.

for municipal purposes, including for drinking water.<sup>36</sup> Water can also be reclaimed for additional industrial use, including energy exploration and production.<sup>37</sup> Further, water lost in agriculture can be recaptured and reused in irrigation where crops consume a higher portion of the water diverted for irrigation.<sup>38</sup> However, recapturing water and putting it to another or the same beneficial use reduces the amount of water returning to the source.<sup>39</sup> Additionally, although not a reuse of water, an irrigator could switch from flood irrigation to a sprinkler system, where crops are able to consume more water than in flood irrigation systems.<sup>40</sup> The ultimate result is the same: less water returns to the water source.<sup>41</sup>

### B. *The Law of Recapture Generally*

It would seem that an appropriator should be commended for recapturing water that has already been used by himself and applying it again in a beneficial manner.<sup>42</sup>

This principle summarizes the policy behind the law of recapture—a law that favors maximizing the use of water.<sup>43</sup> Generally, seepage and waste water belong to the appropriator, and as long as the appropriator has not abandoned or forfeited his water right, he may reclaim that water if he is willing and able to place it to

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<sup>36</sup> See Brockmann et al., *supra* note 9, § 29.01.

<sup>37</sup> *Id.* § 29.02.

<sup>38</sup> See *Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011); Pring, *supra* note 1, pt. II (stating that the conservation opportunities to improve irrigation practices may result in saving millions of acre-feet of water each year).

<sup>39</sup> See Robert David Pilz, *At the Confluence: Oregon's Instream Water Rights Law in Theory and Practice*, 36 ENVTL. L. 1383, 1392–93 (2006) (describing how water that is recaptured does not return to the source and thus does not constitute “return flow” that would be available to other users).

<sup>40</sup> See MacDonnell, *supra* note 12, at 292–93 (discussing the benefits of sprinklers, including increased crop yields, less water diverted, less fertilizers and pesticides entering streams and aquifers). Flood irrigation generally requires enough water to reach the plants across the entire desired irrigation area. But plants at the lower end of the field are underwatered, while those plants on the upgradient side may get too much water. *Id.*; *Kazan v. New Escalante Irrig. Co.*, 846 P.2d 1223, 1227 (Utah 1992). Conversely, sprinklers are more easily controlled and allow for more even distribution of water, allowing plants to receive the optimal amount of water. MacDonnell, *supra* note 12, at 292–93.

<sup>41</sup> See, e.g., *Montana v. Wyoming*, 131 S. Ct. at 1773 (describing the decreased amount of water available to Montana pre-1950 users due to Wyoming users switching to sprinklers for irrigation). Pre-1950 water users in Montana and Wyoming were treated as a separate category of water users in the Yellowstone River Compact. See *id.*

<sup>42</sup> *Barker v. Sonner*, 294 P. 1053, 1054 (Or. 1931).

<sup>43</sup> See *id.*

a beneficial use.<sup>44</sup> However, if the appropriator discharges return or waste waters taken in excess of his needs, and those waters return naturally to the water source after his needs are satisfied, then the return waters are subject to appropriation by others.<sup>45</sup> Seepage or waste waters are not subject to recapture if the appropriator takes no action to reclaim and reuse the water before it reaches the water source.<sup>46</sup>

A downstream user—usually a neighboring landowner—can put water to beneficial use before the water reenters the water source, but the landowner does not have an absolute right to continue to receive a specified amount.<sup>47</sup> Rather, the original appropriator may recapture that water for additional consumptive use on his land.<sup>48</sup> Some states limit the right of recapture to water that is still within the boundaries of the appropriator's land.<sup>49</sup> Other states determine whether the water has been discharged without the intent to recapture.<sup>50</sup> Here, an original appropriator may be able to recapture water even after it leaves the boundaries of the original appropriator's property.<sup>51</sup> Even if the original appropriator does not

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<sup>44</sup> 45 AM. JUR. 2D *Irrigation* § 30 (2013); *Barker*, 294 P. at 1056 (stating that irrigation districts may be entitled to reclaim waste water that has collected within ravines and gulches in the irrigation district); *Ide v. United States*, 263 U.S. 497, 505 (1924) (stating that the federal government's right to use water includes a second use to accomplish the reclamation for which the appropriation was first made). There is some authority suggesting that seepage water belongs to the river system and is subject to the priority system to where the original appropriator cannot reuse that diverted yet unconsumed water. *See, e.g., Adams Cnty. v. Farmers Reservoir and Irrig. Co.*, 115 P.3d 638, 642 (Colo. 2005) as modified by denial of reh'g, (Jul. 18, 2005).

<sup>45</sup> Water taken in excess of an appropriator's needs is not beneficially used, so the legal right to continue diverting that excess water may not exist. *See Hofeldt v. Eyre*, 849 P.2d 1295, 1298 (Wyo. 1993) (“[B]eneficial use is a continuing requirement which must be satisfied in order for the appropriation to remain viable.”). *See also Nebraska v. Wyoming*, 325 U.S. 589, 636–37 (1945); *Binning v. Miller*, 102 P.2d 54, 58 (Wyo. 1940); 94 C.J.S. *Waters* § 426 (2014).

<sup>46</sup> *See Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1076 (Mont. 1933).

<sup>47</sup> *See Tarlock, supra* note 27, § 5.17; 94 C.J.S. *Waters* § 426 (2014).

<sup>48</sup> *See infra* notes 49–59 and accompanying text.

<sup>49</sup> *See Dept't of Ecology v. U.S. Bureau of Reclamation*, 827 P.2d 275, 279 (Wash. 1992) (discussing when Washington appropriators lose the right to recapture water); *Barker*, 294 P. at 1056 (water is not even considered waste water until it leaves the land of the original appropriator); *Smithfield W. Bench Irrig. Co. v. Union Central Life Ins. Co.*, 142 P.2d 866, 867 (Utah 1943) (the owner of a water right is entitled to the water so long as he retains it on his property under his control); *Thompson v. Bingham*, 302 P.2d 948 (Idaho 1956) (same); *Burkart v. Meiberg*, 86 P. 98, 99 (Colo. 1906) (same).

<sup>50</sup> *See Dept't of Ecology*, 827 P.2d at 279–80.

<sup>51</sup> *See Tarlock, supra* note 27, § 5.17. For cases supporting this proposition, *see Dept't of Ecology*, 827 P.2d at 279; *Ramshorn Ditch Co. v. United States*, 269 F. 80, 85–86 (8th Cir. 1920) (“Seepage and waste water may be said to have been abandoned by the original appropriator when it is returned or allowed to return to its natural channel, with no intention on the part of the appropriator of recapturing it.”); *Davis v. Gale*, 32 Cal. 26, 32–34 (1867) (stating that if water were returned to the stream without any intention of recapture, it would become public water); but *see United States v. Haga*, 276 F. 41, 44 (D. Idaho 1921) (determining that a showing of intent is not required for reusing unconsumed water; rather, only a showing that the water right is not being abandoned or forfeited is necessary).

state an explicit intent to recapture and reuse his diverted water, he may be able to recapture it as long as he does not abandon or forfeit his right to that water through non-use.<sup>52</sup>

In certain situations, additional rules may apply to the reuse of seepage or recaptured water.<sup>53</sup> For example, if unconsumed water that was provided by a federal reclamation project becomes seepage water, states may not be able to approve appropriations for seepage water within the boundaries of a federal reclamation project.<sup>54</sup> Generally, the Bureau of Reclamation has the ability to recapture seepage water—especially when it comprises a major source of supply—but no court has imposed a duty.<sup>55</sup> In addition, there is a distinction for appropriators who import water and then attempt to recapture and reuse any unconsumed water.<sup>56</sup> Water importers have absolute rights of use and reuse for beneficial purposes, but appropriators of water from a local or native source do not.<sup>57</sup> Reuse rights in imported water may exist simply because of importation, and downstream users gain an unvested right to use only the water actually released to a local stream.<sup>58</sup> Additionally, reuse rights in imported waters may not contain a geographical limitation or require the water importer to demonstrate intent or beneficial use of that recaptured water.<sup>59</sup>

Water law developed primarily on a state-by-state basis.<sup>60</sup> Like many states, Wyoming developed its own rules and nuances in the law of recapture.<sup>61</sup> Yet, rules from other states and federal courts helped instruct Wyoming's development of its doctrine of recapture.<sup>62</sup> Although Wyoming ultimately developed its own case

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<sup>52</sup> *Ide v. United States*, 263 U.S. 497, 506 (1924).

<sup>53</sup> *See infra* notes 54–59 and accompanying text.

<sup>54</sup> *See Jensen v. Dep't of Ecology*, 685 P.2d 1068, 1071–72 (Wash. 1984). Generally, the federal government can recapture and reuse seepage water which goes unconsumed, so long as the Government does not abandon or forfeit the water from non-use. *See Haga*, 276 F. at 44.

<sup>55</sup> *See Tarlock, supra* note 27, § 5.17; William J. Hoes, Comment, *Recapture of Reclamation Project Groundwater*, 53 CAL. L. REV. 541, 546–48 (1965).

<sup>56</sup> *See, e.g., Thayer v. City of Rawlins*, 594 P.2d 951, 958 (Wyo. 1979).

<sup>57</sup> *See* 94 C.J.S. *Waters* § 426 (2014).

<sup>58</sup> *See City of Thornton v. Bijou Irrig. Co.*, 926 P.2d 1, 69–71 (Colo. 1996).

<sup>59</sup> *See id.*; *Thompson v. Bingham*, 302 P.2d 948, 949–50 (Idaho 1956); *Thayer*, 594 P.2d at 958; 94 C.J.S. *Waters* § 426 (2014).

<sup>60</sup> *See Montana v. Wyoming*, 131 S. Ct. 1765, 1773, n.5 (2011) (describing how each state develops its water law, and the Court was merely a federal court reviewing state law); *see also* Dwyer, *supra* note 24, section II.

<sup>61</sup> *See Binning v. Miller*, 102 P.2d 54, 58–61 (Wyo. 1940) (discussing recapture for the first time in Wyoming).

<sup>62</sup> *See supra* notes 54–59 and accompanying text.



law, the Wyoming Supreme Court considered cases from other states when it first considered recapture in *Binning v. Miller*.<sup>63</sup>

### C. Wyoming Case Law on Recapture

There is little case law in Wyoming describing the law of recapture. In 1940, the Wyoming Supreme Court first considered the law of recapture in *Binning*.<sup>64</sup> In *Binning*, the original appropriator built a dam in a swale near the boundary of his land to capture unconsumed water he wanted to apply to an adjoining tract of land.<sup>65</sup> Another neighboring landowner previously erected a headgate to divert water from the appropriator's swale and complained to the division water superintendent after the appropriator built the dam.<sup>66</sup> The trial court ruled against the original appropriator, finding that his dam was unlawful.<sup>67</sup> The Wyoming Supreme Court reversed and adopted principles of recapture from other states.<sup>68</sup> The *Binning* court considered various principles of water law that the Wyoming Supreme Court and other state supreme courts previously had accepted.<sup>69</sup> Generally, seepage water belongs to the original appropriator as long as he can capture it while it is still on his land.<sup>70</sup> The appropriator must also make beneficial use of the water on the land for the purpose for which it was appropriated.<sup>71</sup> A downstream landowner or an intervening party can acquire a right to use water that flows, seeps, or percolates from the land of an appropriator who first diverted the water, but the intervener cannot force the landowner to continue the flow of water.<sup>72</sup> The *Binning* court ultimately determined that when

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<sup>63</sup> See *Binning*, 102 P.2d at 58–61 (citing cases from Montana, Arizona, Utah, and Idaho in the court's analysis).

<sup>64</sup> *Id.* at 54.

<sup>65</sup> *Id.* at 61 (“Binning does not claim that he can use the waste and seepage water in question upon the land for which the water was appropriated, but wants to use it on land, about 100 acres in extent, which is adjoining.”). Here, Binning's attempt could be considered as not only an attempt to recapture water, but also an attempt to effectuate a completely new appropriation. See *id.* A “swale” is a piece of land that is lower than the surrounding land in a tract; it may also be land where two slopes meet and form a watercourse. See NEW OXFORD AMERICAN DICTIONARY 1753 (3d ed. 2010).

<sup>66</sup> *Binning*, 102 P.2d at 56. Here, Binning wanted to use the recaptured waters on additional lands that did not have a water right. *Id.* at 57.

<sup>67</sup> *Id.* at 57.

<sup>68</sup> See *id.* at 64 (reversing the judgment against the original appropriator in part, modifying in part, and affirming in part).

<sup>69</sup> See *infra* notes 70–72 and accompanying text.

<sup>70</sup> *Binning*, 102 P.2d at 61.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 60–61 (citing *Garns v. Rollins*, 125 P. 867, 872 (Utah 1912)). In *Garns*, the Utah Supreme Court noted that an intervener could obtain a right from the original landowner to use the water or have the flow continued through a grant. *Garns*, 125 P. at 872.

an original appropriator decides to recapture and reuse water before the water leaves his land, the intervener's use of that water was not protected.<sup>73</sup>

The Wyoming Supreme Court next considered the law of recapture nearly twenty years later in *Bower v. Big Horn Canal Ass'n*.<sup>74</sup> In *Bower*, a farmer received a permit to appropriate seepage water that collected in his drainage ditch.<sup>75</sup> The seepage water originated from the Big Horn Canal, and the farmer brought suit against the canal association to condemn a right of way for a flume to deliver the canal's seepage water in accordance with his permit.<sup>76</sup> The court held that the farmer could appropriate water as it seeped across his property from the canal.<sup>77</sup> But the court limited the farmer's right, which was always subject to the canal association's right, and stated that "[n]o appropriator can compel any other appropriator to continue the waste of water which benefits the former."<sup>78</sup> The court also noted that if a senior appropriator by a different method of irrigation can utilize his water so it is all consumed, and no waste water returns by seepage or percolation to the river, no other appropriator can complain.<sup>79</sup>

The Wyoming Supreme Court considered the law of recapture again in *Thayer v. City of Rawlins*.<sup>80</sup> The City of Rawlins imported its municipal water from the North Platte River and from Sage Creek, a tributary.<sup>81</sup> Rawlins discharged the effluent into a channel, and Thayer and others diverted the effluent for irrigation and other purposes.<sup>82</sup> Rawlins proposed to build an aerated lagoon system at a location below Thayer's point of diversion.<sup>83</sup> The city sought and received a declaratory judgment stating that the users of the discharged effluent water were not entitled to compensation for losing the ability to use that water.<sup>84</sup> The Wyoming Supreme Court affirmed.<sup>85</sup> The *Thayer* court reaffirmed

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<sup>73</sup> *Binning*, 102 P.2d at 61; see also *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600 (Wyo. 1957) ("The real question in the case was whether the prior appropriation of what was termed in the original application as 'waste and seepage water was good as against the owner of the land from which said water came. The court held that the seepage water which formed a natural stream might be appropriated, subject to the right of the land owner to use the water for beneficial purposes upon the land for which the water forming the seepage was originally appropriated.").

<sup>74</sup> 307 P.2d 593 (Wyo. 1957).

<sup>75</sup> *Id.* at 596.

<sup>76</sup> *Id.* at 595.

<sup>77</sup> *Id.* at 602.

<sup>78</sup> *Id.* at 601.

<sup>79</sup> *Id.*

<sup>80</sup> 594 P.2d 951 (Wyo. 1979).

<sup>81</sup> *Id.* at 952–53. Rawlins piped this water approximately sixteen miles from the North Platte. *Id.*

<sup>82</sup> *Id.* at 952.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 958.

the general principles from *Binning* but recognized the differences in this case; first, the water was imported, and second, the unconsumed imported water went into a local stream where it was then diverted.<sup>86</sup> The court stated that the lower landowner using discharged imported water “merely takes his chances as to future supplies, no matter how long the lower landowner uses such water.”<sup>87</sup> The court also noted that the city’s effluent was imported and held that an importer of water had the right to reuse, successively use and make disposition of those imported waters.<sup>88</sup> Justice Rooney dissented and focused on the overriding importance of beneficial use, which he believed should be the controlling principle in all issues involving water.<sup>89</sup>

One year after *Thayer*, the Wyoming Supreme Court decided *Fuss v. Franks*.<sup>90</sup> In *Fuss*, a group of landowners received water directly from an adjacent canal, and excess water unconsumed after its initial use drained through a waste-water ditch, where an intervening landowner collected and used that excess water to irrigate his property.<sup>91</sup> The intervening landowner applied for a permit from the State Engineer’s Office to use the supplemental supply of water, and the state engineer approved the permit.<sup>92</sup> The original appropriators brought an action to prevent the intervener from collecting and using this water.<sup>93</sup>

The *Fuss* court affirmed the district court’s dismissal of the original appropriators’ complaint in part, agreeing with the intervener that he had the

<sup>86</sup> See *id.* at 955–56 (“These concepts are not new to Wyoming water law, since they have been applied to protect the right of a senior appropriator to recapture waste and seepage water.”).

<sup>87</sup> *Id.* at 955 (“We indicated in *Binning v. Miller* that if the senior appropriator had allowed the lower landowner to use waste water for 35 years, but then legitimately began to use it himself, the lower landowner would have no right to complain . . .”).

<sup>88</sup> *Id.* (citing *City and County of Denver Bd. of Water Comm’rs v. Fulton Irrig. Ditch Co.*, 506 P.2d 144, 146–47 (Colo. 1972)).

<sup>89</sup> *Id.* at 958 (Rooney, J., dissenting) (“Beneficial use of water is paramount . . . [and] all issues involving water must be controlled by this concept of beneficial use.”). Chief Justice Raper joined Justice Rooney’s dissent. Justice Rooney’s main contention was that the Board of Control, not the courts, should first decide whether the city could change the point of discharge of the effluent. *Id.* In this case, Justice Rooney believed that the court should not have disrupted the certificates of appropriation that the Board of Control issued after determining that the appropriators had a beneficial use to which the water would be applied. *Id.* at 961–64. Wyoming defines “beneficial use” as the basis, measure, and limit of the right to use water at all times . . .” See WYO. STAT. ANN. § 41-3-101 (2013); see also *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 511 (Wyo. 1983). Appropriators can only acquire an amount of water that is reasonably necessary for the beneficial purpose. See *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 571 (Wyo. 1939).

<sup>90</sup> 610 P.2d 17 (Wyo. 1980). Justice McClintock concurred and stated that the intervener should not be able to obtain a permit for waste or seepage water, and the court could decide solely based on *Binning* because the landowners had not shown they had recaptured the water before it escaped their lands. *Id.* at 22–23 (McClintock, J., concurring).

<sup>91</sup> *Id.* at 19 (majority opinion).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

right to use the waste water because it left the original appropriator's land.<sup>94</sup> The court also noted that the original appropriator wanted to use the waste water on a different tract of land further down the drainage ditch.<sup>95</sup> The court once again relied on *Binning*, holding that the intervener's permit was valid because the water had left the original landowners' properties, and those landowners no longer had a superior right to the water once it left their property.<sup>96</sup> Further, the court noted that if the original appropriators wanted to recapture the excess water that pooled in the ditch for use on other lands, the original appropriators would have to apply for a change of use permit.<sup>97</sup> Justice McClintock concurred and stated that the original appropriators had not brought themselves within the rule of recapture because they did not show that they had recaptured the water before it escaped from the lands for which it had originally been acquired.<sup>98</sup> Because the original appropriators had not brought themselves within the law of recapture, they could not show that a legal right had been invaded.<sup>99</sup> But, disagreeing with the majority, Justice McClintock believed that, under *Binning*, the downstream appropriator who came to rely upon those waters could not establish an appropriative right to seepage or waste waters; only the original appropriator could apply for such a right.<sup>100</sup>

#### D. *Montana v. Wyoming: The United States Supreme Court Considers Recapture*

The United States Supreme Court addressed Wyoming's law of recapture recently in *Montana v. Wyoming*.<sup>101</sup> Montana and Wyoming are signatories to the Yellowstone River Compact, which apportioned waters of the Yellowstone Basin between the two states.<sup>102</sup> The Compact created a two-tier system, giving priority to water users with appropriative rights before January 1, 1950; after that

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<sup>94</sup> *Id.* at 20, 22. The court reversed only on the issue of whether the original landowners stated a claim for injunctive relief based on flood danger. *Id.* at 22.

<sup>95</sup> *Id.* at 20–21.

<sup>96</sup> *Id.* (“When the water leaves the land for which it was appropriated and would, if left to flow uninterrupted, reach a natural stream, it becomes eligible to other and separate appropriation for other and different uses. It leaves the landowner upon which the seepage rose, and from which it has escaped, without any superior right to such water by reason of its having been utilized upon the land to which it was first appropriated.”). See also *Bower v. Big Horn Canal Ass’n*, 307 P.2d 593, 602 (Wyo. 1957) (holding that seepage water arising on landowner's land was subject to appropriation by him for lands other than those upon which the seepage arises).

<sup>97</sup> *Fuss*, 610 P.2d at 20 (citing *Scherck v. Nichols*, 95 P.2d 74 (Wyo. 1939)).

<sup>98</sup> *Fuss*, 610 P.2d at 23 (McClintock, J., concurring); *United States v. Ide*, 277 F. 373, 382 (8th Cir. 1921).

<sup>99</sup> *Fuss*, 610 P.2d at 23.

<sup>100</sup> *Id.* at 22 (citing *Binning v. Miller*, 102 P.2d 54, 60 (Wyo. 1940)).

<sup>101</sup> 131 S. Ct. 1765 (2011).

<sup>102</sup> *Id.* at 1770; MacDonnell, *supra* note 12, at 267–68.

date, each state can secure water to the extent necessary to provide supplemental water supplies.<sup>103</sup> Montana filed suit against Wyoming and alleged, among other things, that pre-1950 upstream appropriators in Wyoming improperly decreased the amount of water flowing to Montana when they switched from flood to more efficient sprinkler irrigation systems that consumed more water.<sup>104</sup> Montana argued the sprinkler systems in Wyoming increased crop consumption of water and decreased the volume of runoff and seepage that returned to the Tongue River and Powder River by twenty-five percent or more, decreasing the amount of water reaching Montana users.<sup>105</sup> The Supreme Court appointed a Special Master, who issued a report to the Supreme Court stating that Montana's allegation failed to state a claim for relief because more efficient irrigation systems are permissible under the Compact so long as the conserved water is used to irrigate the same acreage watered in 1950.<sup>106</sup>

Montana filed an exception (that is, an objection to the Special Master's report), and the United States Supreme Court affirmed the Special Master's decision.<sup>107</sup> Writing for the majority, Justice Clarence Thomas first discussed basic principles of prior appropriation, including the limitation of beneficial use on the right to use water.<sup>108</sup> In reviewing the principles of prior appropriation, the Court concluded that Wyoming's pre-1950 users upstream could switch from flood irrigation to more efficient sprinkler irrigation systems.<sup>109</sup> Wyoming users could switch so long as no additional water was diverted and the conserved water was used on the same acreage for the same purpose (agriculture), even if the switch decreased the amount of runoff and seepage water returning to the river system and thus to Montana's pre-1950 users.<sup>110</sup> Montana's and Wyoming's prior appropriation law contemplated improvement to irrigation systems that could increase consumption, and the law of recapture supported treating improvements

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<sup>103</sup> *Montana v. Wyoming*, 131 S. Ct. at 1770. The Compact did not limit the priority to users of a specific stream, but simply stated that beneficial uses of the Yellowstone River System would continue to enjoy priority. *Id.*

<sup>104</sup> *Id.* at 1771.

<sup>105</sup> *Id.* There were a series of below-average runoff years between 2000 and 2006 resulting in critical water shortages in both Montana and Wyoming. See MacDonnell, *supra* note 12, at 268.

<sup>106</sup> *Montana v. Wyoming*, 131 S. Ct. at 1769.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1772. The Court also noted that the Montana and Wyoming pre-1950 water users were equal in priority, and Montana users may get no water at all because Wyoming users may lawfully consume all of the water. *Id.*

<sup>109</sup> *Id.* at 1773. The Court noted the "lack of clarity in this area of water law" and stated that its assessment of the case was merely a "federal court's description of state law" and it was not the "Court's role to guide the development of state water regulation." *Id.* at 1773, n.5.

<sup>110</sup> *Id.* at 1773.

to irrigation methods as properly within an original appropriative right.<sup>111</sup> The Court considered other similar, permissible situations to Wyoming's switch to sprinkler irrigation, including the ability to change to more water-consuming crops and the ability to increase the acreage irrigated so long as the increased acreage was part of the landowner's plan from the start and pursued diligently over the years.<sup>112</sup> The Court concluded that improvements to irrigation systems are the type of changes that fall outside the no-injury rule—a rule that prevents water users from changing their use if it harms appropriators downstream—as it exists in Montana and Wyoming.<sup>113</sup>

The Court then discussed the law of recapture in Wyoming. When considering Wyoming's law, the Court relied on *Binning*, stating that an appropriator who has diverted water for irrigation purposes has the right to recapture and reuse that recaptured water—whether it was runoff or seepage water—before it escapes his control or property so long as the water was used for the same purpose on the same land.<sup>114</sup> The Court further concluded that an appropriator is entitled to the exclusive control of his appropriated water so long as he is able and willing to apply it to beneficial uses, and that right extends to waste and seepage water incident to practical irrigation.<sup>115</sup> Then, relying on *Bower*, the Court explained that an intervening water user could not secure a permanent right to continue to receive that water because the original owner “might find better ways of utilizing water on the same land so that less waste and seepage would occur.”<sup>116</sup>

Ultimately, the Court held that Wyoming's and Montana's law of recapture allows appropriators to improve their irrigation systems, even to the detriment of downstream appropriators.<sup>117</sup> The Court reasoned that, by using sprinklers rather than flood irrigation, Wyoming's pre-1950 users upstream effectively recaptured

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<sup>111</sup> *Id.* (“[A]lthough the no-injury rule prevents appropriators from making certain water-right changes that would harm other appropriators, a change in irrigation methods does not appear to run afoul of that rule in Montana and Wyoming.”).

<sup>112</sup> *Id.* at 1774 (citing *East Bench Irrig. Co. v. Deseret Irrig. Co.*, 271 P.2d 449, 455 (Utah 1954); *Van Tassel Real Estate & Live Stock Co. v. Cheyenne*, 54 P.2d 906, 913 (Wyo. 1936) (per curiam)).

<sup>113</sup> *Montana v. Wyoming*, 131 S. Ct. at 1774. The Court determined that improvements to irrigation methods are not changes to the place of diversion, place of use, or purpose of use and thus seem to be excluded from both states' laws concerning the no-injury rule. *Id.*

<sup>114</sup> *Id.* at 1774–76. The Court cited a treatise which suggests that, in some narrowly defined circumstances, the landowner retains the right to reuse water even if it has left his property. *Id.* at 1774, n.7.

<sup>115</sup> *Id.* at 1774–75 (citing *Ide v. United States*, 263 U.S. 497, 506 (1924)).

<sup>116</sup> *Montana v. Wyoming*, 131 S. Ct. at 1775 (citing *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600–01 (Wyo. 1957) (“No appropriator can compel any other appropriator to continue the waste of water which benefits the former.”)).

<sup>117</sup> *Montana v. Wyoming*, 131 S. Ct. at 1777.

water by using a system that reduced loss due to seepage and runoff.<sup>118</sup> The sprinkler system was a different mechanism for increasing the volume of water available to the crops without changing the amount of the diversion.<sup>119</sup> Finally, the Court noted that *Binning*, *Bower*, and *Fuss* all expressly stated that “lower appropriators who have perfected their own appropriative rights are nonetheless at the mercy of the property owners from which their water flows.”<sup>120</sup>

### III. ANALYSIS

The analysis first describes the positive attributes of Wyoming’s law of recapture and why the United States Supreme Court reached the correct outcome in *Montana v. Wyoming*.<sup>121</sup> Second, the analysis addresses the tensions between the fundamental principles of prior appropriation and the doctrine of recapture, and between the legal rights of appropriators with society’s economic interest in water use and reuse.<sup>122</sup> Third, the analysis will suggest possible steps to clarify the doctrine of recapture and make it one that has practical application in the twenty-first century.<sup>123</sup>

#### A. *The Virtues of Wyoming’s Current Law of Recapture*

Wyoming’s law of recapture provides a strong framework for ensuring that appropriators are able to consume as much of their diverted water as possible by reusing unconsumed water from their appropriations and putting that recaptured water to a beneficial use.<sup>124</sup> Wyoming case law provides a basic framework for both state agencies and water appropriators to consider how to treat recaptured water or an increase in consumptive use.<sup>125</sup> Wyoming’s doctrine of recapture also attempts to strike an equitable balance by imposing a geographical limitation on

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<sup>118</sup> *Id.* at 1776.

<sup>119</sup> *Id.* at 1776–77.

<sup>120</sup> *Id.* Montana also objected to the Special Master’s report because the Compact’s definition of “beneficial use” does not permit Wyoming to increase the amount of depletion. *Id.* at 1778. The Court rejected Montana’s argument, stating that within the Compact, a “beneficial use” is a type of use that depletes the water supply. *Id.* Ultimately, the Court overruled Montana’s first exception to the Special Master’s report. *Id.* Justice Scalia dissented, disagreeing with the majority’s definition of “beneficial use.” Justice Scalia believed that the Compact’s drafters deliberately selected the word “deplete” instead of “divert,” and such language meant that use of water could not be increased beyond the amount of water depleted. *Id.* at 1780–82 (Scalia, J., dissenting).

<sup>121</sup> See *infra* notes 124–27 and accompanying text.

<sup>122</sup> See *infra* notes 128–49 and accompanying text.

<sup>123</sup> See *infra* notes 150–76 and accompanying text.

<sup>124</sup> See *supra* notes 24–34 and accompanying text (describing basic principles of reuse and recaptured water).

<sup>125</sup> See *supra* notes 64–100 and accompanying text; see also Brockmann, *supra* note 9, § 29.03 (describing how Kansas appears to have no case law discussing the doctrine of recapture).

an original appropriator's ability to reuse water and allowing a downstream or neighboring user to apply for an appropriative right for unconsumed water that leaves the original appropriator's land.<sup>126</sup> Additionally, the United States Supreme Court's decision in *Montana v. Wyoming* likely ensures that irrigators and other water users have an incentive to use water more efficiently through improvements in the method of delivering water to the appropriator's land.<sup>127</sup>

### *B. The Tension between Prior Appropriation and the Law of Recapture*

The law of recapture appears to be inconsistent with the fundamental principles of prior appropriation. This is particularly true in today's world, where demand for water continues to increase.<sup>128</sup> Without revising the doctrine of recapture to reflect more adequately the limitation of beneficial use and the no-injury rule, the doctrine will not work properly in today's American West.

#### *1. Beneficial Use*

As previously stated, beneficial use is the basis, measure, and limit of a water right.<sup>129</sup> Under this doctrine, an appropriator can only divert as much water as necessary to accomplish the use.<sup>130</sup> Beneficial use is dynamic: water users must only divert the amount of water that can be put to beneficial use on their land.<sup>131</sup> Even though beneficial use was intended to limit diversions to the amount of water actually required, the concept of beneficial use, in reality, inhibits increased efficiency in water use.<sup>132</sup> Practically, the concept of beneficial use does not incentivize innovation and efficient practices.<sup>133</sup> If an appropriator wants to improve the efficiency of his use, thereby increasing the benefit he derives from

<sup>126</sup> See *supra* notes 90–100 and accompanying text (describing the Wyoming Supreme Court's opinion in *Fuss v. Franks*).

<sup>127</sup> See First Interim Rep. of the Special Master at 72–73, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

<sup>128</sup> See *supra* notes 1–6 and accompanying text.

<sup>129</sup> See *supra* notes 19–22 and accompanying text.

<sup>130</sup> See *supra* notes 19–22 and accompanying text.

<sup>131</sup> See Neuman, *supra* note 21, at 922 (“Beneficial use is in fact a fairly elastic concept . . . [that] allows water users considerable flexibility in the amount and method of use, and leaves line drawing to the courts.”).

<sup>132</sup> This is particularly true because states define the term “beneficial use” vaguely. See 94 C.J.S. *Waters* § 426 (2014).

<sup>133</sup> See Pring, *supra* note 1, pt. III. Some suggest that the failure to enforce the requirement of diverting only the amount of water an appropriator can put to beneficial use has created the inefficient use of water. See Neuman, *supra* note 21, at 947 (“[T]he common law beneficial use doctrine, as it has developed over the past century, does not appear to be an efficiency-seeking doctrine at all. It is instead a laissez-faire legal doctrine that leaves the water users alone for the most part, once in a while reining in a bad actor or an especially egregious practice.”).



his appropriated water, the state would likely consider the issue of whether the appropriator previously accomplished his beneficial use with the amount of water the appropriator is permitted to divert. On the other hand, from the original appropriator's view, the issue is whether he should be penalized as previously wasting water because he now can accomplish the same purposes with less water.

If the appropriator had accomplished the use for which he sought the water without using the full amount of his appropriation, then the appropriator's appropriation should be reduced.<sup>134</sup> This is true because of the requirement in prior appropriation that limits the amount of water available for actual use to the amount the appropriator actually puts to beneficial use.<sup>135</sup> However, the rule of recapture in Wyoming is in direct conflict with the principle of beneficial use.<sup>136</sup> Instead of losing the portion of the appropriation which he does not put to beneficial use, an appropriator can reuse unconsumed water that otherwise would return to the stream for downstream appropriators.<sup>137</sup>

Ultimately, beneficial use discourages an appropriator from innovating new methods and approaches and from utilizing water conservation techniques, particularly if the appropriator would lose control and use of the amount of water conserved.<sup>138</sup> Thus, senior appropriators have less incentive to apply their appropriated water more efficiently. In times of water shortage, senior appropriators can "call" for satisfaction of their water rights.<sup>139</sup> Additionally, junior appropriators are the first to bear the costs of a water shortage; they would have more incentive to appropriate and use the available water more efficiently because they have less chance to divert the full amount of their appropriations.<sup>140</sup>

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<sup>134</sup> See Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 ENVTL. L. 1137, 1142 (1998) ("The use it or lose it principle provides for the loss of appropriated water if it is not put to a beneficial use.").

<sup>135</sup> *Id.*

<sup>136</sup> Compare WYO. STAT. ANN. § 41-3-101 (2013) (stating that beneficial use is the basis, measure, and limit of the right to use water at all times), with *Binning v. Miller*, 102 P.2d 54, 60-61 (Wyo. 1940), and *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600 (Wyo. 1957) (permitting an appropriator to reuse water that downstream appropriators may otherwise use).

<sup>137</sup> See, e.g., *Binning*, 102 P.2d at 60-61; *Bower*, 307 P.2d at 600.

<sup>138</sup> See Michael A. Gheleta, *Water Use Efficiency and Appropriation in Colorado: Salvaging Incentives for Maximum Beneficial Use*, 58 U. COLO. L. REV. 657, 658 (1988).

<sup>139</sup> See Christine A. Klein, *Water Bankruptcy*, 97 MINN. L. REV. 560, 585 (2012). However, if the water manager, after considering various factors, decides that it is physically impossible to deliver water to the senior user placing the call in usable quantities, then the manager will deem the call "futile" and decline to curtail junior users. See *State ex rel. Cary v. Cochran*, 292 N.W. 239, 244-46 (Neb. 1940).

<sup>140</sup> See Klein, *supra* note 139, at 592-93.

Until Wyoming addresses the tension between beneficial use and the doctrine of recapture, water appropriators may hesitate to improve their efficiency in usage and/or delivery systems.<sup>141</sup>

## 2. *The No-Injury Rule*

Generally, an appropriator may not make a change to his appropriation if such a change would injure another appropriator.<sup>142</sup> Most states protect downstream water users who draw their supply from historical return flows, thus inhibiting an upstream appropriator's ability to recapture and reuse water.<sup>143</sup> In the context of recapture, the downstream appropriator encounters a problem when an upstream appropriator elects to reuse unconsumed water.<sup>144</sup> If the downstream user complains to the Board of Control or sues the upstream appropriator, the likely result would have both positive and negative aspects. The downstream user who depends on the upstream appropriator's unconsumed water returning to the water source would likely be protected under the change-of-use statute.<sup>145</sup> However, that protection would ensure the continued inefficient use of water.<sup>146</sup> In prior appropriation states, appropriators may be able to use inefficient methods to divert, deliver, and apply water if those methods are considered typical in that geographic area.<sup>147</sup> Ultimately, the no-injury rule requires the downstream user to prove injury, and the senior, upstream appropriator does not have to show that his proposed recapture would not cause injury to downstream users.<sup>148</sup> This burden on downstream users would be particularly challenging if the senior appropriator did not increase his historic consumptive use when recapturing and reusing water.<sup>149</sup>

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<sup>141</sup> See *supra* notes 129–40 and accompanying text.

<sup>142</sup> See *supra* note 23 and accompanying text (describing the no-injury rule).

<sup>143</sup> See Brockmann, *supra* note 9, § 29.05.

<sup>144</sup> See *supra* notes 44–51 and accompanying text.

<sup>145</sup> See WYO. STAT. ANN. § 41-3-104 (2013) (stating that an appropriator who wishes to change his water right from its present use to another use, or to a different place, cannot increase the historic amount consumptively used in any manner that would injure other existing lawful appropriators); see also *Garber v. Wagonhound Land & Livestock Co., LLC*, 2012 WY 89, ¶¶ 26, 28, 279 P.3d 525, 532–33 (Wyo. 2012).

<sup>146</sup> See MacDonnell, *supra* note 12, at 292–93 (describing how prior appropriation law is “generally very solicitous of protecting existing water rights”).

<sup>147</sup> See MacDonnell, *supra* note 12, at 293.

<sup>148</sup> See WYO. STAT. ANN. §§ 41-4-503, 41-5-514 (2013) (stating that for applications for use and change of use, the State Engineer must consider whether the applicant's proposed use would impair the rights of other users).

<sup>149</sup> See, e.g., *Garber*, ¶ 12, 279 P.3d at 529.

### C. *Addressing the Tension Between Prior Appropriation and Recapture*

#### 1. *Potential Changes for the Law of Recapture*

There are several steps the Wyoming Legislature or the Wyoming Supreme Court could take to clarify the doctrine of recapture.<sup>150</sup> First, Wyoming needs to decide if, within the context of recapture, there should be a clear distinction between waste water and recaptured water.<sup>151</sup> Some courts in the Western states have taken the view that water unconsumed in use is waste water, presumably to encourage appropriators to use their water more beneficially.<sup>152</sup> Generally, waste water may be recaptured by the original appropriator at any time and reused, even if that water previously returned to the stream and has been appropriated by others.<sup>153</sup> But if a court eliminates the original appropriator's obligations to maintain return flows of unconsumed water simply because the water is characterized as waste, then the definition of waste water would be confused with that of recaptured water.<sup>154</sup> Thus, Wyoming should clarify the meaning of recaptured water to include water that the original appropriator has the right to reuse, and the meaning of waste water to include water which the original appropriator must allow to return to the water source for downstream users to appropriate.

In distinguishing waste water and recaptured water, there are two primary considerations. First, an upstream appropriator's unconsumed water that previously returned to the water source and formed the basis for a downstream appropriator's water right could be considered waste water to protect that downstream appropriator's ability to receive and fulfill his appropriative right.<sup>155</sup> This water is characterized as water that has returned to the stream from which it came.<sup>156</sup>

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<sup>150</sup> See *infra* notes 151–76 and accompanying text. The Wyoming Supreme Court could address the doctrine of recapture, but only if it receives a case that meets the requirements for standing and ripeness. See, e.g., *Cox v. City of Cheyenne*, 79 P.3d 500, 505 (Wyo. 2003) (“Generally, a justiciable controversy is defined as a controversy fit for judicial resolution.”).

<sup>151</sup> See *supra* notes 24–34 and accompanying text.

<sup>152</sup> See MacDonnell, *supra* note 12, at 280 (stating that the cases make no attempt to distinguish unconsumed water that is truly waste from other unconsumed water, like the residue of that amount of water necessary to properly irrigate the land); see also Steven J. Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483, 489 (1982) (“Water waste in a particular irrigation operation can be considered as the volume of water diverted from the natural water supply that is not consumptively used by the crops.”).

<sup>153</sup> See generally *Arizona Pub. Serv. Co. v. Long*, 773 P.2d 988, 997–98 (Ariz. 1989).

<sup>154</sup> See MacDonnell, *supra* note 12, at 282.

<sup>155</sup> See *supra* notes 24–34 and accompanying text (describing waste water).

<sup>156</sup> See Adell Amos, *Freshwater Conservation in the Context of Energy and Climate Policy: Assessing Progress and Identifying Challenges in Oregon and the Western United States*, 12 U. DENV. WATER L. REV. 1, 80–81 (2008) (characterizing return flows as water that returns to the natural course of the stream from which it was taken, after being applied by an appropriator).

Second, Wyoming should strengthen the geographical limitation discussed in *Binning v. Miller* and *Fuss v. Franks*, as it is a somewhat insufficient limitation on the doctrine of recapture.<sup>157</sup> In *Binning*, the Wyoming Supreme Court allowed the original appropriator to recapture and reuse unconsumed water only so long as the water was still located on the appropriator's land.<sup>158</sup> On its face, this geographic limitation would be equitable to those downstream appropriators who have relied on upstream appropriators' unconsumed water returning to the water source—if the water did not return to the water source, it would never be available to any downstream appropriators.<sup>159</sup> However, this limitation would still permit a senior appropriator to recapture and reuse all of the unconsumed water from his appropriation and application to beneficial use, so long as the appropriator recaptures the water before it leaves his own land.<sup>160</sup> As a result, downstream users may face adverse effects, even with the current geographic limitation in place.<sup>161</sup> A senior appropriator who recaptures most or all of the unconsumed water could leave the dependent downstream appropriators with severely diminished or no return flows upon which to rely.<sup>162</sup> Additionally, Wyoming's previous cases dealing with recapture considered an original appropriator's attempt to recapture years after the original appropriator's initial use, increasing the likelihood that downstream appropriators have come to rely upon the original appropriator's unconsumed water—particularly when that water previously returned to its source.<sup>163</sup>

One solution to mitigate this tension between senior, upstream appropriators and downstream appropriators is to reduce the amount of the diversion by reducing the upstream appropriator's beneficial use measurement of his appropriation.<sup>164</sup>

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<sup>157</sup> See *supra* notes 64–73 and accompanying text (describing *Binning v. Miller*); see also *supra* notes 90–100 and accompanying text (describing *Fuss v. Franks*).

<sup>158</sup> See *Binning v. Miller*, 102 P.2d 54, 59–61 (Wyo. 1940); see also *Fuss v. Franks*, 610 P.2d 17, 20 (Wyo. 1980) (“The owner of land upon which seepage or waste water rises has the right to use and reuse capture and recapture such waste waters for use only upon the land for which the water forming the seepage was originally appropriated. When water leaves the land for which it was appropriated and would, if left to flow uninterrupted, reach a natural stream, it becomes eligible to other and separate appropriation for other and different uses. It leaves the landowner upon which the seepage rose, and from which it has escaped, without any superior right to such water by reason of its having been utilized upon the land to which it was first appropriated.”) (internal quotation marks omitted).

<sup>159</sup> See *Fuss*, 610 P.2d at 20.

<sup>160</sup> See MacDonnell, *supra* note 12, at 287–88.

<sup>161</sup> See *infra* notes 162–76 and accompanying text.

<sup>162</sup> See *Comstock v. Ramsay*, 133 P. 1107, 1108 (Colo. 1913). In *Comstock*, the Colorado Supreme Court noted that upstream diversions from the South Platte River completely depleted the channel until unconsumed water from irrigation returned to the river. *Id.* The Court took notice that almost every decree on the river relied on irrigation return flows and refused to grant an appropriation for seepage water that would interfere with its return to the stream. *Id.* at 1110–11.

<sup>163</sup> See *Fuss*, 610 P.2d at 20; *Thayer v. City of Rawlins*, 594 P.2d 951, 958 (Wyo. 1979); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600 (Wyo. 1957); *Binning*, 102 P.2d at 59–61.

<sup>164</sup> See WYO. STAT. ANN. § 41-3-101 (2013).

This reduction would ensure that unconsumed water returns to the water source for downstream appropriators and provide more protection for the downstream appropriators.<sup>165</sup> However, this solution would remove much of the incentive for these senior appropriators to seek more efficient use of their appropriation.<sup>166</sup>

Another potential solution is to reevaluate the geographic limitation in the context of the original appropriation.<sup>167</sup> Specifically, the geographic limitation should prohibit the use of recaptured water for purposes not within those contemplated under the original appropriation.<sup>168</sup> Because an appropriation includes a limitation on the place where appropriated water can be put to beneficial use, a geographic limitation on the use of recapture water based on the original appropriation would prevent the use of recapture water on lands not included within the original appropriation.<sup>169</sup> This type of limitation could provide stability to downstream users who rely upon return flows for their appropriation. These changes would maintain some of the incentive for senior appropriators to improve efficiency while providing some protection to downstream users. This balance helps the law of recapture find its place within the prior appropriation system, particularly with regard to the concepts of beneficial use and the no-injury rule.

## 2. *Beneficial Use*

Wyoming can address the tension between beneficial use and recapture with a clear distinction between recapturing and reusing water and an increase in consumption. This distinction should permit recapture when an appropriator more efficiently applies the water to his stated beneficial use, but should not allow recapture when an appropriator uses the recaptured water to expand his consumption beyond the original beneficial use.<sup>170</sup> The distinction should be based on the original appropriator's intent at the time of her appropriation.<sup>171</sup> This intent to recapture could also be considered as intent to eventually place the entire

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<sup>165</sup> See *supra* notes 129–41 and accompanying text (describing the tension between the concept of beneficial use in prior appropriation and the law of recapture).

<sup>166</sup> See *supra* notes 138–41 and accompanying text.

<sup>167</sup> See *Basin Elec. Power Co-op v. State Bd. of Control*, 578 P.2d 557, 569 (Wyo. 1978) (stating that an appropriator can use diverted water within the limits of his appropriation).

<sup>168</sup> See *id.*

<sup>169</sup> See WYO. STAT. ANN. § 41-3-101 (2013) (stating that water rights “shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made . . .”).

<sup>170</sup> See *infra* notes 175–78 and accompanying text.

<sup>171</sup> See *infra* notes 173–76 and accompanying text (describing the need for clarity in an appropriator's intent to change the method of use).

amount of the appropriation to beneficial use.<sup>172</sup> To give this distinction effect, Wyoming needs to consider requiring an appropriator to demonstrate his intent to recapture water when he initially perfects or has perfected his appropriation before he recaptures water.<sup>173</sup> If an appropriator manifested this intent when the water is first appropriated, downstream users would have notice and would have no recourse if the appropriator decides later to recapture and reuse water that previously returned to the water source.<sup>174</sup> Another role intent could play in the law of recapture is if an appropriator intended to use his appropriated water more efficiently in the future. This intent may be explicit or inferred, as downstream and junior appropriators should expect that the upstream appropriator will make more efficient use of his appropriation so long as it benefits him.<sup>175</sup>

However, it is unclear whether an intent limitation would serve to ensure the most equitable and efficient use of water. Generally, intent in the context of recapture is considered only for abandonment purposes.<sup>176</sup> If an appropriator allowed water to leave his land, he intended never to recapture and reuse it.<sup>177</sup>

Ultimately, the Wyoming Legislature should declare that when a landowner applies for and receives an appropriation, the appropriation implicitly includes the ability for the appropriator to change the method of delivery or use without fear of legal reprisal from any downstream appropriators who came to rely on any unconsumed water. This statement will provide much-needed clarity for both downstream appropriators and upstream appropriators who wish to change

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<sup>172</sup> See MacDonnell, *supra* note 12, at 276. Intent to appropriate (whether through demonstration of intent or, in modern times, filing a permit application) is one of the basic requirements of a valid appropriation. See, e.g., *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 402 (9th Cir. 1985); *McDonald v. Bear River & Auburn Water & Mining Co.*, 13 Cal. 220, 232 (1859).

<sup>173</sup> See *supra* note 110 and accompanying text. Generally, the ability to recapture is not predicated on a demonstrated intent at the time of appropriation, and cases discussing intent are generally in the context of reuse and abandonment and forfeiture. See, e.g., *Stevens v. Oakdale Irrig. Dist.*, 90 P.2d 58, 61–62 (Cal. 1939); *Jones v. Warm Springs Irrig. Dist.*, 91 P.2d 542, 548 (Or. 1939); CLESSON S. KINNEY, *LAW OF IRRIGATION AND WATER RIGHTS*, 2006–09 (2d. ed. 1912).

<sup>174</sup> See, e.g., *Binning v. Miller*, 102 P.2d 54, 60–61 (Wyo. 1940); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600 (Wyo. 1957).

<sup>175</sup> *Montana v. Wyoming*, 131 S. Ct. 1765, 1775 (2011) (citing *Bower*, 307 P.2d at 600–01 (“No appropriator can compel any other appropriator to continue the waste of water which benefits the former.”)).

<sup>176</sup> See, e.g., *Dep't of Ecology v. U.S. Bureau of Reclamation*, 827 P.2d 275, 279–80 (Wash. 1992). The Wyoming Supreme Court suggested that intent may also play a role in the forfeiture of water rights. See *Sturgeon v. Brooks*, 281 P.2d 675, 683 (Wyo. 1955). *But see Ward v. Yoder*, 357 P.2d 180, 182 (Wyo. 1960) (citing *Carrington v. Crandall*, 147 P.2d 1009, 1011–12 (Idaho 1944)) (stating that statutory forfeiture may take place regardless of the appropriator's intent).

<sup>177</sup> *Dep't of Ecology*, 827 P.2d at 279–80. The primary exception to this rule is federal reclamation projects, which are generally exempt from state change of use procedures. See, e.g., *City of Raton v. Vermejo Conservancy Dist.*, 678 P.2d 1170, 1174 (N.M. 1984).

the method of delivery—sprinklers for irrigation, for example.<sup>178</sup> Upstream appropriators will know that they can change their method of delivery to a more efficient one when that method becomes economically feasible. Downstream appropriators will know that less water may be available in the future if an upstream appropriator elects to improve the efficiency of his appropriation. This clarity will provide both certainty and fairness: although this interest in efficiency could curtail the use of water upon which downstream appropriators have relied, downstream appropriators could still rely upon the no-injury rule in the context of recapture.<sup>179</sup>

### 3. *The No-Injury Rule*

Neither the Wyoming Legislature nor the Wyoming Supreme Court has considered the effect an upstream appropriator's recapture may have on downstream users who have come to rely on return flows for their appropriation.<sup>180</sup> In Wyoming, it is not possible to enlarge upon the historical beneficial use of an appropriated water right through a change of use, a change of the place of use, or a change in the point of diversion.<sup>181</sup> But if an upstream appropriator increases his consumptive use by recapturing and reusing previously unconsumed water, he enlarges his historical beneficial use without any consideration of whether downstream users are injured.<sup>182</sup> The Wyoming Legislature could enact a statute requiring an application for reuse, similar to the processes for change in use or change in point of diversion, where the Board of Control would have to consider whether reuse would injure other appropriators.<sup>183</sup> This statute could include a presumption that favors recapture, unless such recapture would violate the no-injury rule. This presumption would provide greater incentive for appropriators to recapture water without harming other appropriators—an

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<sup>178</sup> See *Montana v. Wyoming*, 131 S. Ct. at 1773–74 (describing how a change in irrigation methods does not appear to violate the law of recapture). The Supreme Court in *Montana v. Wyoming* stated that an appropriator could increase his consumption by changing to a more water-intensive crop so long as he did not change the acreage irrigated or amount of water diverted. *Id.* at 1774.

<sup>179</sup> See *infra* notes 180–92 and accompanying text.

<sup>180</sup> See, e.g., *Binning v. Miller*, 102 P.2d 54, 60–61 (Wyo. 1940); *Bower*, 307 P.2d at 600. The Wyoming Supreme Court in *Bower* referred to possible harm to downstream users but determined the issue need not be decided there. Furthermore, it is likely that the Legislature would be the first branch to consider the no-injury rule in the context of the law of recapture. See, e.g., *Cox v. City of Cheyenne*, 79 P.3d 500, 505 (Wyo. 2003) (“Generally, a justiciable controversy is defined as a controversy fit for judicial resolution.”).

<sup>181</sup> See *Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339, 350–51 (Wyo. 1983).

<sup>182</sup> See, e.g., WYO. STAT. ANN. § 41-3-104 (2013). This statute provides that, when an appropriator wants to change his use, the Board of Control considers, among other things, whether the change would “in any manner injure other existing lawful appropriators.” *Id.*

<sup>183</sup> See, e.g., WYO. STAT. ANN. §§ 41-3-104, 41-3-114(a) (2013).

incentive for upstream appropriators to recapture water would meet at least one goal of prior appropriation—encouraging maximum beneficial use.<sup>184</sup>

But such a process would likely forego virtually all recapturing of water if the recapture “tends to impair the value of [a downstream appropriator’s] existing rights.”<sup>185</sup> One example of impairment is when a downstream user has come to rely upon the upstream appropriator’s unconsumed water returning to the water source.<sup>186</sup> The Wyoming Legislature could distinguish recapture from an efficiency improvement contemplated in the original appropriation. Ultimately, a statutory scheme for recapture that requires consideration of injury to downstream users would prevent the upstream appropriator from diminishing the downstream users’ available water.<sup>187</sup>

The question of whether an upstream appropriator can legally recapture water may depend on where the water has gone when diverted water goes unconsumed.<sup>188</sup> If the appropriator can recapture the water before it leaves his control, then he will likely be able to reuse that water.<sup>189</sup> But if the return flow reenters the natural stream—which most unconsumed water will—downstream and junior appropriators could utilize that water and preclude the upstream appropriator’s ability to recapture and reuse that water in the future.<sup>190</sup> Thus, recapture may not be possible without injury to others unless there is enough water in the system to satisfy downstream users’ appropriations.<sup>191</sup>

Whether a downstream appropriator could succeed in an action against an upstream, senior appropriator who attempts to recapture water is unclear; the Wyoming Supreme Court in *Bower* suggested—without deciding—that a downstream user could prevent an upstream user from recapturing water if the downstream user could prove that such interception materially damaged his prior rights.<sup>192</sup> For a Wyoming upstream appropriator who would already be facing

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<sup>184</sup> See Koehl, *supra* note 134, at 1142–43 (1998) (describing a dominant theme of western water law as the goal of full beneficial use of water).

<sup>185</sup> See WYO. STAT. ANN. § 41-3-104 (2013).

<sup>186</sup> See, e.g., *Thayer v. City of Rawlins*, 594 P.2d 951, 952 (Wyo. 1979).

<sup>187</sup> See *supra* notes 158–63 and accompanying text.

<sup>188</sup> See *supra* notes 158–63 and accompanying text (describing the need for clarity in the geographical limitation on recapture).

<sup>189</sup> See *supra* notes 64–100 and accompanying text.

<sup>190</sup> See, e.g., *Binning v. Miller*, 102 P.2d 54, 60–61 (Wyo. 1940); *Bower v. Big Horn Canal Ass’n*, 307 P.2d 593, 600 (Wyo. 1957).

<sup>191</sup> See *supra* notes 142–90 and accompanying text.

<sup>192</sup> See *Bower*, 307 P.2d at 602. The Court’s language suggests that the burden would be placed on the downstream users to demonstrate injury, a burden the appropriator applying for the change usually has to meet before receiving permission to make the change.



the costs of implementing new technology and conservation methods, the legal hurdles and confusion she would face may sufficiently deter her from instituting efforts to recapture water that is unconsumed from her diversion. Thus, protection for a recapture permit holder would provide incentive for an appropriator to seek approval before recapturing water. Conversely, without sufficient protection and incentive for the appropriator who wishes to recapture, the ultimate result would be the continued uncertainty for downstream users who rely on upstream appropriators' unconsumed water and upstream appropriators' inefficient use of water, costs society can ill afford to bear in light of a diminishing resource facing ever-increasing demand.

#### IV. CONCLUSION

With a changing climate and increased demand, the need to use water as efficiently as possible is more important than ever.<sup>193</sup> Recapturing and reusing unconsumed water presents one possible solution to the problem of increased demand.<sup>194</sup> Although Wyoming's doctrine of recapture has a solid foundation, the current law needs to be clarified to provide more guidance for water appropriators both upstream and downstream.<sup>195</sup> Additionally, the doctrine of recapture should be revised to account for the tension in values between the doctrine of recapture and basic principles of prior appropriation law, including the no-injury rule and the concept of beneficial use.<sup>196</sup> Recapturing and reusing water presents a way to promote technological innovation and more efficient use of water, but the law should strike a balance between original appropriators consuming more water and downstream users relying on return flows to access water for their beneficial uses.

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<sup>193</sup> See *supra* notes 1–2 and accompanying text (describing the scarcity of water and increased demands for water in the West).

<sup>194</sup> See *supra* notes 42–63 and accompanying text.

<sup>195</sup> See *supra* notes 121–92 and accompanying text.

<sup>196</sup> See *supra* notes 150–92 and accompanying text.