WYOMING LAW REVIEW

VOLUME 14 *2014* NUMBER 2

THE DEVELOPMENT OF WYOMING WATER LAW

*Lawrence J. MacDonnell**

This Article provides a chronological overview of notable steps in the development of Wyoming water law. It begins with laws adopted while Wyoming was still a territory. It then describes the significant changes made with adoption of the State Constitution and early legislation implementing water-related constitutional provisions. The next section follows developments up through the end of World War II. The final section discusses developments from the end of World War II to present day.

1.1. Territorial Laws

Wyoming became a Territory on July 25, 1868.[1] The first Territorial Legislature met in 1869 and enacted a statute authorizing three or more persons to incorporate for the construction of ditches to divert water from streams.[2] The certificate of incorporation needed to include information specifying the source of water, the location of the point of diversion, the location of the ditch, and the purpose of use.[3] Diversions could not interfere with existing water uses, an early recognition of the priority system.[4] Ditches had to be kept in good repair.[5] Anyone damaging ditch facilities could be brought to court.[6] This first Legislature also included provisions in its mining statute requiring any person "claiming any

* This article is adapted from the first chapter of a forthcoming book, TREATISE ON WYOMING WATER LAW.

** Retired Professor of Law, University of Wyoming College of Law.

[1] T. A. LARSON, HISTORY OF WYOMING 64 (1965).

[2] 1869 Wyo. Sess. Laws 244–45.

[3] *Id.*

[4] *Id.* at 245.

[5] *Id.* 245–46.

[6] *Id.*

ditch, or other water site" to post a notice at the water source stating the purpose of the ditch and to post another notice at the point of use.[7] A copy of the notice had to be filed with the county clerk within fifteen days.[8] Ditches had to be constructed within a specified time period.[9] The statute authorized a right of way for these ditches, but required that the diversions not interfere with the vested rights of others.[10]

The Territorial Legislature did not enact any laws involving water again until 1876. In that session, the Legislature adopted provisions specifically relating to diversion and use of water for irrigation purposes.[11] This law authorized those owning or claiming lands along or near streams to divert water for agricultural purposes "to the full extent of the soil."[12] It authorized rights of way through the lands of others as necessary to divert water and transport the water to the person's land, subject to a duty of keeping the ditch in good repair and responsibility for any damages to others.[13] It included a mandatory process for payment of just compensation in the event a landowner refused to allow use of his land for ditches.[14] The legislation provided for a system of administration in the event of inadequate water for all uses using water commissioners appointed by county commissioners with authority to work out sharing arrangements.[15]

In 1886 the Legislature enacted a more comprehensive set of water laws.[16] The new law established "irrigation districts," land areas organized by hydrographic units.[17] It provided for a water commissioner for each district, appointed by the governor from recommendations made by the related county commissioners.[18] It

---

[7] 1869 Wyo. Sess. Laws 310–11.

[8] *Id.* at 311.

[9] *Id.*

[10] *Id.*

[11] 1876 Wyo. Sess. Laws 377–79. The chapter was entitled "Irrigation."

[12] *Id.* at 377. Cooper suggests in his "A History of Water Law" the language, "to the full extent of the soil," anticipated the concept of beneficial use as a limit on the amount of water appropriated. CRAIG COOPER, A HISTORY OF WATER LAW, WATER RIGHTS & WATER DEVELOPMENT IN WYOMING 11 (2004) [hereinafter History of Wyoming Water Law]. Later it was argued (unsuccessfully) that the language in this provision authorizing parties claiming land on the "bank, margin, or neighborhood, of any stream" to use water adopted riparian law. Moyer v. Preston, 6 Wyo. 308, 319, 44 P. 845, 847–48 (Wyo. 1896).

[13] 1876 Wyo. Sess. Laws 377.

[14] *Id.* at 377–78.

[15] *Id.* at 377.

[16] The 1886 and 1888 territorial statutes drew heavily from existing Colorado laws enacted in 1879 and 1881. ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 105 (1983).

[17] 1886 Wyo. Sess. Laws 294–95. The legislation established eight such districts around the state.

[18] *Id.* at 295. The important role of water commissioners in administering water rights is discussed in Appendix B, History of Wyoming Water Law, *supra* note 12, at 108–10.

directed the water commissioners to close and lock headgates as necessary "in time of a scarcity of water" to protect prior rights.[19] The legislation made unauthorized use of a headgate a misdemeanor, subject to up to six months imprisonment, a fine up to $100, or both.[20] The legislation gave Commissioners authority to arrest violators.[21] Commissioners also had authority to regulate use of water to "prevent unnecessary waste."[22] They were not to "begin their work," however, until requested to do so in writing by at least two ditch owners or managers.[23] The Legislature declared the water of every "natural stream" not previously appropriated to be the "property of the public, and the same is dedicated to the use of the people, subject to appropriation as herein provided."[24] This legislation required any person claiming the right to use water for beneficial purposes or claiming an interest in any ditch or reservoir to file a statement of claim with the district court, unless such a statement had already been filed.[25] The statement needed to include (i) the name and address of the claimant, (ii) the name of the ditch or reservoir, (iii) the name of the source of water, (iv) the location of the head-gate, (v) the length, width, depth and grade of the ditch and its general direction, (vi) the date of appropriation (based on initiation of construction), (vii) the amount of water claimed, (viii) the capacity of the ditch, (ix) if for irrigation the number of acres, and (x) if not for irrigation, the purpose of use.[26] The statement of claim also had to be filed with the county clerk to be recorded.[27] Henceforth, no one could appropriate water without filing such a statement of claim with both the county clerk and the district court.[28] Construction of the facilities necessary to use water had to commence within sixty days after filing and be prosecuted thereafter "diligently and continuously to its completion."[29] Survey work could constitute commencement of construction.[30]

The 1886 legislation provided a system for adjudicating in district court the priorities of all users of water from the same source within each district.[31] Under

---

[19] 1886 Wyo. Sess. Laws 295–96.

[20] *Id.* at 295.

[21] *Id.*

[22] *Id.* at 307 ("[S]uch commissioners shall so shut and fasten the head-gate or gates of all ditches so that no more water will flow into said ditch than is actually required and will be used for the users or purposes for which such water was appropriated.").

[23] *Id.* at 297.

[24] *Id.* at 299–300.

[25] *Id.* at 297–98.

[26] *Id.*

[27] *Id.* This requirement was repealed in 1888. *See* 1888 Wyo. Sess. Laws 120–21.

[28] 1886 Wyo. Sess. Laws 298–99.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 297.

the system, any person desiring such a determination needed to file a petition with the court, stating the names of the ditches and reservoirs claiming water from a particular source within the district together with the names of those with interests in these facilities.[32] The judge would fix the date of a hearing to take evidence in support of or against the claims of priority.[33] A certified copy of the order setting the hearing date would be provided to each interested person.[34] Based on this evidence, the court then would determine the date of commencement of each facility, the diligence with which it was constructed, and its capacity—in cubic feet per second (cfs)—in a decree.[35] Parties with an interest in the source but not notified about the proceeding could provide information to the court at a later time and obtain an adjudication of their priority.[36] Still another provision required all ditches to have an "obstruction" to prevent fish from entering the ditch.[37] Failure to comply with this requirement was punishable as a misdemeanor that could result in a fine of up to $100, imprisonment for up to sixty days, or both.[38]

The Legislature also addressed use of reservoirs in this law. The legislation required anyone proposing to store and use water through construction of a reservoir to file a claim with the county clerk and district court.[39] It also specifically authorized use of reservoirs to store unappropriated water for beneficial use and gave condemnation authority for this purpose.[40] However, it prohibited construction of dams higher than ten feet in river channels.[41] Moreover, owners of reservoirs became liable for any damages resulting from unplanned releases of stored water.[42]

In 1888, the Territorial Legislature took substantial steps toward establishing public management of Wyoming's water.[43] It established the position of Territorial Engineer, to be appointed by the Governor for a two-year term.[44] The Territorial

---

[32] *Id.* at 300–01.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 307.

[38] *Id.*

[39] *Id.* at 298–99.

[40] *Id.* at 306.

[41] *Id.*

[42] *Id.*

[43] 1888 Wyo. Sess. Laws 115–22.

[44] *Id.* at 115–16. According to Cooper: "In March of 1888, right after the close of the legislative session, Territorial Governor Thomas Moonlight appointed Elwood Mead, a professor at Colorado Agricultural College in Fort Collins, as Wyoming's first Territorial Engineer." COOPER, *supra* note 12, at 17.

Engineer exercised supervision of the diversion of water and directed the work of the water commissioners.[45] The legislation directed the Territorial Engineer to make measurements of the flows in the various streams, beginning with those most used for irrigation, and to make a study for developing a system of reservoirs for the storage of water.[46] The legislation also directed the Territorial Engineer to make an annual report to the Governor and to include recommendations concerning changes of law.[47] Upon request, the Territorial Engineer was authorized to measure the carrying capacity of ditches and issue a certificate therefor.[48] The legislation required all ditches to have a measuring device installed as close to the headgate as feasible.[49] It directed the district courts to provide a record of all adjudicated water rights to the Territorial Engineer to be recorded into a single compilation and used for the administration of water uses.[50] Henceforth anyone intending to appropriate water had to file a statement of claim with the appropriate county clerk within ninety days after beginning construction.[51] The statute expressly declared all unappropriated water to be the property of the public,[52] authorized "relation back" of the priority date to the date of commencement of construction for diligently developed water projects,[53] established a preference for domestic uses in times of shortage,[54] limited the amount of water that can be diverted to that necessary to accomplish the intended beneficial purpose,[55] established non-use of water for two years as abandonment of the water right,[56] and required ditches carrying "surplus" water to make that water available to anyone who could place it to beneficial use.[57] The legislation specifically declared "cubic feet per second" as the basis for measurement of a diversion.[58] In sum, the Territorial Legislature established much of Wyoming's basic law of prior appropriation in this statute—provisions that were considerably more advanced than those adopted in most other western states at that time.[59] Even more dramatic advances were soon to come.

---

[45] 1888 Wyo. Sess. Laws 116.

[46] *Id.* 116–17.

[47] *Id.* The requirement for an annual report was set forth in § 8.

[48] *Id.* at 117–18.

[49] *Id.* at 118–19.

[50] *Id.* at 119–20.

[51] *Id.* at 120–21.

[52] *Id.* at 120.

[53] *Id.* at 121. Relation back preserves the original priority date of the appropriation.

[54] *Id.* It gave irrigation use a preference over manufacturing uses.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 121–22.

[58] *Id.* at 122.

[59] 1893–1894 SECOND BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 20 [hereinafter 1893–94 Report].

1.2. The Wyoming Constitution and Statehood

In preparation for becoming a state, Wyoming held a Constitutional Convention in the fall of 1889.[60] Delegates established a committee to develop recommendations on water matters to be included in the Constitution.[61] Elwood Mead, the new Territorial Engineer, provided information to the Committee substantially influencing its deliberations.[62] Mead came to Wyoming from Colorado where he observed the strengths and weaknesses of that state's legal approach.[63] Ultimately, the Wyoming Constitution included nine provisions relating to water.[64] Article I Declaration of Rights, Section 31 provided: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must in the state, which, in providing for its use, shall equally guard all the various interests involved."[65] This unusually strong expression of State interest in managing use of water undoubtedly reflected Mead's awareness of the problems under Colorado's more laissez faire system.[66]

Article VIII of the Constitution specifically concerned irrigation and water rights. It began by stating 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."[67] Additionally, Article VIII reiterated that Wyoming would utilize prior appropriation for beneficial use as the basis of a water

---

[60] Phil Roberts, *The Wyoming Constitutional Convention and Adoption of Wyoming's Constitution, 1889, and the Aftermath,* http://uwacadweb.uwyo.edu/robertshistory/wyoming_constitutional.htm (last visited May 31, 2013).

[61] JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING, 3rd Day, at 10 (1893).

[62] Shields' paper on Mead and the Constitution reproduces a letter submitted by Mead to the Constitutional Convention's Committee on Science and Irrigation. John W. Shields, Elwood Mead's Establishment of the Constitutional Foundations of Wyoming's Water Law 20–22 (on file with author).

[63] DUNBAR, *supra* note 16, at 99–106. Mead noted especially the judicial decrees awarding excessive quantities of water to appropriators and absorbed ideas about establishing an administrative system of control that would ensure that awards of water matched the uses to which the water would be placed. He grew wary of private canals obtaining water rights that they in turn sold to actual users, favoring instead the direct linking of water rights with the purpose and place of use.

[64] WYO. CONST. art. I, §§ 31-32; WYO. CONST. art. VIII, §§ 1-5; WYO. CONST. art. XIII, § 5; WYO. CONST. art. XVI, § 10.

[65] WYO. CONST. art. I, § 31.

[66] According to Kluger, Mead drafted the provisions included in the Constitution. JAMES R. KLUGER, TURNING ON WATER WITH A SHOVEL: THE CAREER OF ELWOOD MEAD 14 (1992). John Shields provides a thorough consideration of Mead's role in the Convention related to water. *See generally* Shields, *supra* note 62.

[67] WYO. CONST. art. VIII, § 1.

right, but made appropriation of water subject to the public interest.[68] Perhaps its most innovative feature was the creation of a "board of control," consisting of the state engineer and the superintendents of the water divisions, and giving the board supervision of "appropriation, distribution and diversion" of state waters.[69] The Constitution made the State Engineer a gubernatorial appointment, with confirmation by the Senate for a six-year term.[70] It emphasized the professional qualifications required of the State Engineer and gave him "general supervision of the waters of the state and of the officers connected with its distribution."[71] And it directed the Legislature to divide the state into four water divisions, each with a superintendent.[72]

Wyoming became a state in 1890.[73] Later that year the new State Legislature adopted a comprehensive set of water laws, fleshing out the constitutional provisions adopted in 1889. The first task was dividing the state into four divisions, largely along river basin lines.[74] Division One, located in the southeast quarter of the state, included the North Platte River basin.[75] Division Two, covering the northeast quarter of the state, encompassed the Powder River and the Tongue River as well as several smaller tributaries of the Missouri River.[76] Division Three, located in the northwest quarter of the state, included the Wind-Big Horn and the Clark's Fork rivers.[77] And Division Four, covering the west and southwest portion of the state, included the Snake, the Green, the Little Snake, and the Bear rivers.[78] As directed by the 1890 legislation, the Governor appointed a superintendent for each division.[79] After dealing with some administrative matters, the statute set out the duties of the State Engineer in some detail.[80] While in many respects this law

---

[68] *Id.* § 3: "Priority of appropriation for beneficial use shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests." Thus the Constitution established the principle that an appropriation could be denied if it was determined not to accord with the "public interests."

[69] *Id.* § 2.

[70] *Id.* § 5. In this way the State Engineer's position was made constitutional, given some independence from the governor, and separated from the four-year election cycle—all in an attempt to make the position a professional rather than a political appointment.

[71] *Id.*

[72] *Id.* § 4.

[73] LARSON, *supra* note 1, at 259.

[74] 1890 Wyo. Sess. Laws 91.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 92. Most of these duties had already been given to the territorial engineer in 1888. *See* 1888 Wyo. Sess. Laws 115–22.

restated much of what had previously been included in the 1888 statute, it added several new provisions. It addressed the responsibilities of the newly appointed Division Superintendents.[81] The 1890 law provided for an appeal to the State Engineer for contested actions by the superintendents.[82] In addition, it directed the water commissioners to make reports to the superintendents concerning water availability and water use for each diversion in their districts and directed the superintendents to shut down diversions in one district using water out of priority to the detriment of a senior diversion in another district.[83]

The legislation also set out the role of the newly established Board of Control.[84] It directed the Board to determine the priorities of all new and previously unadjudicated appropriations.[85] Giving this power to an administrative body was perhaps the most radical aspect of Wyoming's new water legislation—a clear reflection of Elwood Mead's enormous influence in this process.[86] The legislation stated that the adjudication process should "begin on the streams most used for irrigation, and be continued as rapidly as practicable, until all the claims for appropriation now on record shall have been adjudicated."[87] It set forth a process for making determinations including measuring stream flow and ditch capacity, public notice, taking of testimony by the Division Superintendent, and information to be considered.[88] The process provided an opportunity for public review of acquired information with public notice once again.[89] Any party with an interest in the stream could contest the findings.[90] Upon completion of these proceedings, the Division Superintendent forwarded the information to the Board of Control.[91] The legislation limited appropriations to the quantity of water necessary for the beneficial use, not to exceed one cubic foot per second (cfs) for each seventy acres of irrigated lands.[92] Each adjudicated right received

---

[81] 1890 Wyo. Sess. Laws 93.

[82] *Id.*

[83] *Id.* at 93–94.

[84] *Id.* at 94–96.

[85] *Id.* at 95–96.

[86] The Wyoming Supreme Court upheld the constitutionality of this power in *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 132–33, 61 P. 258, 263 (Wyo. 1900).

[87] 1890 Wyo. Sess. Laws 95–96.

[88] *Id.* Notice included both announcements in newspapers and direct mailings to those with recorded interests in the use of water from the source. The information required of the claimant was specified in considerable detail.

[89] *Id.* at 96–97.

[90] *Id.* at 97.

[91] *Id.*

[92] *Id.* at 98. The institution of this statutory duty of water was another Mead innovation. For his discussion of the process used to develop this standard, see SECOND ANNUAL REPORT OF THE TERRITORIAL ENGINEER TO THE GOVERNOR OF WYOMING FOR THE YEAR 1889, at 25–32 [hereinafter 1889 Report]. *See also* COOPER, *supra* note 12, at Appendix A.

a certificate specifying its priority number, the amount of water appropriated and, if for irrigation, a description of the land to be irrigated.[93] The Board then forwarded a copy of the certificate to the appropriate county clerk for recording.[94] The legislation provided a right of appeal from the Board of Control's decision to the district court.[95]

Application now had to be made to the president of the Board of Control (the State Engineer) before any work relating to new or expanded appropriations began. The State Engineer then determined the sufficiency of the information provided in the application, whether unappropriated water was available in the source, and whether the proposed appropriation was "not otherwise detrimental to the public welfare."[96] Affirmative findings on these matters allowed issuance of a permit enabling the applicant to move ahead with the necessary construction of facilities. With this provision, Wyoming became the first state to require a permit prior to appropriating water.[97] An applicant could appeal an adverse decision of the State Engineer to the Board of Control. Successful applicants, within six months, must provide the State Engineer with a map or plat showing the location of the facilities, the source of water, and the place of use.[98] Upon completion of the facilities and the application of water to beneficial use (a "perfected" right), the permittee had to provide evidence of beneficial use to the Board which then issued a certificate of appropriation to the permittee, with a copy to the county clerk.[99] One modification from the 1888 statute established the priority date as the date of filing the application, assuming the appropriation was diligently developed.[100] Finally, the new law addressed the water commissioners' role, largely adopting existing procedures.[101] The Board of Control established districts within which commissioners administered water uses.[102]

This new statute established the essential elements of Wyoming law governing the appropriation of water that remain remarkably similar today. Without doubt,

---

[93] 1890 Wyo. Sess. Laws 98–99.

[94] *Id.*

[95] *Id.* at 99.

[96] *Id.* at 100–02. The state engineer is authorized to approve the application but for less water or less time than requested.

[97] COOPER, *supra* note 12, at 26. *See also* Anne MacKinnon, *Historic and Future Challenges in Western Water: The Case of Wyoming*, 6 WYO. L. REV. 291, 300 (2006).

[98] 1890 Wyo. Sess. Laws 102.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 102–04.

[102] *Id.* 102–03.

these provisions were primarily the work of Mead.[103] While Wyoming statutory law already demonstrated some progressive features, Mead took the State considerably further.[104] Perhaps most importantly, Mead established a policy of active state supervision of the diversion and use of water, taking the concept of state ownership of water an important step further by requiring would-be appropriators first to obtain a permit from a designated state official and authorizing that official to condition, and even deny, the application.[105] His other major innovation was establishing an administrative Board of Control and giving it power to adjudicate water rights.[106] Mead felt strongly about protecting the full range of interests held by the citizens of Wyoming respecting uses of water, insisting that appropriators

---

[103] The 1888 statute establishing the position of territorial engineer had specifically invited this person to provide suggestions for new law. Mead's explanation for the legislation is provided in his 1889 report as territorial engineer and is worthwhile reading. Portions are reproduced in SELECTED WRITINGS OF ELWOOD MEAD ON WATER ADMINISTRATION ION WYOMING AND THE WEST 11–13 (John W. Shields & Anne MacKinnon eds., 2000) [hereinafter Mead Selections].

[104] The 1888 provisions were advanced for their time. Two particularly striking features were the explicit limitation of diversions to no more than the amount of water necessary to accomplish the use (presumably irrespective of the amount claimed or the size of the diversion structure and ditch) and the statutory abandonment of a water right following two consecutive years of non-use. 1888 Wyo. Sess. Laws 121. Other states had adopted the common law of abandonment that required demonstration of intent to abandon coupled with non-use, not simply two years of non-use. Mead disclaimed any involvement in the drafting or preparation of the 1888 legislation, describing a meeting with Cheyenne attorney Gibson Clark in that year at which Clark showed Mead a draft bill that apparently was the one adopted later that year. Mead Selections, *Recollections of Irrigation Legislation in Wyoming*, *supra* note 103, at 7. Mead stated: "I don't recall offering any advice regarding the bill." *Id.*

[105] Mead explained the need for such supervision of new appropriations in his 1889 report as territorial engineer:

> No diversion or appropriation should be permitted, therefore, until the sanction of the territory, through its constituted authorities has been obtained, and the beneficial character of the proposed use established. Such oversight and precaution is necessary for the proper protection of public interest (public water supply being of greater agricultural value than public lands) and in order that controversies growing out of extravagant and injurious claims may be avoided.

1889 Report, *supra* note 92, at 97, *as reprinted in* Mead Selections, *supra* note 103, at 13. *See also* MacKinnon, *supra* note 97, at 300–301 (discussing two major Mead water law elements—"active state ownership" and the use of an administrative panel instead of courts).

[106] 1890 Wyo. Sess. Laws 95–96. When first appointed Wyoming's first territorial engineer, Mead encountered a request by the City of Cheyenne for administration of the water rights on Crow Creek. He consulted the court decree adjudicating rights to Crow Creek and found that it only identified individuals as holding rights without linking the rights to a point of diversion. Moreover he discovered an enormous variation in the amount of water authorized for diversion that bore little or no relation to the area of land to be irrigated. This experience confirmed his commitment to having administrative experts adjudicate water rights. Mead Selections, *supra* note 103, at 8–9. Mead expressed his concern that the board of control proposed in the Constitution would face opposition, especially by lawyers, and attributed acceptance of this provision to Willis VanDevanter who subsequently served as a justice on the U.S. Supreme Court. *Id.* at 10.

understand they held only a limited right of use as necessary to accomplish some beneficial purpose and not a right of ownership of the state's water.[107]

1.3. Implementation and Further Development of Wyoming Law

Following adoption of the 1890 statutes, Mead and his staff set to work examining the roughly 3,000 claims to use water already existing. Only a handful of claims had been adjudicated in court under previous procedures, many of which presented major problems of interpretation.[108] Notices of claims filed with county clerks under previous law turned out to be almost entirely insufficient, lacking information about the location of the point of diversion, the size and location of the diversion and delivery facilities, the date construction began and the time required for completion, and the location and purpose of use, among other things.[109] As provided by statute, Division Superintendents took testimony and developed a record respecting the appropriation, and the State Engineer (or his assistants) measured the facilities' capacity.[110] The job of measuring stream flows and determining the size of ditches absorbed the modest resources of the State Engineer in the early years.[111] By 1894, Mead reported substantial progress in determining rights to the use of the State's water.[112]

By this time others had taken notice of Wyoming's approach, described by a leading treatise writer as "the most elaborate and effective statute of this class of

---

[107] This perspective is expressed most directly in the constitutional provision that "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must in the state, which, in providing for its use, shall equally guard all the various interests involved." WYO. CONST. art. I, § 31.

[108] In the 1889 Report, Mead noted the existence of some 3000 ditches with unadjudicated rights. 1889 Report, *supra* note 92, at 94. Inadequacies with the few existing judicial decrees have already been noted.

[109] 1891–1892 FIRST BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 4–5 [hereinafter 1891–92 Report]. Among the many examples of unusable claims Mead cites is one claiming the right to divert 60,000 cubic feet per second (more than the combined flow of all of the rivers of the state) into a ditch two feet wide and six inches deep. *Id.* at 61–62.

[110] 1890 Wyo. Sess. Laws 96–98.

[111] 1891–92 Report, *supra* note 109, at 46–47.

[112] 1893–94 Report:

> Since January 1st, 1891, the Board has taken testimony, determined the priorities and amounts of 1,490 different appropriations and issued certificates to the owners thereof. Five hundred and forty-six of these have been issued since March 1st, 1893. These certificates describe 255,121.96 acres of irrigated land, more than the area stated in the 11th census as being irrigated in this State. The total volume of water being appropriated is 3,791.61 cubic feet per second, of which more than 90 per cent. was for irrigation; the remainder being for domestic uses, the water of stock and for power.

Id. at 17.

any of the States or Territories of the Arid Region."[113] Culling from his experience during the preceding four years, Mead proposed some modest revisions in the earlier statute.[114]

Also in 1894, Congress adopted the Carey Act, named after the Wyoming senator sponsoring it.[115] This law made available up to one million acres of federal land to states that would ensure their irrigation and settlement.[116] In 1895 the Wyoming Legislature formally accepted this offer and established procedures for its implementation.[117] The law gave responsibility for selection and transfer of lands to the State Land Board of Commissioners.[118] It invited proposals from private entities to construct the facilities necessary to irrigate designated lands.[119] The Wyoming law authorized selected entities to file an application for a permit to appropriate water with the State Engineer.[120] It tasked the State Engineer with determining the feasibility of the proposed irrigation project.[121] Project lands were to be sold for $0.25 per acre.[122] Settlers could submit proof of "reclamation, settlement, and occupation" after three years if they met certain requirements.[123] Patents to the land passed first to the State and then to the settler.[124] Water rights to all lands became appurtenant to the lands on which they were used as soon as title to the lands passed to the State.[125] The Shoshone Land and Irrigation Company developed the first Carey Act project in Wyoming to obtain land titles from the United States, with the active involvement of William F. "Buffalo Bill" Cody.[126]

---

[113] CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION § 492 (1893). Kinney is quoted in the 1893–94 Report. 1893–94 Report, *supra* note 59, at 20.

[114] 1895 Wyo. Sess. Laws 84–94, 115–19. Included were such matters as clarifying the process for contesting evidence given to the superintendent, procedures for appealing a decision of the board of control to the district court, provisions concerning permit applications, provisions concerning state review of proposed dams, and a new provision authorizing the state engineer to collect fees for review of applications and issuance of certificates.

[115] Act of Aug. 18, 1894, ch. 301, § 4, 28 Stat. 422 (1894) (codified as amended at 43 U.S.C § 641 (2012)).

[116] *Id.*

[117] 1895 Wyo. Sess. Laws 69–79.

[118] *Id.* at 70.

[119] *Id.* at 71.

[120] *Id.* at 71–72.

[121] *Id.* at 72.

[122] *Id.* at 74–75.

[123] *Id.* at 75–76. This included demonstrating the possession of a perpetual water right sufficient to enable full irrigation of the land.

[124] *Id.* at 76–77.

[125] *Id.* Remaining payments for the water right became a first lien on the land.

[126] For a discussion of the travails of this effort, see DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY 1848–1902 255–60 (1992). *See also* History of Wyoming Water, *supra* note 12, at 29.

In 1896 the Wyoming Supreme Court ruled that the riparian doctrine prevalent in the eastern states had no application in Wyoming.[127] According to the Court, "[t]he common-law doctrine relating to the rights of a riparian proprietor in the water of a natural stream, and the use thereof, is unsuited to our requirements and necessities, and never obtained in Wyoming."[128] Instead, the State adopted the prior appropriation doctrine.[129]

Later in life Mead recalled that "[t]he idea of a public control which would operate was not readily accepted."[130] Early irrigators who had built ditches and taken water without any supervision believed they owned the water just as they owned their land, he explained.[131] Moreover, many felt they owned whatever water they claimed or had the capacity to divert—not just what they actually used and certainly not what somebody else decided was all they needed to use.[132] Yet Mead was a fierce advocate for public control of water to protect what he saw as the critical public interest in assuring full use of the State's limited water supply.[133]

---

[127] Moyer v. Preston, 6 Wyo. 308, 318, 44 P. 845, 847 (Wyo. 1896).

[128] *Id.*

[129] *Id.* The Court stated,

> A different principle, better adapted to the material conditions of this region, has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation. Our statutes have repeatedly recognized this right, and the constitution of the state declares it.

Id.

[130] Mead Selections, *Recollections of Irrigation Legislation in Wyoming*, *supra* note 103, at 9.

[131] *Id.*

[132] According to Mead,

> [t]he greatest difficulty was in overcoming the view that the filing of the statement with the county clerk, under the territorial law gave to the party filing this statement an absolute ownership in the stream, of the volume of water stated in the claim. This *ex parte* statement was always referred to by the party who made it as his water right, and was regarded as giving him as valid a title to the stream as his patent to land, gave to his homestead.

Id. at 11.

[133] Thus in his 1893–94 Report Mead characterized an appropriation as a "free grant" from the public and a "surrender by the public to the individual of this right of use and the protection by the public of the individual in its enjoyment . . . ." 1893 Report, *supra* note 59, at 41. In the THIRD BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, 1895 AND 1896, he stated:

> It will also show that the rights of the public in streams have to some extent been disregarded, and that the liberality, which permits an appropriator to take and use this public property without cost, has not been appreciated, but on the contrary it has been perverted to mean an entire surrender of public interest therein, so that the individual who has acquired a right to use water to irrigate a field has come to believe that he owns that quantity of water whether he irrigates the field or not. He has also come to believe that because he has used the water to irrigate the field one month of the twelve he has a right to control and dispose of it for the other eleven months as well.

Water, he noted, was far more valuable than land; its availability controlled the possibilities for agriculturally-based settlement.[134] He felt strongly that private control of water should be limited only to that amount necessary to accomplish the intended use.[135] As to the widespread claims for additional water, Mead stated:

> There is no reason, therefore, for giving to prior appropriators the control of the surplus and permitting them to make it a speculative commodity. Justice to the public, and a proper regard for the extension of irrigation, require that water rights for irrigation should be restricted to the actual needs of the land where acquired, and that the surplus, which increased duty of water makes available, should be subject to appropriation on the same liberal terms as were given to the first rights on the stream.[136]

The view that an appropriation establishes only the right to continue using the amount of water actually diverted and only so much as is actually necessary to accomplish the stated purpose had in fact been adopted into Wyoming law in 1888, prior to Mead's arrival.[137] Yet it is clear that Mead and the Board of Control encountered many appropriators with a different understanding during the adjudication process, in which Mead reported it was often necessary to revise the original claims.[138]

The inevitable challenge to the Board of Control's authority reached the Wyoming Supreme Court in 1900 in the case of *Farm Investment Company v. Carpenter*.[139] Plaintiff Farm Investment, purchaser and user of Territorial water rights, failed to participate in the Board's 1893 adjudication process for French Creek.[140] Defendants asserted Farm Investment lost its water right as a

---

1895–1896 THIRD BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 39–40 [hereinafter 1895–96 Report]. He described appropriations as a "perpetual license" limited to its approved use. *Id.* at 43.

[134] *See, e.g.*, *id.* at 161 ("The water of our streams has greater value than the lands which border them.").

[135] *See, e.g.*, 1891–92 Report, *supra* note 109, at 59; 1895–96 Report, *supra* 133, at 39–40.

[136] 1895–96 Report, *supra* note 133, at 42.

[137] 1888 Wyo. Sess. Laws 121.

[138] 1893–94 Report, *supra* note 59, at 40 ("[W]e have refused to recognize as valid the extravagant claims of appropriators, made in the original statements of claim to water. We have refused to recognize the claim that the capacity of the ditch determines the amount of the appropriation."). In rejecting use of the capacity of the ditch as the measure of an appropriation, Mead was going contrary to the approach widely followed at that time in prior appropriation states. *See, e.g.*, CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS AND THE ARID REGION DOCTRINE OF APPROPRIATION OF WATERS, 2D ED. § 882 (1912).

[139] 9 Wyo. 110, 61 P. 258 (Wyo. 1900).

[140] *Id.* at 121, 61 P. at 259.

consequence.[141] Farm Investment challenged the authority of an administrative entity to exercise what it asserted was a judicial function;[142] it challenged the constitutionality of the law establishing the Board of Control,[143] the "retroactive" application of the statute to its water rights,[144] and the adequacy of notice provided in the statute.[145] Even though it failed to participate in the adjudication, Farm Investment asserted the continuing ability to demonstrate the existence of its rights.[146] One key part of Mead's scheme faced comprehensive judicial scrutiny.

The court recognized the importance of the case: "It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration."[147] The court began its analysis with a comprehensive survey of the development of Wyoming water law. In discussing the development of the adjudication process, initially conducted by district courts, the court noted the purpose of adjudications

> is to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water.[148]

At the end of its review, the court concluded: "One can hardly fail to be impressed with the gradual tendency exhibited in the various acts towards the greater effectiveness of public supervision."[149]

---

[141] *Id.*

[142] *Id.* at 133–45, 61 P. at 263–67.

[143] *Id.* at 132–33, 61 P. at 263.

[144] *Id.* at 145, 61 P. at 267–68.

[145] *Id.* at 151–52, 61 P. at 269–70.

[146] *Id.* at 147–49, 61 P. at 268–69.

[147] *Id.* at 122, 61 P. at 259 ("They [the legal issues] strike at the root of the system adopted in this state for the supervision and distribution of the appropriated waters.").

[148] *Id.* at 125, 61 P. at 260. The court added:

> The persons instituting the proceeding were not required to allege any injury to them or their property, nor any facts necessary to constitute a cause of action at law, or ground for relief in equity. The purpose of the adjudication was a decree settling the various priorities of right from the same stream, and the issuance thereunder of a certificate to each appropriator represented; showing his relative priority, and the quantity of water to which he should be found entitled.

Id. at 125, 61 P. at 260.

[149] *Id.* at 127, 61 P. at 261.

In connection with its constitutionality discussion, the court addressed the State of Wyoming's power to declare its waters State property.[150] The court regarded the public status of water as inherent in the prior appropriation doctrine: "Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character."[151] The court added:

> In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one.[152]

The court expressed no doubt about the constitutional power to assert public ownership of water.[153]

The public character of water in the court's view suggested the need for state supervision of its use.[154] Many matters involving water use are technical in nature and require special expertise for effective management.[155] The court suggested

[150] *Id.* at 135–39, 61 P. at 264–65.

[151] *Id.*

[152] *Id.* at 137, 61 P. at 264–65.

[153] *Id.* ("But, however this may be, we entertain no doubt of the power of the people, in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state.").

[154] Although Mead had left Wyoming by this time to work in Washington, D.C., he must have been pleased with the court's strong affirmation of his views about the importance of protecting the broader public interest in state water:

> The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution. It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare, and advance material wealth and prosperity.

Id. at 140, 61 P. at 266.

[155] The court stated:

> In the development of the irrigation problem under the rule of prior appropriation, perplexing questions are continually arising, of a technical and practical character. As between an investigation in the courts and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line, can, in the first instance, solve the questions involved, with due regard to private and public interests, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested parties, and with a larger degree of satisfaction to all concerned.

Id. at 142, 61 P. at 266–67.

water professionals are better suited than judges to make these determinations.[156] Moreover, the court continued: "The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character."[157] Here the court went to the heart of the legal issue. The Board engaged in primarily administrative, not judicial matters.[158] Thus, no violation of the constitutionally-required separation of powers occurred.[159]

The court also addressed whether these procedures applied to rights established prior to the statutory enactment. The court held that they do. The court recognized the long-standing general requirements for demonstrating a claim to the use of water and suggesting no difference existed between obligations of Territorial right holders and those asserting rights following statehood.[160] Noting the practical problems of not including Territorial claims, the court provided clear support for the Legislature's legal authority to require this procedure.[161]

Respecting the effect of failing to participate in the proceedings, however, the court noted the absence of any governing provisions in the legislation:

---

[156] Here the Court quoted from Kinney about the "spectacle" of learned judges decreeing rights to more water than was available in the stream. *Id.* at 142–43, 61 P. at 267. Mead had noted this passage in his 1893–94 Report, *supra* note 59, at 20–22.

[157] *Farm Inv. Co*., 9 Wyo. at 143, 61 P. at 267. The Court added: "The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right,-a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which, for the state in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests." *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] The same duty to submit proofs is imposed alike upon all who claim a right to the use of water by priority of appropriation. It is certainly a mistaken notion that the legislature is powerless to require an owner of a property right, however long that ownership may have subsisted, to submit his claims to a legal tribunal, in an authorized proceeding, upon due and proper notice, for determination, as between him and others claiming interests in the same subject-matter. When the subject of the right is water, and the right is confined to its use, the water itself belonging to the public, which assumes to control its appropriation and distribution, the legislature may undoubtedly require all parties to submit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, instead of the assertion of the individual consumer, so far as the public records are concerned, and that the interests of the public and all interested parties may be protected. *Id.* at 145, 61 P. at 267–68.

The court added:

> The legislative power of regulation must be and is equally as comprehensive. If, as necessary to the complete and ample supervision of the matters within the operation of the board's authority, a power of adjudication is essential, appropriate, and valid, such a power, conferred without restriction as to claimants, must be held to be co-extensive with the supervisory control of which it is an incident. We are therefore of the opinion that all claimants are required to appear and submit their proofs.

Id. at 146, 61 P. at 268.

> [T]he statute imposes no express penalty upon a claimant in case evidence of his neglect or refusal to give evidence of his appropriation. Neither is there any express limitation in such cases upon a further assertion of rights by legal proceedings, or in some manner, if any, authorized by law.[162]

The court decided the only rights determined in an adjudication are those of participating parties and stated: "We are therefore constrained to hold that an existing claimant is not concluded as to his water right by a determination of the board of control in adjudication proceedings under the statute, wherein they have not been considered, and by a decree which is perforce silent respecting them."[163] The court suggested the appropriate venue for asserting such rights was the district court.[164]

In his First Biennial Report, written in 1892, Mead provided this statement of the principles of Wyoming water law:

> In determining the extent and priorities of appropriations the Board has adhered to the following fundamental principles:
>
> 1st. That to constitute a valid appropriation the water must have been applied to a beneficial use, and in the case of appropriation for irrigation the water must have actually been applied to the land.
>
> 2nd. That the amount of the appropriation is governed by the volume used and by the requirements of this use. In the case of appropriations for irrigation, by the needs of the land reclaimed.
>
> 3rd. Where reasonable diligence is shown in the construction of diverting works and utilizing water, the appropriation dates from

---

[162] *Id.* at 148, 61 P. at 268.

[163] *Id.* at 149, 61 P. at 269. The court added:

> But the proceeding is instituted by the board, in an official capacity, representing the public, for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters. A part of the object, also, is public recognition of an appropriation previously made, and the issuance of documentary evidence of title. It does not necessarily follow from the establishment of the priorities of certain appropriators that there are no others entitled to divert water from the same stream.

Id. at 148, 61 P. at 269.

[164] *Id.* at 150, 61 P. at 269 ("[I]n the absence of a previous determination by the board or in the courts of the priorities or rights of claimants upon, a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to.").

> the beginning of work on the ditch, the survey to be considered as a part of such work. Where reasonable diligence is not shown, the appropriation to date from the utilization of the water.
>
> 4th. Priority of appropriation to give priority of right except in the case of appropriations made between 1888 and 1891, during which time the law, made appropriations for domestic use a preferred priority.
>
> 5th. The present law restricts appropriations for irrigation to one cubic foot per second for each seventy acres irrigated. While this does not apply to lands reclaimed before its enactment, no appropriation for a larger amount has been made, because in all cases, so far considered, this volume has appeared to be ample.
>
> 6th. Transfers of rights to water, made in advance of any adjudication, either by the courts or the Board, have not been recognized, the reason being that parties had not such ownership as would enable them to give valid title to the water sold. No transfers, involving changes in location or character of use, have been recognized. The Board has taken no formal action on this subject, but the views of the writer are stated at the conclusion of this discussion.[165]

That these principles are nearly all still good law today says much about the wisdom of Mead's views, but it misses the opposition Mead had to overcome when they were forming. Mead regularly encountered claims of right substantially exceeding actual use in which the claimant asserted a vested right either because of future intentions to irrigate more land or because of the existence of a ditch capable of carrying more water.[166] While resisting these claims, partly on the basis of their unfairness to subsequent actual users who would then be junior to the speculative claimant who ultimately found a use for the water, he particularly opposed the practice of selling these claims for "surplus" water to another party.[167] In his view, water rights (especially for irrigation) should attach to the land on which they are used rather than to the individual appropriator.[168] Since the quantity

---

[165] 1891–92 Report, *supra* note 109, at 59–60.

[166] *Id.* at 65.

[167] 1893–94 Report, *supra* note 59, at 44. His position reflected his emphasis on the public character of water and the need for the representative of the public (the state engineer and the board of control) to protect interests that might extend beyond those of the individual parties involved in the sale. *Id.* at 45. *See also* Mead's discussion of proposals for the sale of surplus water in the 1895–96 Report, *supra* note 133, at 45–51.

[168] His views are most fully developed in the 1893–94 Report, *supra* note 109, at 33–35. He posed the question: "Shall the water of our streams become private merchandise or shall it remain

of water obtained under an appropriation is always limited to only the amount that can be beneficially used, there can never legally be surplus water attached to an appropriation. Mead recognized the Board's denial of proposed sales of water was contrary to decisions emerging at the time in other arid states, but supported the Board's position based on his understanding of certain provisions of Wyoming law.[169]

The legality of water sales finally reached the Wyoming Supreme Court in 1904. In the case of *Johnston v. Little Horse Creek Irrigating Co.*, the Court allowed the sale and transfer of a portion of a water right.[170] Springdale Ditch Company, holder of an adjudicated right to divert ten cfs from Little Horse Creek for the irrigation of 700 acres with priority number eight, deeded an undivided one-half interest in this right to the Little Horse Creek Irrigating Company, with its headgate located about two and one half miles downstream.[171] The deed provided for an every-other-week rotation of the diversion right.[172] Little Horse Creek Irrigating Company held priority number ten on the creek to divert 17.14 cfs for irrigating 1,200 acres[173] Johnston, an upstream irrigator holding the right to divert 7.71 cfs to irrigate 541 acres under priority number nine, challenged the transfer as invalid under Wyoming law.[174] The water commissioner refused to honor the transfer, allowing Johnston to divert water ahead of the right transferred to Little Horse.[175]

The court began by noting language in two previous Wyoming Supreme Court decisions suggesting a water right could be sold separate from the land on which it was used.[176] It went on to acknowledge Mead and the Board's view that a

---

the property of the public?" Describing water as a "one of the gifts of nature" Mead noted that Wyoming law declares water the property of the public and suggested that allowing sales would turn water into a speculative commodity. *Id.* at 35. Mead not only opposed the sale of surplus water but also water that had previously been placed to beneficial use. 1895–96 Report, *supra* note 133, at 40.

[169] 1895–96 Report, *supra* note 133, at 39.

[170] 13 Wyo. 208, 79 P. 22 (Wyo. 1904).

[171] *Id.* at 222–23**,** 79 P. 22–23.

[172] *Id.*

[173] *Id.*

[174] The Board of Control adjudicated all three water rights, which had been established during territorial days.

[175] See also a discussion of the facts of the case prior to the Wyoming Supreme Court decision in the 1895–96 Report, *supra* note 133, at 52–53.

[176] Frank v. Hicks, 4 Wyo. 502, 35 P. 475 (Wyo. 1894); McPhail v. Forney, 4 Wyo. 556, 35 P. 773 (Wyo. 1894) ("As held in the case of Frank v. Hicks, (decided at the present term,) a right to the use of water for purposes of irrigation, together with the ditch or other conduit for the water, may be conveyed separate from the land upon which the water is used." (citation omitted)). *McPhail*, at 560, 35 P. at 774.

water right permanently attached to the land on which it was used.[177] Nevertheless, it said, the courts in all states that considered the issue upheld the right to transfer a water right separate from the land.[178] The court clarified that surplus water could not be sold, only water actually applied to a beneficial use.[179] According to the court, this case involved the transfer of a portion of Springvale's right to use water, emphasizing this was a transfer not of water but of its usufructuary right, which the court made clear was regarded as a property right and thus capable of transfer.[180] The court considered Mead's argument that Wyoming law required permanent attachment of an irrigation water right to the land on which it was used and found no basis in the statutes for this position.[181] The only limitation, the court found, was that a transfer changing the use of water must not injuriously affect the rights of other appropriators.[182]

The court found Johnston would not be injured by this transfer, stating that Springvale would only be irrigating half the land it used to irrigate while Little Horse would only use the water on the same amount of acreage as Springvale had.[183] Thus, the court concluded: "This is not an increase over the quantity of land previously irrigated, and there is nothing in the testimony showing or tending to show that the use of the water since the transfer has resulted in an injury to the plaintiffs in error."[184] While solicitous of Mead's views and his knowledge, the court dismissed years of effort by Mead categorizing uses of water in Wyoming as a privilege rather than a right with the statement that his

---

[177] The court stated:

> We are aware that, notwithstanding the expressions and decisions in the cases above mentioned, which decisions were rendered in 1894, prior to the execution of the deed in question, there has existed in the minds of the administrative officers of the state, charged with the execution of the laws governing the appropriation and distribution of water, an opinion that, by reason of some provisions of our statutes unlike the statutory provisions prevailing in most of the other arid states, water appropriated for the irrigation of land becomes not only appurtenant thereto, but inseparably connected therewith, and therefore incapable of transfer or conveyance separate from the land; and the opinion, we understand, has prevailed among such officers, that in the cases aforesaid the effect of our peculiar statutory provisions was not considered.

Johnston, 12 Wyo. at 226, 79 P. at 24.

[178] *Id.* at 226, 79 P. at 24.

[179] *Id.* Here the court provided a ringing endorsement of Mead's view about the extent of an appropriation of water, that it only extended to water actually placed to beneficial use.

[180] *Id.* at 226–28, 79 P. at 24–25.

[181] *Id.* at 230–31, 79 P. at 25–26.

[182] *Id.* at 237, 79 P. at 28.

[183] *Id.* at 235–36, 79 P. at 27.

[184] *Id.* at 236, 79 P. at 27.

objections were "fanciful."[185] Carefully examined, the court concluded, there were no real problems with allowing transfers of water rights separate from the land.[186] If any such transfers emerged, legislatures could address them.[187] What explains these differences in view? Probably their different views of the nature of a water right.[188] Mead viewed individual water uses as licenses rather than full-blown property rights.[189] The state grants the license allowing individuals to make use of public water under the assumption that it is in the public interest to do so.[190] Moreover, Mead believed public grants to use water existed to benefit the land, not to enrich individuals.[191] Other states took the position that a water "right" was a property right that, as with other property, it could be freely transferred subject only to the requirement that if the use changed there could be no injury to other water rights.[192] The Wyoming Supreme Court adopted this latter approach.[193]

In 1905 the Legislature adopted a law authorizing transfer of water rights from one piece of land to another subject to the no injury requirement, effectively codifying the *Johnston* decision.[194] Five years later, however, the Legislature reversed itself.[195]

---

[185] The Court said:

> In the brief of counsel for plaintiffs in error, much is said with reference to the policy of the rule permitting a sale of a water right separate from the land; and counsel has submitted with such brief the views of a former State Engineer of this state, who worthily occupies an eminent position as an irrigation engineer, and whose ability is unquestioned, and for whose opinions the members of this court entertain a high regard.

Id. at 230–31, 79 P. at 25–26.

[186] *Id.* at 231–32, 79 P. at 26.

[187] *Id.*

[188] *See* Anne MacKinnon, *Making Their Own Way: Recognizing the Commons in Water Management, Wyoming 1900–1925, in* 3 WATER HISTORY 197–98 (2011).

[189] 1893–94 Report, *supra* note 59, at 34–35.

[190] *Id.* at 142.

[191] *Id.*

[192] *Johnston*, 13 Wyo. at 226, 79 P. at 24.

[193] *Id.* at 235, 79 P. at 27.

[194] 1905 Wyo. Sess. Laws 147. It provided for transfer of the water right by deed. The Board of Control could "refuse to recognize" the transfer if it believed it would injure other appropriators. It authorized seeking an injunction against state officials if they interfered with use of the water. The actual determination of injury had to be made by a court, but any such action had to be brought within four years of the transfer. *Id.*

[195] *See infra* notes 212–15 and accompanying text.

1.4 Development of Wyoming Law Post-Mead and Pre-Modern Era

Mead left Wyoming in 1899 to take a position in the U.S. Department of Agriculture.[196] In 1901, in response to *Farm Investment Company v. Carpenter*, the Legislature enacted a statute stating that anyone with a claim in the source of water under the Board of Control's adjudication must participate in the proceeding as the Board's findings were conclusive regarding all claimants' rights to use water from the source.[197] The statute provided a one-year window following an adjudication within which parties, not participating but with a claim, could still seek a hearing.[198]

In 1903, the Legislature specifically addressed the use of reservoirs for storing water.[199] Anyone intending to store water for beneficial use first had to obtain a permit from the State Engineer.[200] The law made the application process subject to the same provisions applying to appropriations of direct flow water.[201] The statute directed reservoir owners and users to work with the water commissioner to ensure delivery of storage water to the place of use.[202] The law provided for the sale of stored water but limited its price to no more than two dollars per acre-foot.[203]

In 1905, the Legislature lengthened the period of nonuse for abandonment from two years to five years.[204] It also established a three-person commission to

---

[196] Kluger, *supra* note 66, at 27.

[197] 1901 Wyo. Sess. Laws 70.

[198] *Id.*

[199] 1903 Wyo. Sess. Laws 74.

[200] *Id.*

[201] *Id.* at 75 (except the requirement to identify the lands to be irrigated).

[202] *Id.*

[203] *Id.* at 76.

[204] 1905 Wyo. Sess. Laws 36. The Biennial Report covering this period does not discuss this change. The 1905 Revision Commission recommended returning the period of nonuse resulting in abandonment to two years, noting that the current law allowed an appropriator to maintain a right by only using water once in a five-year period. 1905–1906 EIGHTH BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 95–96 [hereinafter 1905–06 Report]. In a later report, the State Engineer bemoaned the expansion to five years remarking that it was already difficult to establish abandonment of water rights. 1901–19910 TENTH BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 121–22 [hereinafter 1909–10 Report]. The Report suggests the period was lengthened in the misapprehension that abandonment applied to permits that had not gone to proof of beneficial use of water. *Id.* The Report noted no abandonments had been proven up to this point (fifteen years after enactment of the original statute). *Id.*

codify and simplify the state's water laws.[205] The Revision Commission published its report in the State Engineer's 8th Biennial Report and made numerous recommendations, including placing limits on the transfer of water rights that the Wyoming Supreme Court allowed in the *Little Horse Creek* case.[206]

In 1907, the Legislature authorized formation and operation of irrigation districts, quasi-governmental entities with the power to levy taxes on benefited property within district boundaries and to issue bonds financing construction of irrigation facilities.[207] That same year the Legislature made a number of additions and changes to the basic administrative framework for water use, largely responding to the 1905 Revision Commission's recommendations.[208] It provided that the share of ownership of irrigation works is based on the ratio of individual rights to diverted water compared to the total of all water diverted by the works, unless the parties establish a different arrangement.[209]

---

[205] 1905 Wyo. Sess. Laws 26. As part of its review, the Commission asked for comments on the following questions:

> 1. Under a partnership ditch, how should the water be divided among various users? 2. Do you favor the adoption of a universal form of division box or weir to be placed under the control of the Water Commissioner? 3. Do you believe the Water Commissioner should have authority to establish periods of rotation in use, among the various ditches along a stream or between irrigators under a partnership ditch? 4. Do you believe the penalty for tampering with ditches, headgates, or other irrigation works or equipment, should be made more severe? 5. From your observation, would you say the work of the Water Commissioner is satisfactory to the users of water in a practical way? 6. Should a higher standard of efficiency be required of persons charged with the duties of Water Commissioner? 7. Do you believe it would be good policy to permit the sale and transfer of water rights, separate from the land for which the same were appropriated? 8. What, according to your observation, are the most frequent causes of dispute and resulting litigation between the appropriators of water? 9. Do you believe that the evidence of a title to a ditch property should be made a matter of record in the office of the Register of Deeds in each County? 10. What has been your experience with surveyors, and do you believe they should be licensed and the license revoked wherever carelessness or incompetency jeopardizes the rights or interests of irrigators?

1905–06 Report, *supra* note 204, at 82–83.

[206] 1905–06 Report, *supra* at 81–99 (Report of Commission Appointed to Revise, Codify and Simplify the Law of Wyoming Relating to Water Rights). The State Engineer, Clarence Johnston, was a member of the commission. The report spends considerable time criticizing the 1905 statute authorizing transfers of water rights. *Id.* at 87 (Chapter 97, Sessions Laws of 1905 should be repealed). The Report stated: "The entire irrigation system of our State is built up on the supposition . . . that water is public property. If water rights can be bought and sold . . . separate from the land, then the water is not property of a public nature." *Id.* at 89. The Legislature responded in 1909.

[207] 1907 Wyo. Sess. Laws 103.

[208] 1907 Wyo. Sess. Laws 138. The recommendations had been made in the several previous biennial reports.

[209] *Id.* at 145.

In 1909, the Legislature made perhaps the most substantive additions to Wyoming water law since 1890-91 when it added the following definition of a water right and of beneficial use:

> A water right is the right to use the water of the State, when such use has been acquired by the beneficial application of water under the laws of the State relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure and limit of the right to use water at all time, not exceeding in any case, the statutory limit of volume.[210]

This provision explicitly embodied Mead's belief that water rights for irrigation should attach to the land and stated that separation of a water right from the land results in loss of priority:

> Water always being the property of the State, rights to its use shall attach to the land for irrigation, or such other purpose or object for which acquired in accordance with the beneficial use made and for which the right receives public recognition, under the law and the administration provided thereby. Water rights cannot be detached from the lands, place or purpose, for which they are acquired, without loss of priority.[211]

Thus the Legislature seemingly overturned *Johnston v. Little Horse Creek Irrigating Co*.[212]

Simultaneously, however, the Legislature added a provision establishing a hierarchy of uses, called preferred uses, placing drinking water uses at the top of the preference list and hydropower at the bottom.[213] Municipal, steam engines, other domestic needs, and irrigation fell in between. The Legislature authorized any higher preference use on this list to condemn a water right for a lower preference use, upon payment of just compensation. It directed the Board of Control to make the necessary changes of use following a specified procedure.[214] In this manner the

---

[210] 1909 Wyo. Sess. Laws 112. The Ninth Biennial Report provides a good summary of the concerns that motivated passage of this law. 1907–1908, NINTH BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 70–75. The view that these changes were the most important since 1891 is also expressed in the Tenth Biennial Report: "All who have studied this legislation agree that it represents the most important action of the law-makers of the State since the original statutes were enacted in 1891." 1909–10 Report, *supra* note 204, at 17.

[211] 1909 Wyo. Sess. Laws 112.

[212] 13 Wyo. 208, 79 P. 22 (Wyo. 1904). *See supra* notes 177–87 and accompanying text (discussing *Johnston*); *see also* Trelease & Lee, *Priority and Progress—Case Studies in the Transfers of Water Rights*, 1 LAND AND WATER L. REV. 1, 7–21 (1966).

[213] 1909 Wyo. Sess. Laws 113.

[214] *Id.*

Legislature made changes of use possible so long as the change shifted the use of water to a higher preference use through the process of condemnation.[215] The result was to preclude shifting uses of irrigation water to other lands without losing priority. Also in 1909 the Legislature authorized rotation of water available under different water rights for use on lands "[t]o bring about a more economical use of the available water supply . . . ."[216]

In 1911, the Legislature authorized formation of special districts for irrigation drainage purposes.[217] In 1913, the State Engineer's Office issued a Manual of Regulations and Instructions for Filing Applications.[218] The Legislature also provided specific procedures to determine abandonment of a water right.[219] An affected water right holder could initiate abandonment proceedings with the Board of Control.[220] The Division Superintendent must hold a hearing and report to the Board which, after another hearing, would make the decision.[221]

The Wyoming Supreme Court decided several water law cases in 1911. Among the issues decided by the court were taxation of irrigation facilities (allowed),[222] power of cities to condemn land for waterworks outside the boundaries of the city (upheld),[223] payment of damages for failure to deliver irrigation water (upheld),[224] constitutionality of locking of headgate by water commissioner (upheld),[225] and protection of a ditch right-of-way established across public land against actions by a subsequent patentee (upheld).[226]

In 1912 and 1913, the Wyoming Supreme Court continued examining the powers of the Board of Control, State Engineer, and state water administration. In one case, the court decided the Board could not deny a certificate of appropriation

---

[215] Voluntary transactions enabling such changes apparently were not authorized, however.

[216] 1909 Wyo. Sess. Laws 155.

[217] 1911 Wyo. Sess. Laws 139. Irrigation of lands may eventually lead to saturation of the underlying ground, raising the level of the groundwater table. If the groundwater reaches up to the root zone or to the surface of the land, crops cannot grow. For a discussion, see History of Wyoming Water Law, *supra* note 12, at 40–42.

[218] 1913–1914 TWELFTH BIENNIAL REPORT OF THE STATE ENGINEER TO THE GOVERNOR OF WYOMING, at 43–45.

[219] 1913 Wyo. Sess. Laws 119.

[220] *Id.*

[221] *Id.* A Provision was made for appeal of the Board's decision to the district court. *Id.* at 120.

[222] Wyoming Cent. Irrigation Co. v. Farlow, 19 Wyo. 68, 114 P. 635 (Wyo. 1911).

[223] Edwards v. City of Cheyenne, 19 Wyo. 110, 114 P. 677 (Wyo. 1911). This decision also determined that cities have discretion to determine water needs, and can sell water to users outside city boundaries. *Id.* at 159–60, 114 P. at 690–91.

[224] Wyoming Cent. Irrigation Co. v. Burroughs, 19 Wyo. 176, 115 P. 434 (Wyo. 1911).

[225] Hamp v. State, 19 Wyo. 377, 118 P. 653 (Wyo. 1911).

[226] Chicago, B. & Q. R. Co. v. McPhillamey, 19 Wyo. 425, 118 P. 682 (Wyo. 1911).

based on issues concerning ownership and rights of use of a ditch.[227] In another case, the court decided the State Engineer, in considering an application to construct a reservoir, could not accept a subsequent application over an earlier application that failed to provide information not required by statute.[228] In 1914, the court denied a water commissioner's authority to reduce Board-approved diversions into a ditch incapable of carrying the authorized amount of water.[229]

In *Nichols v. Hufford*, a 1913 decision, the Wyoming Supreme Court limited the quantity of appropriated water under a territorial right to the amount that can be beneficially used, and upheld the limitation imposed by the Board of Control of no more than one cubic foot per second per seventy acres of irrigated land.[230]

In 1914, the Wyoming Supreme Court considered the validity of a Territorial court decree issued in 1888 adjudicating to the City of Cheyenne rights to use 12,481 cubic feet per second of the waters of Crow Creek.[231] Despite evidence that the City intended to appropriate only 12.48 cfs, the court upheld the decree while also stating that cities may take actions they deem necessary to meet the future water needs of their inhabitants.[232]

In 1915, the Wyoming Supreme Court upheld an action by the State enjoining use of a dam constructed for power purposes but not in accordance with the submitted plan because it posed a risk of damage to an adjacent railroad and thus constituted a public nuisance.[233] In 1916, the court upheld the power of a water commissioner to close and lock the headgate of an out-of-priority ditch "as a proper exercise of the police power of the state . . . ."[234]

---

[227] Collett v. Morgan, 21 Wyo. 117, 128 P. 626 (Wyo. 1912).

[228] Laughlin v. State Bd. of Control, 21 Wyo. 99, 128 P. 517 (Wyo. 1912). The information included the ditch to be used to fill the reservoir, the location of the reservoir outlet, and the land on which the water would be used. *Id.*

[229] Parshall v. Cowper, 22 Wyo. 385, 143 P. 302, 303 (Wyo. 1914). The Court stated: "The duty of the officers authorized and required to distribute the water of a stream is to divide the water according to the rights of the appropriators, as determined by the Board of Control." *Id.* at 393, 143 P. at 303.

[230] 21 Wyo. 477, 133 P. 1084 (Wyo. 1913). The Court agreed that the appropriator had been wasting water under his existing manner of use. *Id.* at 491–92, 133 P. at 1088.

[231] Holt v. City of Cheyenne, 22 Wyo. 212, 137 P. 876 (Wyo. 1914).

[232] *Id.* at 226, 231–32, 137 P. at 878, 880. The issue involved a change of point of diversion as part of construction of additional water collection and supply facilities and the sale of water to Fort Russell located outside city boundaries. The Court rejected these claims, including the claim that the decree to the City was void on the basis of laches. *Id.* at 234, 137 P. at 881.

[233] Big Horn Power Co. v. State, 23 Wyo. 271, 148 P. 1110 (Wyo. 1915).

[234] Van Buskirk v. Red Buttes Land & Live Stock Co., 24 Wyo. 183, 195, 156 P. 1122, 1125 (Wyo. 1916).

In 1917, the Legislature authorized exchanges of storage water with direct flow uses, enabling out-of priority uses so long as there was no injury.[235] Also in 1917, the Legislature directed the Division Superintendents to administer deliveries of water under "all permits approved by the state engineer, whether the rights acquired thereunder have been adjudicated or not."[236]

In 1919, the Wyoming Supreme Court appeared to hold that groundwater belonged to the owner of the overlying land in deciding that water from an artificially-developed spring could not be appropriated as state water.[237]

In 1921, the Legislature expanded the law pertaining to reservoirs uses and reservoir water.[238] In particular, this law specified that reservoir owners hold the right to store water therein and can sell or lease stored water.[239] The use of stored water outside the state required special permission from the State Engineer.[240] Anyone owning storage capacity in the reservoir became as an owner of the reservoir.[241] Storage water did not attach to the land on which it was used except where provided by deed.[242] Reservoir owners had to provide a list to the State Engineer of all those to receive water and also had to provide an annual report describing the location and amount of use.[243] Reservoir owners with excess water were required to make this water available to parties who could be served and requested such service.[244]

In 1922, the United States Supreme Court decided the case of *Wyoming v. Colorado* involving the use of the interstate Laramie River.[245] The decision quantified and limited the amount of water that could be diverted out of the watershed in Colorado through the Laramie-Poudre Tunnel and apportioned the basin's water supplies largely according to priority of appropriation. That

---

[235] 1917 Wyo. Sess. Laws 70.

[236] 1917 Wyo. Sess. Laws 31. In 1921 the Legislature provided that "final proof under the permit must be submitted within five years after the time specified for the completion of beneficial use of water." 1921 Wyo. Sess. Laws 18. Nevertheless, the Wyoming Supreme Court decided that it is not necessary to file proofs of appropriation. Laramie Rivers Co. v. LeVasseur, 65 Wyo. 414, 426–27, 202 P.2d 680, 684 (Wyo. 1949).

[237] Hunt v. City of Laramie, 26 Wyo. 160, 181 P. 137 (Wyo. 1919).

[238] 1921 Wyo. Sess. Laws 216.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* In a separate enactment that year the Legislature made it clear that only direct flow water rights attached permanently to the land. 1921 Wyo. Sess. Laws 267.

[243] 1921 Wyo. Sess. Laws 216.

[244] *Id.* at 217.

[245] 259 U.S. 419 (1922).

same year, the Wyoming Supreme Court decided that an existing use under a water right cannot be changed to a preferred use until the water rights have been acquired through condemnation or otherwise.[246]

In 1923, the Legislature first addressed the problem of sewage and industrial discharges, establishing basic treatment requirements under the supervision of the State Board of Health.[247] The legislation authorized the Board of Health to examine the quality of water supplied for domestic use and establish necessary rules and regulations preventing pollution.[248]

In 1924, the United States Supreme Court upheld the Reclamation Service's ability to capture return flow water collecting in a ravine after irrigation for delivery to other lands within the Shoshone project area in Wyoming.[249] The Court upheld this use, finding that Reclamation intended to collect and reuse this project water when appropriating the water from the Shoshone River.[250] Determining that the ravine was not a natural stream under Wyoming law, the Court denied plaintiff's right to appropriate the water.[251]

In the 1925 decision *Wyoming Hereford Ranch v. Hammond Packing Co.*, the Wyoming Supreme Court held that Wyoming's statutory system of appropriation was the only way to establish a water right.[252] At issue were competing claims to use Crow Creek, one established by physical diversion and use of water but without a permit from the State Engineer, and a subsequent diversion authorized by permit.[253] The Court extensively discussed the historical basis for adoption of the administrative system and concluded that this statutory system was the only means to establish an appropriation.[254]

In 1926, the Wyoming Supreme Court upheld the law authorizing formation of irrigation districts and enabling districts to collect assessments on benefited property within the district boundaries to repay water delivery facility bonds issued by the district.[255]

---

[246] Town of Newcastle v. Smith, 28 Wyo. 371, 205 P. 302 (Wyo. 1922).

[247] 1923 Wyo. Sess. Laws 169.

[248] *Id.* at 170.

[249] Ide v. United States, 263 U.S. 497 (1924).

[250] *Id.* at 507.

[251] *Id.* at 505.

[252] 33 Wyo. 14, 236 P. 764 (Wyo. 1925).

[253] *Id.* at 29–30, 236 P. at 768.

[254] *Id.* at 29–38, 236 P. at 768–71.

[255] Sullivan v. Blakesley, 35 Wyo. 73, 246 P. 918 (Wyo. 1926).

In 1927, the Legislature made water rights taxable as real estate.[256] Rights attached to the land are taxed as part of the land; those not permanently attached to the land are taxed separately.[257] The tax assessment included the proportionate share of the physical facilities necessary for their use.[258]

Several cases involving disputes between water providers and water users, often in Carey Act projects, reached the Wyoming Supreme Court in the 1920's and early 1930's. One involved the manner of sale of an insolvent company formed to provide water to lands within a Carey Act project.[259] Another decided a lien could be placed on unsold water rights contracts held by an insolvent Carey Act company and sold to pay outstanding debt.[260] A third decided that the debt of an insolvent Carey Act company could not be extended to those acquiring land and water rights from the company.[261]

In 1932, the Wyoming Supreme Court held that even though the priorities of water rights from the Big Laramie and Little Laramie Rivers were adjudicated separately, they could be administered as a single source to meet the priority of a downstream senior.[262]

In 1935, the Legislature established the "surplus" water statute giving appropriators the right to use unappropriated water available at their headgates beyond the amounts established in permits and certificates so long as it could be beneficially used.[263] This provision was intended in part to strengthen Wyoming's claim to water in interstate streams.[264]

---

[256] 1927 Wyo. Sess. Laws 40. In 1924 the Wyoming Supreme Court determined that companies delivering water under a Carey Act project held a taxable interest in the facilities and water rights they possessed pending completion of the project. Lakeview Canal Co. v. R. Hardesty Mfg. Co., 31 Wyo. 182, 224 P. 853 (Wyo. 1924).

[257] 1927 Wyo. Sess. Laws 40.

[258] *Id.*

[259] State v. Tidball, 35 Wyo. 496, 516, 252 P. 499, 506 (Wyo. 1927) (holding the company and its assets can be sold as a going concern so purchaser can continue to meet existing obligations and complete project).

[260] Bench Canal Co. v. Sullivan, 39 Wyo. 345, 271 P. 221 (Wyo. 1928).

[261] Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n, 43 Wyo. 41, 297 P. 385 (Wyo. 1931).

[262] Laramie Irrigation & Power Co. v. Grant, 44 Wyo. 392, 13 P.2d 235 (Wyo. 1932). Junior priorities on the Little Laramie had been curtailed to meet the demands of a downstream senior on the Big Laramie River.

[263] 1935 Wyo. Sess. Laws 154 (codified as amended at WYO. STAT. ANN. § 41-4-317 (2012)). The usage of surplus is limited to each appropriator's proportion of acreage under permit compared to the entire permitted acreage of the stream.

[264] *See* History of Wyoming Water Law, *supra* note 12, at 60. It was common in some locations to divert large amounts of water onto hay and grass fields that at times exceeded the authorized rate of diversion and the one cfs per seventy acre limit established in Wyoming law. Nebraska filed its original action against Wyoming in the U.S. Supreme Court seeking to protect its uses of water from the North Platte River in 1934. Nebraska v. Wyoming, 293 U.S. 523 (1934).

Also in 1935, the Wyoming Supreme Court upheld the damming of diffused surface water on defendant's property without a permit from the State.[265] The decision extensively discussed what constitutes a natural stream, the waters of which are owned by the State and subject to appropriation under the permit system.[266]

Two additional unsuccessful attacks were made on the 1888 decree awarding 12,481 cubic feet per second of water from Crow Creek to the City of Cheyenne.[267] The first sought to enjoin Cheyenne from taking water through pipelines and storage reservoirs not identified in its decree and involved changes in points of diversion.[268] The second presented a direct request to modify and correct the decree.[269]

Statutory forfeiture of water rights was the subject of several cases in this period. One case concerned the effect of the Board of Control's failure to file a certified copy of its forfeiture decision with the clerk of the appropriate district within the statutory sixty-day period.[270] Another case, decided by the Wyoming federal district court, held that the party asserting forfeiture must "prove that he would be benefited if defendant's appropriation were cut off."[271] Still another decision noted that forfeitures are not favored and must be intentional and voluntary.[272] And another made clear that forfeiture requires a formal proceeding that must be initiated following at least five years of nonuse and preceding renewed use of water under the right.[273]

In 1937, the Legislature created the State Water Conservation Board, the predecessor to today's Water Development Commission.[274] The Legislature charged the Board with carrying out investigations of ways to increase use of the water available in Wyoming.[275] Also in 1937, the Wyoming Supreme Court noted

---

[265] State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (Wyo. 1935).

[266] *Id.* at 182–87, 44 P.2d at 1009–10.

[267] The Court had previously upheld this decree in *Holt v. City of Cheyenne*, 22 Wyo. 212, 137 P. 876 (Wyo. 1914).

[268] Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne, 49 Wyo. 333, 54 P.2d 906 (Wyo. 1936).

[269] Application of Beaver Dam Ditch Co., 54 Wyo. 459, 93 P.2d 934 (Wyo. 1939).

[270] Horse Creek Conservation Dist. v. Lincoln Land Co., 50 Wyo. 229, 59 P.2d 763 (Wyo. 1936) (not fatal to Board's decision or the court's jurisdiction).

[271] Hagie v. Lincoln Land Co., 18 F. Supp. 637, 639 (D. Wyo. 1937).

[272] Ramsay v. Gottsche, 51 Wyo. 516, 69 P.2d 535 (Wyo. 1937) (flooding preventing diversion and use of water excuses nonuse).

[273] Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P.2d 572 (Wyo. 1939).

[274] 1937 Wyo. Sess. Laws 258.

[275] *Id.* at 259.

again that water right adjudications are not limited to the Board of Control but may also be made in courts.[276]

In 1939, the Legislature required its approval for any water development within Wyoming for use in another state.[277] Also that year, the Wyoming Supreme Court determined that uses of water exceeding the statutory one cfs per seventy acres are not necessarily wasteful.[278] And the federal district court for Wyoming decided that the 1909 statute permanently attaching irrigation water rights to the land on which they were used could not restrict a change of place of use under a Territorial water right.[279]

In 1940, the Wyoming Supreme Court considered another in a series of challenges by Little Laramie water users to the Wyoming Development Company's project.[280] Plaintiffs sought recognition as appropriators of previously unadjudicated springtime flood flows.[281] The court denied these claims as untimely and rejected a prescriptive rights claim.[282] Also in 1940, the court determined an appropriator could recapture water for additional use on the same land even though others had been using this water before it returned to the stream.[283]

In 1941, the Legislature removed the language "without loss of priority" in respect to the penalty for detaching a direct flow water right from the lands, place, or purpose for which it was acquired.[284] Also in 1941, the Legislature established the Interstate Streams Commission office to represent Wyoming in matters related to interstate streams and to undertake any necessary investigations.[285] The new law designated the State Engineer as Interstate Streams Commissioner.[286]

In 1943, the Wyoming Supreme Court considered complaints against the Laramie Rivers Company and its operation of Lake Hattie and the Pioneer Canal.[287] Among other holdings, the court rejected a claim that unsold company

---

[276] Simmons v. Ramsbottom, 51 Wyo. 419, 68 P.2d 153 (Wyo. 1937).

[277] 1939 Wyo. Sess. Laws 212.

[278] Quinn v. John Whitaker Ranch Co., 54 Wyo. 367, 92 P.2d 568 (Wyo. 1939).

[279] Hughes v. Lincoln Land Co., 27 F. Supp. 972 (D. Wyo. 1939).

[280] Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 100 P.2d 124 (Wyo. 1940); *see* Laramie Irrigation & Power Co. v. Grant, 44 Wyo. 392, 13 P.2d 235 (Wyo. 1932).

[281] Campbell, at 372, 100 P.2d at 130.

[282] *Id.* at 391–96, 100 P.2d at 137–40.

[283] Binning v. Miller, 55 Wyo. 451, 102 P.2d 54 (Wyo. 1940).

[284] 1941 Wyo. Sess. Laws 23.

[285] 1941 Wyo. Sess. Laws 124.

[286] *Id.*

[287] State v. Laramie Rivers Co., 59 Wyo. 9, 136 P.2d 487 (Wyo. 1943).

stock already attached to lands identified in the water rights decree as included within the company's service area but not yet in irrigation use.[288]

A 1944 Wyoming Supreme Court decision involved still another attack on the Wyoming Development Company, this time by some of its own users. Plaintiffs asserted the company had a duty to determine the number of acres that could be reliably irrigated under existing water rights and to limit future distribution of water rights accordingly.[289] The court rejected this argument finding that the company was under no obligation to do so.[290]

1.5. Legal Developments in the Post World War II Era

In 1945, the Legislature first addressed the question of groundwater use.[291] It declared the "reasonable use" of groundwater a matter of public interest.[292] It recognized existing beneficial uses of groundwater not injurious to existing adjudicated surface rights and not abandoned as vested rights.[293] Without using the term appropriation, the new statute nonetheless applied the beneficial use language of appropriation to groundwater use.[294]

Also in 1945, the Legislature added a provision authorizing use by pre-March 1, 1945 direct flow irrigation water rights of "surplus" water, generally up to an additional one cfs per seventy acres of irrigated land.[295] The provision thus placed an outer limit on the amount of water that could be diverted under the related 1935 provision.[296] The additional one cfs, by statute, holds a March 1, 1945 priority date.[297] All subsequent appropriations are junior to this expanded right of use.

And, in that same year, the United States Supreme Court determined uses of the North Platte River water among Colorado, Nebraska, and Wyoming.[298] Its

---

[288] *Id.* at 35, 136 P.2d at 495.

[289] Anderson v. Wyoming Development Co., 60 Wyo. 417, 436–37, 154 P.2d 318, 324 (Wyo. 1944).

[290] *Id.* at 475–80, 154 P.2d at 339–41.

[291] 1945 Wyo. Sess. Laws 166.

[292] *Id.*

[293] *Id.*

[294] "Reasonable economic beneficial use shall be the basis, the measure and limit of the right to use underground percolating water at all times." *Id.* The Legislature directed the State Engineer to make investigations and hold hearings to gain information respecting recommended additions to this law. *Id.*

[295] 1945 Wyo. Sess. Laws 189–90. Appropriators only holding permits were authorized to divert surplus water, along with those holding certificates. *Id.* 190.

[296] 1935 Wyo. Sess. Laws 154.

[297] *Id.* § 4.

[298] Nebraska v. Wyoming, 325 U.S. 589 (1945).

equitable apportionment followed priorities to some degree but considered other factors as well. The decision limited Colorado to existing uses, limited Wyoming to irrigation of 168,000 acres of land, and required natural flows at the Wyoming state line to be shared 25%-75% with Nebraska.[299]

In 1947, the Legislature added more provisions regulating groundwater use.[300] It focused on getting information about existing wells (requiring registration of a statement of claim) and requiring new wells to register.[301] The new law made clear that groundwater use fell under the priority system and established the date of well completion for existing wells and the date of registration for new wells as the basis for the priority date.[302] Groundwater rights could be forfeited or abandoned in the same manner as surface rights.[303] Changes of point of withdrawal are authorized under the Board of Control's supervision without loss of priority so long as the new well draws water from the same aquifer.[304] The Legislature also expanded the existing exchange statute, allowing exchanges between direct flow appropriators as well as between a direct flow appropriator and the holder of a storage right.[305] Such exchanges are administered so that there is no adverse effect on other appropriators.[306]

In 1949, the Wyoming Supreme Court once again revisited the Wyoming Development Company's water rights.[307] This time, the Laramie Rivers Company challenged the extent of use under the Development Company's 633 cfs direct

---

[299] As described by Cooper in History of Wyoming Water Law:

> The 1945 decree limited Wyoming appropriators in the North Platte Basin to the irrigation of 168,000 acres from the mainstem river above Guernsey Reservoir and from the mainstem and its tributaries above Pathfinder reservoir. It also prohibited Wyoming from storing water in Pathfinder, Guernsey, Seminoe, and Alcova Reservoirs except as junior to Nebraska canals, and limited irrigation storage in smaller reservoirs above Pathfinder (excluding Seminoe) to 18,000 acre feet per year. Remaining natural flow of the North Platte River between Guernsey and Tri-State Dam near the Wyoming-Nebraska border was then apportioned 25% to Wyoming and 75% to Nebraska.

COOPER, *supra* note 12, at 65.

[300] 1947 Wyo. Sess. Laws 112–15.

[301] *Id.* at 112, 113. It directed the State Engineer to determine the capacity of the groundwater sources. *Id.* at 113–14.

[302] *Id.* at 114.

[303] *Id.* at 114.

[304] *Id.* § 115.

[305] 1947 Wyo. Sess. Laws 141.

[306] *Id.*

[307] Laramie Rivers Co. v. LeVasseur, 65 Wyo. 414, 202 P.2d 680 (Wyo. 1949). Cooper explains this decision as follows: "[T]he court determined that a certificate of appropriation should ordinarily be issued only for water that has been applied to a beneficial use even though a larger amount may have been permitted, and upheld the statutory requirement that obtaining a permit to appropriate is mandatory in Wyoming." COOPER, *supra* note 12, at 67.

flow right because not all lands identified under the 1912 decree were irrigated.[308] While acknowledging that ordinarily rights should only be adjudicated for water actually applied to beneficial use, the court refused to order reduction of diversions by the Development Company to benefit the Plaintiff.[309] In addition, the court rejected, on procedural grounds, challenges to the Development Company's Reservoir No. 2.[310]

In 1951, the Legislature asserted the State's "sovereign right" to use moisture in the clouds within State borders.[311] Recognizing the limited understanding of weather modification, the legislation established a Weather Modification Board and directed it to investigate weather modification's feasibility.[312] Anyone seeking engagement in weather modification must obtain a permit from the State Engineer.[313] In separate legislation that same year, the Legislature allowed the transfer of water rights from land to be inundated by construction of Glendo, Boysen, and Yellowtail Reservoirs.[314] The transferred use had to be from the same source of water and could not increase the amount of water historically used.[315]

In 1955, the Legislature provided funding and procedures for maintaining a complete tabulation of all water rights.[316] Also in 1955, the Wyoming Supreme Court reaffirmed that resumption of use prior to a forfeiture challenge continues a water right not used for longer than the five-year statutory standard.[317]

In 1956, the Wyoming Supreme Court held that a user of surplus reservoir water should be given a reasonable opportunity to provide input in decisions setting such water usage rates.[318]

In 1957, the Legislature enacted a more comprehensive scheme regulating use of groundwater.[319] Now, before drilling a well one must obtain a permit from

---

[308] Laramie Rivers, at 421, 202 P.2d at 682.

[309] *Id.* at 426, 202 P.2d 684. The Court determined the full 633 cfs was being applied to beneficial use, citing to Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 100 P.2d 124 (Wyo. 1940). In addition, the Court noted the problem of laches (failure to pursue the claim in a timely fashion).

[310] Laramie Rivers, at 427–37, 202 P.2d 684–89.

[311] 1951 Wyo. Sess. Laws 241.

[312] *Id.* at 241–42.

[313] *Id.* at 242.

[314] 1951 Wyo. Sess. Laws 80.

[315] *Id.*

[316] 1955 Wyo. Sess. Laws 65.

[317] *See* Sturgeon v. Brooks, 73 Wyo. 436, 281 P.2d 675 (Wyo. 1955).

[318] *See* Lake De Smet Reservoir Co. v. Kaufmann, 75 Wyo. 87, 292 P.2d 482 (Wyo. 1956).

[319] 1957 Wyo. Sess. Laws 272–83. Cooper, History of Wyoming Water Law, provides this summary:

the State Engineer.[320] The legislation established a process for designating heavily-used aquifers as "critical areas."[321] The new law made clear that a groundwater pumper is not protected in any particular water elevation or pressure.[322] Domestic and stock watering wells are exempt from priority regulation.[323]

Also in 1957, the Legislature required establishment of drinking water standards for all public water supplies.[324] Additionally, the Wyoming Supreme Court determined a landowner can intercept and use water leaking from a ditch before it reaches the stream so long as the use does not interfere with downstream water rights.[325] In that same year, the United States Supreme Court issued still another decree in *Wyoming v. Colorado*, incorporating a stipulation between the two states increasing Colorado diversions to 49,375 acre-feet per year, including 19,875 acre-feet that can be diverted to the Colorado Front Range.[326] The remainder can be used on lands in Colorado that drain into the Laramie River.[327]

In a 1958 decision, the Wyoming Supreme Court determined that ownership of a half interest in a reservoir passed with the lands when sold to another

---

> Those laws provided that wells for domestic and stock uses would have preferred rights over other groundwater uses even though they were still exempt from filing requirements, and that all other wells would need to be permitted by the State Engineer before construction could commence. The appointment of a Division Advisory Committee on groundwater matters was required for each of the four historic water divisions, and the State Engineer was directed to establish aquifer districts and sub-districts within those water divisions. In districts or sub-districts where concerns for the condition of an aquifer existed, the laws provided for the designation of "critical areas" and the election of an advisory board to manage the concerns of that area.The statutes further clarified that an underground water right does not include the right to have the water level in any well maintained at any elevation above that required for maximum beneficial use, and established a penalty for drilling without an approved permit. Additionally, the new law specified that groundwater rights were subject to the abandonment statutes the same as surface water rights, and that a change in location of a well could similarly be accomplished by petition to the Board of Control. The State Engineer was given the authority to promulgate rules regarding minimum well construction standards upon advice and consent of the Board of Control, and to order the cessation of the flow of water from any well when necessary.

COOPER, *supra* note 12, at 71–72.

[320] 1957 Wyo. Sess. Laws 274–75.

[321] *Id.* at 273.

[322] *Id.* at 276.

[323] *Id.* at 272.

[324] 1957 Wyo. Sess. Laws 353–54.

[325] *See* Bower v. Big Horn Canal Ass'n, 77 Wyo. 80, 307 P.2d 593 (Wyo. 1957).

[326] 353 U.S. 953 (1957).

[327] *Id.* at 954.

party because the lands were irrigated with water from the reservoir under a secondary permit.[328]

In 1959, the Legislature authorized temporary use of existing rights for up to two years for highway construction purposes.[329] Only the amount of water historically consumed can be applied to the new use. Compensation must be paid to any injured water right holders.[330]

The Legislature responded in 1959 to the spread of residential development outside traditional urban areas by authorizing formation of water and sewer districts.[331] This very extensive legislation provided detailed procedures for formation and operation of such districts.[332] Included were the powers to levy taxes and issue bonds.[333]

Also that year, the Wyoming Supreme Court decided the statutory provision that lands supplied with water from a reservoir be identified is not a requirement,

---

[328] *See* Condict v. Ryan, 79 Wyo. 211, 226–27, 333 P.2d 684, 688 (Wyo. 1958). The Court noted the statutory distinction between a primary reservoir permit that provides authorization to construct the facility and a secondary permit that authorizes appropriation and beneficial use of impounded waters. Here, the Court decided, the use of the primary permit had been explicitly limited by reference to the secondary permit in which specific lands to be irrigated had been identified. As noted in Sturgeon v. Brooks, Wyoming law treated reservoir rights as attached to the land just as with direct flow rights until the Legislature changed this rule in 1921. 1921 Wyo. Sess. Laws 216. Sturgeon v. Brooks, 73 Wyo. 436, 454, 281 P.2d 675, 681 (Wyo. 1955).

[329] 1959 Wyo. Sess. Laws 204–05. The bill was entitled: "State Highway Commission—Water Rights," and it only authorized this commission to temporarily use other water rights for highway construction purposes. Cooper, History of Wyoming Water Law, describes the bill in the following way:

> In keeping consistent with other changes in use, the statute required that only the historic consumptive portion of the water right was eligible for acquisition by the temporary user. For the purposes of the statute and to avoid drawn-out studies, historic consumptive use was presumed to be 50% of the water right amount, although the State Engineer was given the prerogative of determining a different number if the situation warranted. Thus, a temporary user would acquire the entire water right for the contract period, but only take 50% of it, leaving the other 50% in the stream to compensate the creek for return flows which would have existed if the land was still in irrigation. Other users on the stream were given the right to have the temporary use shut down if it was found to have affected their ability to exercise their valid water rights.

COOPER, *supra* note 12, at 73.

[330] 1959 Wyo. Sess. Laws 204–05. It provided a means for regulating any such temporary uses if necessary to ensure that other water rights from the same source, senior or junior, obtain sufficient water. The temporarily-used rights were given protection from any loss, abandonment, or other impairment during this temporary period of use.

[331] 1959 Wyo. Sess. Laws 257–88.

[332] *Id.* at 258.

[333] *Id.* at 259–60.

although a secondary permit identifying such lands has the effect of attaching a water right to the identified lands.[334]

In 1960, the Wyoming Supreme Court clarified that forfeiture of an unused water right did not require intent to abandon.[335]

In a 1961 decision, *Day v. Armstrong*, the Wyoming Supreme Court upheld the public's right to use non-navigable river waters of the state for recreation purposes, based on public ownership of the water.[336] In another decision, the court allowed judicial consideration of a water right "abandonment" as a defense in an injunction proceeding to allow property access to restore a ditch.[337]

Also in 1961, the Legislature authorized formation of Watershed Improvement Districts dealing with such matters as erosion, flood control, siltation, water shortage, and water supply on a watershed-wide basis.[338]

In 1964, the Wyoming Supreme Court concluded a water rights proceeding must include as indispensable parties all those holding title to the right.[339] One year later the Legislature adopted provisions specifically authorizing permanent point of diversion changes for existing water rights.[340] Previously, such changes did not require Board of Control action—and accordingly, some occurred with

---

[334] *See* Condict v. Ryan, 79 Wyo. 211, 335 P.2d 792 (Wyo. 1959).

[335] Ward v. Yoder, 357 P.2d 180 (Wyo. 1960); 355 P.2d 371 (Wyo. 1960).

[336] 362 P.2d 137 (Wyo. 1961). The bed of non-navigable rivers and streams belongs to the adjacent riparian landowner. In this case, a riparian landowner objected to recreational use of the North Platte River as it passed over his privately-owned bed. As Cooper notes,

> Necessary disembarking activities incidental only to floating, such as walking or wading 'upon submerged lands in order to pull, push or carry craft over or across shallows, riffles, rapids or obstructions' are included in the right to float, but otherwise using 'the bed or channel of the river to wade or walk the stream remains an unlawful trespass.'

COOPER, *supra* note 12, at 78.

[337] *See* Louth v. Kaser, 364 P.2d 96 (Wyo. 1961).

[338] 1961 Wyo. Sess. Laws 387–98.

[339] Anita Ditch Co. v. Turner, 389 P.2d 1018 (Wyo. 1964).

[340] 1965 Wyo. Sess. Laws 373–375. Cooper explains:

> The statute required that any such change must occur without injury to any other appropriator, and that consent of the owner(s) of any diversions intervening between the original point of diversion and the new one must be obtained. If those consents were not obtainable or included with the petitions as filed with the State Engineer or Board of Control, a public hearing was required, to give non-consenters the opportunity to state their reasons for non-consent. Using information gained at the hearing, the State Engineer and Board of Control were then required to assess the impact of such a proposed change on the administration of the stream and issue an order accordingly.

COOPER, *supra* note 12, at 76.

Board approval and were recorded, and others did not. The Legislature also authorized "supplemental supply water rights," defined as rights to irrigate land already included in an existing water right but from a different source of supply (such as another stream).[341] Previously existing water rights continue, but the total use of water on the lands under both the original and supplemental rights could not exceed one cfs per seventy acres of land.[342]

In 1965, the Legislature also expanded the stored water exchange statute to include uses for industrial and municipal purposes in addition to irrigation.[343]

In 1966, the Wyoming Supreme Court considered its first groundwater use dispute. A property owner with a senior shallow well challenged City of Casper's pumping from three nearby wells.[344] The court denied relief because of inadequacy of the landowner's well.[345] Also in that year, the court upheld a 1935 Board of Control action effectively authorizing a change in the point of diversion, concluding that the Board had such authority even before the Legislature enacted the 1965 statute expressly authorizing such changes.[346]

In 1967 the Legislature established a planning program for development and use of Wyoming's water.[347] Cooper in his History of Wyoming Water Law states:

---

[341] 1965 Wyo. Sess. Laws 372. Cooper provides this background:

> In codification of another historic practice that had never been included in the laws, the 1965 legislature enacted a statute to authorize the holders of original water rights from one source of supply to apply for waters from another source to supplement their original right in times of shortage. At least as early as 1923–24, the State Engineer had been granting water right permit applications for supplemental supply, but there had never been statutory recognition of the practice, nor were there specific guidelines as to the conditions that qualified one for a supplemental supply or procedures to be followed in permitting. The 1965 law specified that a supplemental supply was useable only when the water in the original source was inadequate to provide a user's full appropriation, and that the supplemental supply could only be used to the extent of what water was needed to satisfy the holder's full one cfs per seventy 70 acre allocation. Thus, by its nature, a supplemental supply right might go unused for as long as the original source could provide an adequate water supply; but when drought conditions again struck, the theory was that the supplemental supply could be used to divert as insurance against crop loss or injury. Inherent in the concept was the standard that the availability of the supplemental supply depended on its priority date in relation to others on its own source.

COOPER, *supra* note 12, at 76.

[342] 1965 Wyo. Sess. Laws 372.

[343] 1965 Wyo. Sess. Laws 8.

[344] Bishop v. City of Casper, 420 P.2d 446 (Wyo. 1966).

[345] *Id.* at 447–48.

[346] *See* White v. Wheatland Irrigation Dist., 413 P.2d 252, 258 (Wyo. 1966).

[347] 1967 Wyo. Sess. Laws 439.

> Following years of intermittent water planning efforts by the State, the 1967 legislature finally enacted an actual water planning program with intentions for a follow-up program of development. Given the historic difficulties of committing reliable state funding to the development of water resources, the number of reservoirs and other structures constructed by previous sporadic planning efforts in the State throughout the years is impressive, and is clear testament to the insightful knowledge of Wyoming hydrology by her settlers. The new water planning program authorized the State Engineer to enter contracts with the federal government and obtain federal funds for water and related land resource planning. The U.S. Congress, in 1965, had enacted the Water Resource Planning Act of 1965, making federal funding available for such planning, and this State legislation authorized participation in that program.[348]

In 1968, the Wyoming Supreme Court determined that the Wyoming forfeiture/abandonment statute allowed consideration of partial abandonment of a water right.[349]

In 1969, the Legislature added use of water for railroads to the statute providing for temporary changes of use of existing water rights.[350] The law also established a presumption that the existing right's consumptive use equaled 50% of the water historically diverted.[351] Then, in 1971, the Legislature authorized temporary changes for drilling "or other temporary purpose . . . ."[352]

In two decisions in 1970 and 1971, the Wyoming Supreme Court rejected abandonment allegations related to Lake DeSmet, using the doctrine of primary jurisdiction to conclude that the Board of Control should address such matters first.[353] Also in 1970, in the context of a partial abandonment action, the court acknowledged the Board of Control's one-fill policy for storage rights.[354]

---

[348] History of Wyoming Water Law, *supra* at 77.

[349] *See* Yentzer v. Hemenway, 440 P.2d 7, 11 (Wyo. 1968).

[350] 1969 Wyo. Sess. Laws 365–67.

[351] *Id.* at 365–66. The presumption can be overcome by actual measurements when deemed necessary by the state engineer.

[352] 1971 Wyo. Sess. Laws 355–57.

[353] Kearney Lake Land & Reservoir Co. v. Lake De Smet Reservoir Co., 487 P.2d 324 (Wyo. 1971); 475 P.2d 548 (Wyo. 1970).

[354] Wheatland Irrigation Dist. v. Pioneer Canal Co., 464 P.2d 533, 540 (Wyo. 1970).

In 1972, the court concluded a lease assignment on State lands did not include water rights used under the lease, effectively leaving them attached to the State lands.[355]

In 1973, the Legislature explicitly authorized change of purpose and place of use of an existing water right.[356] The bill included several express limitations on such changes and subjected them to Board of Control review and approval.[357] In a separate bill, the Legislature authorized change of use of irrigation water rights on lands taken out of agricultural production.[358] The Legislature also gave the State Engineer authority to initiate forfeiture proceedings before the Board of Control for appropriations unused for at least five consecutive years.[359] The Legislature authorized holders of direct flow rights to store the water so long as storing did not injure other water rights.[360] The provisions authorizing water exchanges were also expanded, subject to specified procedures.[361] In addition, the Legislature

---

[355] King v. White, 499 P.2d 585 (Wyo. 1972). The assignment did not expressly include the water rights, a requirement the Court regarded as necessary because of the distinct property-right nature of a water right. *Id.* at 588.

[356] 1973 Wyo. Sess. Laws 221–22.

[357] *Id.* Section 1 reads in part:

> The change in use, or change in place of use shall be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriations.

Id.

[358] 1973 Wyo. Sess. Laws 289–90. The reasons provided for taking land out of agriculture were their acquisition for "railroad roadbed construction, highway construction, mining or petroleum extraction operations or industrial site acquisitions . . . ." *Id.* Also stated was their taking through eminent domain. *Id.*

[359] 1973 Wyo. Sess. Laws 241–43. Cooper added:

> Although statutes providing for abandonment of unused water rights had been in Wyoming law since 1888, such an action had always been contemplated to come about by one affected appropriator attacking the water rights of another. In an attempt to act on the knowledge that certain water rights might lay idle for the statutory period, but that other affected appropriators were reluctant to attack that negligence of their neighbor, the 1973 legislature enacted a series of statutes to allow the State Engineer to file forfeiture actions to clean up such abandoned rights. The legislation in practice puts the State Engineer in the unenviable position of being the heavy hand of government attacking private property rights, a situation that has never sold well in Wyoming, but does indeed provide a mechanism for answering a problematic occurrence when conditions warrant.

COOPER, *supra* note 12, at 81.

[360] 1973 Wyo. Sess. Laws 307.

[361] 1973 Wyo. Sess. Laws 195–96.

expanded the groundwater regulation program by creating local boards for control areas.[362] And the Legislature addressed the status of water produced as a by-product of oil and gas and mining activities, authorizing its appropriation for beneficial use under water right procedures.[363] Finally, the Legislature created still another category of water called "additional supply" under which groundwater can be used to irrigate land that already had water rights attached to it.[364]

In 1975, the Legislature established the Wyoming Water Development Program "to foster, promote and encourage the optimum development of the state's human, industrial, mineral, agricultural, water and recreational resources."[365] The new law tasked the program with developing policies and procedures for "the planning, selection, financing, construction, acquisition and operation of projects and facilities for the conservation, storage, distribution and use of water, necessary in the public interest to develop and preserve Wyoming's water and related land resources."[366] It stated:

> The program shall encourage public irrigation facilities, reducing flood damage, abating pollution, preserving and developing fish and wildlife resources, and shall help make available the waters of this state for all beneficial uses, including but not limited to municipal, domestic, agricultural, industrial, hydro-electric power and recreational purposes, conservation of land resources

---

[362] 1973 Wyo. Sess. Laws 222–23.

[363] *Id.* According to Cooper:

> In seeking to deal with water developed as a by-product of some other non-water related activity in the State, the 1973 legislature enacted statutes to govern the appropriation and use of any water occurring as a result of the operation of oil well separator systems, dewatering of mines, etc. The statutes allow appropriation of such by-product water for any use in the same manner as other water rights, except that they require a written agreement between the producer or developer of the water and the end user, if that is someone other than the producer. To be appropriated, the water must be intercepted while it is readily identifiable as by-product water and before it has commingled with any other waters of the State.

COOPER, *supra* note 12, at 81.

[364] 1973 Wyo. Sess. Laws 223–231. Cooper explains:

> The only limit on the amount of that water, termed "additional supply," is the amount applied to beneficial use, i.e. unlike surface water irrigation appropriations, there is no standard gallons-per-minute or cfs value assigned to the appropriation by statute. Also, unlike 'supplemental supply' for surface water, there is no prohibition against using the additional supply when the original supply is fully available and in use, as long as all the water is placed to beneficial use.

COOPER, *supra* note 12, at 82.

[365] 1975 Wyo. Sess. Laws 334–37.

[366] *Id.*

> and protection of the health, safety and general welfare of the people of the state of Wyoming.[367]

Other legislation that year authorized the State Engineer, in administration of water rights and approval of new permits, to require that water be available for instream watering of livestock.[368] Also in 1975, the Wyoming Supreme Court considered the surplus water statute for the first time, stating the legislature had "adjudicated" the right to use up to one additional acre-foot of water per seventy acres of irrigated land to each valid existing water right with a priority date of March 1, 1945.[369]

In 1977, the court rejected a claim that a water permit should be cancelled for failure to submit proofs of application to beneficial use to the Board of Control.[370]

The Wyoming Supreme Court first interpreted the 1973 change of use statute in *Basin Electric Power Cooperative v. State Board of Control*.[371] The court determined that the statutory limitation of the changed right to the consumptive portion

---

[367] *Id.*

[368] 1975 Wyo. Sess. Laws 320. He is to ensure this result both in his administration of water rights and when considering permits for new rights. Cooper explains:

> The use of water flowing in streams or rivers for watering livestock has been recognized as long as livestock have been present in Wyoming. However, although it may seem, and is a common misunderstanding, that such a use would be a natural right, and that livestock would have much the same access to open water as wildlife, the State determined early that water for livestock required a permit, the same as all other appropriative rights. The same elements required of other uses also applied to stock water appropriations—intent, diversion, diligence, and beneficial use—before the right could be adjudicated. Thus, the act of allowing livestock to have free access to creeks and streams did not, in and of itself, constitute an appropriation. Instead, the appropriator of livestock water had to construct some facility for providing that water to his stock, such as a pond, ditch, trough, tank, spring development, or other man-made installation in order to show his intent and diligence. Large numbers of livestock appropriations acquired in this manner exist all over the State, many of them being in irrigation ditches as adjuncts to the irrigation rights. Nonetheless, due to the threat to livestock health posed by a lack of water for even a short period of time, the 1975 legislature created a provision in the law whereby the State Engineer can require water to be provided to meet reasonable demands for instream stock use at his discretion. This authority may be enacted, for instance, when the flow of a stream may have gotten so low that its use for permitted diversions does less community good than the broader need for stock water left instream, or when reservoir filling has shut off the flow of a stream, yet livestock in pastures downstream from the dam require drinking water. It can also be used in the 'consideration of any applications for permits.'

COOPER, *supra* note 12, at 81.

[369] *See* Budd v. Bishop, 543 P.2d 368 (Wyo. 1975). The Court dismissed a claim of unconstitutionality on standing grounds. *Id.* at 371–73.

[370] Snake River Land Co. v. State Bd. of Control, 560 P.2d 733 (Wyo. 1977).

[371] 578 P.2d 557 (Wyo. 1978).

of the original use is a requirement separate from the no injury requirement.[372] Also in 1978 and again in 1979, the Wyoming Supreme Court considered cases challenging State Engineer extensions of time for reservoir construction. Both cases involved efforts to continue challenging the original permit, and both were rejected.[373] In another 1979 decision, the court upheld the right of an imported water user to change its use without objection by downstream parties who claimed legal right to the water.[374] The case involved changing the point of discharge in a tributary of waste treatment facility water originally diverted from the North Platte River.[375] Also that year the court upheld groundwater permits and certificates authorizing storage of groundwater used to irrigate lands at a later time.[376] The decision is notable for its discussion of the Board of Control's powers.[377]

In 1979, the Legislature created the Wyoming Water Development Commission and charged it with implementing the State's water development program originally established in 1975.[378] The nine commission members are

---

[372] *Id.* at 569–70. Cooper notes:

> Changes in use from irrigation to municipal use, and from irrigation to industrial use, became huge undertakings in the 1980's, sometimes seeking the transfer of water rights over distances of 200 to 300 miles along the North Platte River from the original ranches to the new places of use. Historic appropriators protested such changes as injurious in week-long hearings before the Board of Control, and the Board's resultant orders were rarely acceptable to all parties. In both the petitions of the City of Casper and Pacific Power and Light Company to transfer water rights from ranches in the Rock River and Saratoga areas to their points of use at Casper and Glenrock respectively, the Board of Control took extensive testimony from experts employed by both sides on the issues of conveyance loss, historic diversion amounts, historic consumptive amounts, historic return flows, and the other safeguards in the change of use statute. Orders of the Board on those petitions resulted in substantial diminutions in the amount of the historic water rights available at the new points of diversion and laid out the realities to be overcome in attempting changes over such distances without causing injury to any other user on the stream.

COOPER, *supra* note 12, at 90.

[373] Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 578 P.2d 1359 (Wyo. 1978) (unavoidable litigation a good cause for extension); Denius v. T R Twelve, Inc., 589 P.2d 374 (Wyo. 1979) (speculation not basis for challenging grant of extension of time).

[374] Thayer v. City of Rawlins, 594 P.2d 951 (Wyo. 1979). Imported water is water brought into a watershed by the intended user.

[375] *Id.* at 952.

[376] John Meier & Son, Inc. v. Horse Creek Conservation Dist., 603 P.2d 1283 (Wyo. 1979).

[377] The court stated: "If this court were to hold that the powers of the Board of Control are strictly limited to those as prescribed or set out specifically by the legislature, we would deny them the authority and the right of supervision of the waters of this state, their appropriation, distribution and diversion and thus defeat a clearly stated constitutional objective." *Id.* at 1288.

[378] 1979 Wyo. Sess. Laws 96–98. The new commission took over program responsibilities that had originally been shared by an "interdepartmental water conference."

appointed by the Governor and approved by the Senate for four-year terms.[379] Funding comes from specific coal and oil and gas taxes.[380]

In 1980, the Wyoming Supreme Court allowed another irrigator to use seepage water no longer under the appropriator's control and before it returned to the stream.[381] Also that year, the court upheld a contractual agreement involving three irrigation districts and the State Board of Control adjusting priorities between parties to the agreement in what amounted to a selective subordination agreement.[382]

In 1981, the Legislature made extraction of heat from water a beneficial use.[383] The Legislature also required land subdividers with appurtenant water rights to submit certain information regarding the planned use of those rights.[384]

In 1982, the Wyoming Supreme Court upheld the denial of a proposed change of point of diversion for a groundwater well intended to partially replace an existing well, holding the authority to change a well location requires removal of the original well.[385] Also that year, the court rejected a change of use of well rights because the change contemplated enlarging the original right.[386]

In 1983, the Wyoming Supreme Court held the change of use statute cannot be used to change an unused permit to appropriate water.[387] Nor could the State Engineer accomplish this result under his authority to make "corrections" to permits.[388] The decision includes a lengthy discussion of what constitutes a perfected water right under Wyoming water law.[389] In another decision that year,

---

[379] *Id.*

[380] According to Cooper:

> Using a 1.5% excise tax on produced coal and a 0.167% severance tax on produced oil and gas, two water development accounts were ultimately created to fund water development projects and, eventually, to rehabilitate earlier-constructed ones. . . . [A]lthough most projects seeking funding were annually submitted to the legislature by the WWDC in what was called the "omnibus water bill," the legislature also could provide special project-specific funding for projects introduced in separate individual project legislation.

COOPER, *supra* note 12, at 83.

[381] Fuss v. Franks, 610 P.2d 17 (Wyo. 1980).

[382] Dechert v. Christopulos, 604 P.2d 1039 (Wyo. 1980).

[383] 1981 Wyo. Sess. Laws 31.

[384] 1981 Wyo. Sess. Laws 286–87.

[385] Town of Pine Bluffs v. State Bd. of Control, 647 P.2d 1365 (Wyo. 1982).

[386] *In re* Petition for Change in Use and for Change in Place of Use for the Ekxtrom No. 1 Well, 649 P.2d 657 (Wyo. 1982).

[387] Green River Dev. Co. v. FMC Corporation, 660 P.2d 339 (Wyo. 1983).

[388] *Id.* at 343–45.

[389] *Id.* at 348–49.

the court decided that a landowner could not sue for damages to underlying groundwater caused by a ruptured oil pipeline; the remedy is an action by the State under the Wyoming Environmental Quality Act.[390]

That same year, the Legislature amended the water export statute, excluding proposals involving less than 1,000 acre-feet from legislative review and eliminating the reciprocity requirement.[391] The new provisions charged the State Engineer with providing his opinion to the State Legislature on proposed water exports.[392] And the Legislature added a lengthy list of legislative considerations.[393]

The Wyoming Supreme Court continued hearing abandonment and forfeiture cases.[394] In 1983, the court concluded that a requirement of substantial repairs to a dam did not excuse eight years of nonuse of water.[395]

---

[390] Belle Fourche Pipeline Co. v. Elmore Livestock Co., 669 P.2d 505 (Wyo. 1983). The decision noted a statutory provision defining waters of the state as including both surface and ground water and prohibiting the discharge of pollution into waters of the state, except under a permit. *Id.* at 509.

[391] 1983 Wyo. Sess. Laws 530–32.

[392] *Id.* at 531.

[393] *Id.* at 531.

[394] Cooper provides this assessment:

> Again due to the recognition of the difficulty of developing new water supplies, the frequency, contentiousness, and cost of abandonment actions, particularly in the North Platte River basin, intensified in the 1980's. Disagreements over the interpretation of certain phrases in the abandonment statutes led to extensive abandonment hearings before the Board of Control regarding burden of proof, standing, "affected" water user, etc. In *Wheatland Irrigation District v. Laramie Rivers Company* (1983), the Supreme Court reversed an order of the Board of Control denying abandonment on the basis of a demonstration that the party being attacked had spent extensive capital rehabilitating their dam facilities in preparation for water use. In upholding its 1960 reversal of its 1937 opinion in *Ramsay v. Gottche*, the Supreme Court instructed that only the actual use of water within the five-year statutory abandonment period could rescue an appropriation from the "gnashing teeth" of the abandonment statute, whether intent to abandon existed or not. In another appeal of a Board of Control order, the court in *Cremer v. State Board of Control* (1984) held that an "affected water user," as mentioned in the abandonment statutes, is one whose water rights are abridged by another user's actions. The benefit of making additional surplus water available to the one filing abandonment was not considered to be sufficient to confer standing as an affected water user in that case. The same year in *Platte County Grazing Association v. State Board of Control*, the court held that the Board of Control was without jurisdiction to have entertained a petition for abandonment where the petitioners had not proven that their water rights were injured by the failure of the party under attack to use its water during the five-year abandonment period. Such a failure of proof left the petitioners without standing to bring the abandonment action, and the Board of Control struggling to figure out how an affected water user could ever make a case for abandonment under the results of the recent appeals of its orders.

Cooper, *supra* note 12, at 89.

[395] Wheatland Irrigation Dist. v. Laramie Rivers Co., 659 P.2d 561 (Wyo. 1983). The Court stated:

In 1984, the Court determined that a party bringing a forfeiture action must be adversely affected to have standing.[396] Later that year, the Court reiterated this view in dismissing a forfeiture claim brought by a senior user against a junior user.[397]

In 1985, the Legislature adopted the "excess" water rights statute, authorizing post-1945 water rights holders to appropriate up to an additional one cfs per seventy acres, just as the Legislature had done previously for pre-1945 rights.[398] Those applying excess water to beneficial use obtained a March 1, 1985 priority date. Another bill authorized changing the point of diversion for permits not yet put to actual use, subject to some restrictions.[399] A separate bill authorized changing the point of diversion for storage.[400] Another bill addressed changing a well's point of diversion.[401] Finally, the Legislature amended the standing provision for forfeiture authorizing "any water user who might be benefitted by a declaration of abandonment to existing water rights or who might be injured by reactivation of the water right" to bring an action.[402] This provision applied to any valid water right holder from the same source of supply with a priority date equal to or junior to the challenged right or the holder of a surplus water right if the challenged right has a priority date of March 1, 1945 or earlier.[403]

Also in 1985, the Wyoming Supreme Court clarified that one cannot obtain a water right through adverse possession.[404] In that same year, in ordering forfeiture of the Lake Hattie storage right, the court determined that failing to divert and

---

> The only thing that will save the contestee from the harshness of the abandonment statute's dictates is for Laramie Rivers to be able to show—once nonuse for the statutory period has been established by the contestant—that the water in contest here was not available for application to a beneficial use within the five-year period contemplated by the statute

Id. at 565.

396 Cremer v. State Bd. of Control, 675 P.2d 250, 256 (Wyo. 1984).

397 Platte Cnty. Grazing Ass'n v. State Bd. of Control, 675 P.2d 1279 (Wyo. 1984).

398 1985 Wyo. Sess. Laws 122–23. Cooper noted:

> Thus, in times of administrative regulation under a call on the river, appropriators with priority dates later than March 1, 1985 must wait until pre-1945 rights are filled with two cfs per 70 acres, and then until rights between 1945 and 1985 are filled with two cfs per 70 acres, before they are entitled to divert any water under their right.

COOPER, *supra* note 12, at 88.

399 1985 Wyo. Sess. Laws 122–23. The change must maintain the original "concept" and still be located in the "vicinity" of the original point of diversion. *Id.*

400 1985 Wyo. Sess. Laws 94–95

401 1985 Wyo. Sess. Laws 282–83.

402 1985 Wyo. Sess. Laws 333–34.

403 *Id.*

404 Lewis v. State Bd. of Control, 699 P.2d 822 (Wyo. 1985).

use water for more than the five-year statutory standard was not justified by a State Engineer order requiring, for safety reasons, substantial dam improvements.[405] And the court once again decided that only a party adversely affected can bring an abandonment action, a standard requiring the party's right be actually injured or abridged if the unused right was once again placed to use.[406]

In 1986, the Legislature established a legal mechanism for protecting unappropriated flows of water in stream segments determined valuable for fishery purposes.[407] Such allocation of flows supporting fisheries was declared a beneficial use of water.[408] The statute specified the process by which the State could appropriate water for instream flow purposes.[409]

That same year, the Wyoming Supreme Court upheld the Board of Control's action quantifying a Territorial water right using the statutory rate of one cfs per seventy acres of irrigated land.[410] Later that year, the court upheld a 1900 agreement providing a supply of water for irrigation exceeding the one cfs per seventy acre standard without evidence this amount would be beneficially used.[411]

In 1987, the court ruled growing hay on lands ordinarily used to store water during a ten-year period in which there was no water to be stored did not establish adverse possession of the lands.[412]

In 1988, the Wyoming Supreme Court issued its first decision in the ongoing Big Horn River adjudication.[413] This decision confirmed existence of reserved

---

[405] Laramie Rivers Co. v. Wheatland Irrigation Dist., 708 P.2d 20 (Wyo. 1985); *see also* Wheatland Irrigation Dist. v. Laramie Rivers Co., 659 P.2d 561 (Wyo. 1983).

[406] State Bd. of Land Comm'rs v. Lonesome Fox Corp., 707 P.2d 167 (Wyo. 1985).

[407] 1986 Wyo. Sess. Laws 140–56.

[408] *Id.*

[409] *Id.*

[410] Zezas Ranch, Inc. v. Board of Control, 714 P.2d 759 (Wyo. 1986). Cooper says:

> In *State ex rel. Squaw Mountain Cattle Company and Two Bar-Muleshoe Water Company v. Wheatland Irrigation District* (1986), the court preserved its concept earlier articulated in *Quinn et. al. v. John Whitaker Ranch Co. et. al.* (1939) that the allocation of irrigation water rights at a rate of one cfs for each 70 acres does not define beneficial use, and use of water in excess of that amount is not necessarily interpreted as constituting waste.

COOPER, *supra* note 12, at 90.

[411] State *ex rel.* Squaw Mountain Cattle Co. v. Wheatland Irrigation Dist., 728 P.2d 172 (Wyo. 1986).

[412] Joe Johnson Co. v. Landen, 738 P.2d 711 (Wyo. 1987).

[413] *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *cert. granted*, Wyoming v. United States, 488 U.S. 1040 (1989), *aff'd by an equally divided court*, 492 U.S. 406 (1989).

water rights for the Wind River Reservation which, using the practicably irrigable acreage standard, allowed diversion and use of 500,000 acre-feet of water from the Wind River and its tributaries as they pass through the reservation.[414] The court determined the treaty purposes impliedly reserved water only for agricultural uses on the reservation.[415] The United States Supreme Court affirmed the decision without opinion in a 4-4 deadlock.[416]

In 1991, the Legislature finally made water commissioners state employees, rather than employees of the county, a change requested by the State Engineer since at least 1913.[417] The legislation added significant professional requirements as qualifications for the position.[418]

In 1992, the Wyoming Supreme Court issued another decision in the Big Horn adjudication, this one determining that Tribes could not use their reserved water rights for instream flow protection purposes.[419] The precise basis of the decision is unclear since there were six different opinions including dissents. The decision upheld continued State Engineer supervision of water uses on the reservation.[420]

In another 1992 decision, the Wyoming Supreme Court interpreted the 1985 forfeiture standing provisions as requiring that (1) the contestant possess a

---

[414] *Id.* at 101, 106.

[415] *Id.* at 112.

[416] Wyoming v. United States, 492 U.S. 406 (1989).

[417] 1991 Wyo. Sess. Laws 279–81. Cooper provides this background:

> Year after year since at least 1913 . . . , the annual and biennial reports of the State Engineers and Water Division Superintendents had criticized the statutory setup wherein the water commissioners were appointed by the governor, employed by the counties, responsible to the State Engineer, and supervised by the Water Division Superintendent . . . . In 1938, Superintendent of Water Division One Ambrose Hemingway, wrote a 25-page report on the inadequacies of the historic system, remarking that if the counties were unsatisfied with the water commissioner's work for whatever reason, they were as likely as not, after a summer's hard and demanding work to not pay him at all.

COOPER, *supra* note 12, at 92.

[418] Cooper summarizes:

> While the former county positions generally had few job qualification requirements, the new state position descriptions necessitated college degrees, or equivalent experience, for the first time. The statutory intent was to finally hire hydrologists and engineering-type personnel as water commissioners who could approach water administration scientifically and be conversant with 100 years of water law and practice.

COOPER, *supra* note 12, at 93.

[419] *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273 (Wyo. 1992).

[420] *Id.* at 282–83.

valid water right equal or junior to the challenged right, (2) the water rights are from the same source of supply, and (3) the contestant would benefit from the forfeiture or be injured by a resumption of water use and held the Board had not adequately examined these requirements in the proceeding.[421]

In 1993, the Wyoming Supreme Court determined that supplemental supply water rights are subject to loss for nonuse.[422] In still another case involving standing to bring a forfeiture action, the court found no standing in a groundwater user whose only benefit would be improving the priority of his right without evidence it would also improve his use.[423]

In 1995, the Legislature required completion of well construction within three years following permit issuance. Ditch construction must be completed within five years following permit issuance.[424]

In 1996, the Wyoming Supreme Court upheld a Board finding of partial abandonment of a supplemental supply right and concluded that the injury necessary to support standing "need not be a certainty but only one that is not too remote or speculative . . . ."[425] In 1997, the Legislature established a requirement that proposed new residential subdivisions describe their proposed system of water supply and certify its adequacy.[426]

In still another forfeiture and abandonment decision, this one in 1999, the Wyoming Supreme Court excused non-use of water for more than five years when

---

[421] Schulthess v. Carollo, 832 P.2d 552, 560 (Wyo. 1992).

[422] Hofeldt v. Eyre, 849 P.2d 1295 (Wyo. 1993). Cooper reported:

> In *Hofeldt v. Eyre* the court surprised water officials all over the State in holding that supplemental supply rights, like all other water rights in the State, must be used at least once in every five year period when water in their source is available or risk being eligible for abandonment. The court reasoned that if the source of supply for the original water right has been adequate to supply the full amount of the appropriation for a full five year period, then there must not have been a need for filing a supplemental supply in the first place, and such an unused supplemental supply, when contested, will be found abandoned. No showing of intent or voluntary act of abandonment was necessary to cause the holder of a supplemental supply to lose his water right in that case.

COOPER, *supra* note 12, at 94.

[423] Joe Johnson Co. v. Wyoming State Bd. of Control, 857 P.2d 312 (Wyo. 1993).

[424] 1995 Wyo. Sess. Laws 196–97.

[425] Goshen Irrigation Dist. v. Wyoming State Bd. of Control, 926 P.2d 943 (Wyo. 1996).

[426] 1997 Wyo. Sess. Laws 394–401.

the non-use was not intentional.[427] In this case, the flow of water was blocked by the owner of land through which the ditch passed.[428]

In a 2001 decision involving a Board finding of partial abandonment of a water right, the Wyoming Supreme Court noted that "the Board's broad authority is constrained by the requirement that its decisions are supported by findings of basic facts upon which its ultimate findings of fact and conclusions are based."[429]

Also in 2001, the United States Supreme Court approved a settlement in the second round of *Nebraska v. Wyoming*, initiated in 1986.[430] Among other things, the agreement capped consumptive uses of water, including hydrologically connected groundwater, in the North Platte Basin of Wyoming.[431] It also capped irrigated acreage in the basin.[432]

In still another decision involving standing to bring forfeiture, the Wyoming Supreme Court stated that there must be a "reasonable likelihood" the forfeiture will benefit the plaintiff.[433]

In a 2009 decision, the Wyoming Supreme Court concluded the State Engineer did not have a duty to expressly discuss the public interest when issuing coal bed methane well permits.[434] In 2010, the court decided that maintenance of a groundwater pumping flow rate was not a sufficient benefit establishing standing to bring a forfeiture action.[435]

---

[427] Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999).

[428] The Court rejected the argument the Legislature had changed the law in 1973 amendments when it added the language "intentionally or unintentionally" to the abandonment provision. *Id.* at 970–71. The appropriator here took no affirmative action against the obstructing landowner.

[429] McTiernan v. Scott, 2001 WY 87, ¶ 23, 31 P.3d 749, 758 (Wyo. 2001).

[430] 534 U.S. 40 (2001).

[431] The agreement placed the cap as the highest amount consumed during a consecutive 10-year period anytime between 1952 and 1999, an amount determined to be 1,280,000-acre-feet upstream of Pathfinder, and 890,000 acre-feet between Pathfinder and Guernsey. Interstate Streams Division, Office of the Wyoming State Engineer, *Wyoming's Compacts, Treaties and Court Decrees* 7–8 (2006), *available at* http://seo.state.wy.us.

[432] Exclusive of the Kendrick Project, no more than 226,000 acres can be irrigated in the North Platte River basin and its tributaries upstream of Guernsey Reservoir. Exclusive of the Wheatland Irrigation District, no more than 39,000 acres can be irrigated in the lower Laramie basin. *Id.* Wyoming also agreed not to build a planned storage project on Deer Creek.

[433] Snider v. Kirchhefer, 2005 WY 71, ¶ 12, 115 P.3d 1, 5 (Wyo. 2005).

[434] William F. West Ranch, LLC v. Tyrrell, 2009 WY 62, 206 P.3d 722 (Wyo. 2009).

[435] Geringer v. Runyan, 2010 WY 98, 235 P.3d 867 (Wyo. 2010).

In 2011, the United States Supreme Court ruled that Wyoming appropriators from the Big Horn River did not violate the Yellowstone Compact by installing sprinklers increasing their water consumption.[436] Such improved irrigation water usage was within the right's original scope as contemplated under the Compact.[437]

In 2012, the Wyoming Supreme Court upheld a Board-approved change of place of use allowing transfer of historic use based on acreage irrigated rather than actual average diversions and consumption.[438] Additionally, the Legislature amended the law governing water use outside the State to include applications from the same source of water cumulating more than 1,000 acre-feet per year.[439]

1.6 Summary

Use of water is central to Wyoming's development. The State has a well-developed legal system governing water uses emphasizing the public character of water resources and encouraging its careful use to achieve valuable social and economic benefits. Under Elwood Mead's influence, but even before his arrival, the State adopted a system of public supervision intended to promote these objectives. The Legislature has adapted this basic system over time, responding to changing circumstances and adding new laws, such as those addressing groundwater, when needed. Water-related litigation reaching the Wyoming Supreme Court or federal courts has been relatively modest.

---

[436] Montana v. Wyoming, 131 S. Ct. 1735 (2011).

[437] *Id.*

[438] Garber v. Wagonhound Land & Livestock Co., LLC, 2012 WY 89, 279 P.3d 525 (Wyo. 2012).

[439] 2013 Wyo. Sess. Laws 70–71.