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Frank J. Trelease

Dellas W. Lee

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In most western states, appropriative water rights are saleable property, permitting water to move to more productive uses in response to economic forces. Against this background the authors examine the Wyoming rule limiting transfers and changes of water to new users and uses, and the many exceptions that have resulted from pressures for certain types of changes. Case studies are reported of changes made under each exception, and the efficiency of the current law and the need for its reform are evaluated.

PRIORITY AND PROGRESS--CASE STUDIES IN THE TRANSFER OF WATER RIGHTS†

*Frank J. Trelease**
*Dellas W. Lee***

I. INTRODUCTION

WESTERN water laws are based on prior appropriation—the first user of water has the better right to it, as against a person who later initiates a new use. The mere statement of this doctrine immediately raises the question of whether it can accommodate progress, whether it can make room for new uses of water that are more desirable than the old. A subsidiary rule of the doctrine gives the answer—that the appropriative water right is a saleable piece of property, which new users can buy from the prior owner. Yet questions still remain as to whether these western water laws are ade-

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* Dean and Professor of Law, University of Wyoming College of Law, Laramie, Wyoming. A.B., LL.B., University of Colorado, J.S.D., University of Wisconsin.

** Assistant Professor of Law, West Virginia University College of Law, Morgantown, West Virginia. LL.B., University of British Columbia, 1959; LL.M., University of Illinois, 1962. Professor Lee performed most of the empirical research on the case studies while on the faculty of the University of Wyoming.

quate to take care of the new growth and development which the future seems to promise for the western states. For there are some restraints on transfers of water rights in all western states and in some of them, notably in Wyoming, there are substantial restrictions designed to tie the water to the land. A long struggle has there taken place over the objects of these restrictions and the exceptions that should be made to them. The laws of that state are thus an excellent subject for a part of a broad investigation of the effect of law on the efficient use of water in the West.

In the last century, irrigated agriculture became the dominant factor in the growth of the West. It not only opened up new lands, it also stabilized the economy as the gold rushes petered out. Irrigation dispelled the myth of the Great American Desert and fulfilled Isaiah's prophesy to the point that it has become one of our most overworked cliches. Since its beginnings, irrigation has claimed most of the water in the West. On the high plains, in the Rocky Mountains, or in the intermountain basins, there are few streams whose dependable flows are not fully appropriated or even overappropriated.[1] Fairly recently new sources of power and technological improvements in wells and pumps have opened up ground water as a new source of supply, and again agriculture has laid first claim to a major portion of these waters.[2]

Today the major prospect for the growth of the West does not lie in the expansion of agriculture. Indeed, irrigation may have to contract. The population is moving to the cities. Technology and industry are the mushrooming sources of wealth. These cities and industries will need water. They cannot take their place at the bottom of the priority list by making new appropriations of the meager and uncertain supply of unappropriated water. They must get firm rights, and the oldest and best rights are held by agriculture.

There is, of course, still room for expansion of western agriculture in some areas, but that enterprise's principal need

1. Fox, *Water: Supply, Demand and the Law*, 32 ROCKY MT. L. REV. 452, 453-54 (1960). In Wyoming, the major exception is the unappropriated allotment of the state in the Colorado River system, principally in the Green River.
2. Bagley, *Water Rights Law and Public Policies Relating to Ground Water "Mining" in the Southwestern States*, 4 J. L. & ECON. 144, 145-46 (1961).

is for improvement in the existing system. Although irrigation by senior appropriators has built an agriculture unmatched in stability in places where dependence is placed on natural rainfall, much irrigation by junior appropriators is a risky enterprise. The ideal situation exists where a firm supply is provided to meet a firm demand, so that senior and junior alike can be guaranteed their water. In some places reaching this ideal will require supplemental water, in some places a cut-back in irrigated acreage, in others a consolidation of ditches, service areas and water rights. Irrigation agriculture should produce a farm economy that is mature and stable, not shaky, drought-ridden and depressed.

If the West is to continue to gain and is to consolidate its past gains, its water law must allow and encourage water to be shifted to more efficient uses, and to be used more efficiently in present uses.

A study of the part the law plays in accomplishing or retarding efficiency in the use of water is therefore certainly timely, and it may be long overdue. An economist analyzing popular concern over the "water shortage" has stated the major problem of western states as follows:

> In the absence of new sources of low cost water, ways must be found for supporting more people with a given quantity of fresh water if the growth of the West we anticipate is to be accommodated .... [T]he pattern of water use in the West must change. In 1955 almost 90 per cent of the withdrawals in the eleven western states were for irrigation purposes and less than 9 per cent were for industrial uses. In the future it seems certain that these proportions will be altered significantly in view of the fact that an acre foot of water dedicated to industrial use—and possibly to recreation—will provide more income and employment and thus support more people than an acre foot dedicated to irrigation . . . [T]he task of the policy maker is to provide an environment which will facilitate an orderly transition in water use where such a transition is desirable.[3]

A wide variety of laws and institutions could be formulated and created to achieve the needed flexibility of water

3. Fox, *supra* note 1, at 456-57.

rights and water use. The water "rights" themselves might have built into them varying degrees of plasticity. They might be made subject to revocation by the state or to defeasance by others if more desirable uses of the water demand its reallocation. This is the theoretical advantage of flexibility claimed by some for the riparian system of water rights. New and more desirable uses are expected to be accommodated within the existing supply while old and less utilitarian ones must give way.[4] Some fairly recent eastern legislation, superimposed upon riparian law, continues this thinking by giving administrators powers to issue permits for water use, cancelable upon administrative determination that the water is needed for a new preferred use.[5] Some states have turned to temporary water rights, issued for a specific period of time with their renewal depending upon whether at the end of the term the water is needed for a higher use.[6]

In the western states a quite different approach is taken. A water right is granted in perpetuity, but the right is transferable so that it can move to higher uses in response to economic forces. Under idealized concepts of prior appropriation law the elements of priority of right, specificity of quantity, transferability and perpetuity make the water right a property right of a high order. The theory behind this doctrine is that by permitting persons to carve out for themselves private property rights from the public-owned assets, each person will attempt to achieve the greatest possible benefit for himself, and the total result of these individual actions will tend to produce maximum welfare for the state or nation. Problems of reallocating the water from the purpose of the original appropriation to a new and higher purpose are presumably handled as are similar problems relating to land resources. Today, land originally patented to an individual as a homestead and used for agricultural purposes might be

4. RESTATEMENT, TORTS §§ 853, 854 (1939). With the possible exception of some California irrigation cases, this rule of law has a somewhat mythological aspect. Research indicates no case applying riparian doctrines in which water once allocated to a beneficial use has been re-allocated to a new more beneficial use. Some pollutive uses have been enjoined in favor of later demands for pure water.
5. MINN. STAT. § 105.44 (1961); WIS. STAT. § 30.18 (1963).
6. IOWA CODE § 455A.20 (1962). This is also the recommendation of the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL WATER USE ACT § 406 (1958).

better used as a factory site or as a city airport. No administrator runs the farmer off his land and terminates his property rights on the ground that he is making an inefficient and wasteful use of a natural resource. The industrialist simply offers to buy the land, tendering enough money to make it attractive to the farmer to leave. The city does the same, though it has the additional power to condemn the land to insure its transfer at a fair price if the farmer is for some reason able to hold out for an exorbitant sum. The sale will be made to the highest bidder and the land will serve its optimum use. In theory the same process holds true for transfers of western water rights held by irrigators, when industrial or municipal uses are more valuable. If the industrialist or the city cannot pay the price, then by definition the transfer of the water to them would not produce greater benefits. If in fact it will produce greater benefits, the value to the purchaser is greater than the value to the seller, and the transfer can be made as in the purchase of the land. The movement of water to its highest beneficial use is supposed to be thus insured by economic forces, rather than by legal processes or governmental intervention.[7]

Not all of the western states attempt to place this ideal into practice. Wyoming was chosen as the locale of this study because for many years it has placed restrictions upon the transfer of water rights, not so severe as popularly supposed but nevertheless imposing serious constraints on the operation of a market in water. For this it has been often criticized. Twenty years ago the National Resources Planning Board submitted a pamphlet, *State Water Law in the Development of the West,* in which it was said:

> One of the advantages of the appropriative doctrine is that it avoids the 'freezing' of the use of water to particular lands that is inevitable under the riparian doctrine. Not to permit changes in the place of use is a step backwards .... It is the Committee's belief that statutes such as a Wyoming statute, which with respect to direct flow, provide that water rights may not be transferred apart from the land

7. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation,* 5 NATURAL RESOURCES J. 1, 29-34 (1965).

> on which they are used without loss of priority are undesirable. They have the effect of tending to freeze the present use pattern of water and therefore are a bar to improvement.[8]

This thought was echoed in the report of the Missouri Basin Survey Commission in 1953:

> To the extent that these regulations tend to prevent changes of water to better lands or to uses giving higher returns, and to prevent new enterprises from insuring a firm supply by buying out early rights, they freeze development in its present pattern and are undesirable.[9]

An economist has said,

> With regard to current water law, the doctrine of appropriation seems better suited to promoting voluntary transferability by sale or exchange between competing users and uses . . . . Although suited to transferability, the doctrine of appropriation, as presently interpreted, places a number of limitations which interfere with sale or exchange and introduce undesirable rigidity. A few states even prohibit the transfer of water from the lands and the use for which it was originally appropriated . . . . Wyoming law provides that water rights to a stream cannot be transferred from the land, place or purpose of use without loss of priority.[10]

Some of these statements are too broad, at least in that they do not take into consideration a number of exceptions which have been built into Wyoming law.

This study will proceed with an intensive look into the Wyoming law, a notation of the difference between that law and the law of other states, and an examination of a number of typical cases of transfers of water rights permitted under various exceptions to this general rule.

A study of law as an institution cannot be made entirely within the walls of a law library. If the law is regarded as

8. NATIONAL RESOURCES PLANNING BOARD, STATE WATER LAW IN THE DEVELOPMENT OF THE WEST 45 (1943).
9. MISSOURI BASIN SURVEY COMMISSION, *Missouri: Land and Water* 195 (1953).
10. Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J. L. & ECON. 41, 51 (1959).

a mechanism by which people accomplish their desires and aims, its effects must be observed, transactions must be studied and alternative arrangements must be considered. Urbanization and industrialization of Wyoming have been slow and have raised few problems. Statistical studies of water transfers might be misleading because of the smallness of the sample, for even if that sample consisted of all cases they would be quite few in number. The case study approach was chosen because while it may not tell all there is to know about the operation of the law, it does give us examples of the law in action and may reveal a pattern which can be analyzed in terms of its effectiveness and be used as a basis for comparison with other systems.

II. PRESENT WYOMING LAW

A. History of the "No Change" Statute

Originally the Wyoming statutes were silent on the right of an appropriator to change the nature of the use or the place of use of water, or to transfer the water to another person. In an early case deciding that a water right for irrigation was appurtenant to the land and was conveyed by a mortgage of the land, the Wyoming Supreme Court noted that the right, although appurtenant, was separable from the land and could be sold separate from it, and the place of use changed.[11] The court cited cases from other states, applying the general law that an appropriative right is a property right and is transferable like other property. At the time, 1894, this was the law universally throughout the western states.

The problem first directly came before the Wyoming Supreme Court in the 1904 case of *Johnston v. Little Horse Creek Irrigating Co.*[12] The court approved the sale of one-half of one ditch company's right to another company, where after the transfer the first company irrigated only one-half as much land, and the second then irrigated no more and put no greater burden on the water right. It was argued that the

11. Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475 (1894).
12. 13 Wyo. 208, 79 Pac. 22 (1904). A fairly recent case upheld a 1907 transaction in which an irrigator deeded his land to another, reserving the water right, and changed the place of the use of the water to other lands owned by him. Hunziker v. Knowlton, 78 Wyo. 241, 322 P.2d 141 (1958).

Wyoming statutes requiring a description of the irrigated land to be set out in water right certificates and permits had changed the rule in Wyoming and tied the water to the land, but the court said that these provisions could not deprive water rights of their property aspects of transferability. Other policy arguments based on possible abuses that might result from transfers of water were rejected by the court on the ground that legislative and administrative measures could remove these objections. Most of these objections, the court felt, could be eliminated by clearly stating exactly what could be sold or transferred and under what conditions. Two paragraphs of the opinion are well worth quoting:

> As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he cannot sell surplus water which he does not need, while retaining his original appropriation; and it has been held that, as against a subsequent appropriator, a senior appropriator cannot give the water he does not use to another for a certain period, who otherwise would have no right to use it. Manning v. Fife (Utah) 54 Pac. 113. So far as we are informed, however, every case in which that or a similar principle has been decided admits that the water right may be sold and conveyed separate from the land, provided that other appropriators are not injuriously affected by such sale.
>
> An individual appropriator of water for irrigation secures no surplus water; hence he has no surplus which he can either sell or give to another, as against subsequent appropriations. His appropriation, and therefore his water right dependent thereon, is at all times limited, within the maximum of his appropriation, to the quantity capable of beneficial use, and actually so used. If during any period he does not require the use of the water, it falls during that period to the subsequent appropriator who does need the same and can beneficially use it. What the appropriator may sell is his water right. That is all he has to sell. That is all that would pass by deed of the land as an appurtenance. The water in the stream is not his property, but his right to use that water, based upon his prior appropriation for beneficial purposes,

> is a property right, and, as such, is capable of transfer. The only limitation upon the right of sale of a water right separate from the land to which it was first applied, and to which it has become appurtenant, laid down by any of the authorities, is that it shall not injuriously affect the rights of other appropriators. In other words, the burden upon the use must not be enlarged beyond that which rested upon it under the original appropriation, and while in the hands of the original appropriator as he was entitled to and did use it. This principle is the necessary result of the fact that the only property in the water owned by the appropriator is a right to use it as measured by his appropriation.[13]

At the time this opinion was rendered, Elwood Mead, Wyoming's first State Engineer and the author of its water laws, had left the state; but his views were urged upon the court in support of the losing arguments. These views had been set forth in his book, *Irrigation Institutions*. Based on his observations of irrigation in Colorado, Mead said:

> If in these transfers the tracts of land from which the water is taken were described, and if it were applied to no greater acreage elsewhere but simply to better land or in a more saving manner, there would be no objection; but so far as the writer's observation has gone this is not the moving purpose of these sales. In every instance investigated the real purpose has been to make money out of excess appropriations. The parties who have acquired surplus rights are unable to use the water themselves, and seek to sell it to someone who can. The primary object is not economy, although this sometimes results. The usual result is to take as much water away from one user as is supplied to another.[14]

Earlier in his book Mead had criticized the Colorado courts for decreeing to appropriators many times the water they needed.[15] Colorado courts had accepted many farmers' exaggerated claims of their needs and diversions, and Mead quoted some examples of decrees that gave quantities such

13. Johnston v. Little Horse Creek Irrigating Co., 13 Wyo. 208, 79 Pac. 22, 24-25 (1904).
14. MEAD, IRRIGATION INSTITUTIONS 174 (1903).
15. *Id.* at 149-53.

as a second foot to 25 acres, to 12 acres, and to 34 acres, on a stream where the average actual use of water was only one cubic foot of water per second for each 187 acres irrigated. It was the sale of these excess appropriations that concerned Mead. He also spoke of the situation in Wyoming and discussed the *Johnston* case which was then being litigated. However, he states that in that case the first appropriator who sold one-half of its water right did not abandon any of the land described in its original statement but on the contrary extended the ditch so it included additional land, so that the practical result of the sale was to more than double the demand made on the stream by the first appropriation. This is not the way the facts are stated by the court, for the report of the case says that the evidence shows that the seller of the water afterwards irrigated not more than one-half as much as it had previously done, and the buyer of the water applied it to less than half of the original quantity of land.

Mead's influence in Wyoming was strong, and it cannot be doubted that his ideas led to the passage in 1909 of a statute which flatly stated, "Water rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority."[16] This was a direct legislative reversal of the *Johnston* case.

In 1941 the Legislature amended this act so as to drop the phrase "without loss of priority."[17] The effect of this amendment is not clear. Before the amendment a person who made a change had in effect made a new appropriation—he kept his water right but acquired a new and recent priority date. With the deletion of this phrase, the statute prohibits a severance of the water but provides no penalty for its violation. It could be argued that a water right illegally transferred is lost or forfeited, or that the transfer is of no effect and the water right remains unimpaired and attached to the original land, or that general criminal penalties for unlawful use of water are applicable.[18]

16. Wyo. Laws 1909, ch. 68, § 1 (now WYO. STAT. § 41-2 (1957)).
17. Wyo. Laws 1941, ch. 25, § 1 (now WYO. STAT. § 41-2 (1957)).
18. WYO. STAT. §§ 41-64, 41-201 (1957).

B. Exceptions to the Rule

As a result of this statute, there is a widespread general belief among Wyoming irrigators that water rights are inseverably attached to land in Wyoming. In fact, however, the Legislature has made so many inroads on this principle, and has engrafted so many exceptions to it, that it can scarcely be said that given the proper circumstances there is any water right that cannot be transferred in Wyoming today. These exceptions will be described in the order in which they occurred.

1. *Domestic and Transportation Purposes.* Section 2 of the same act which declared that water rights cannot be detached from the lands, place or purpose for which they are acquired provided that any water right might be condemned to supply water for preferred domestic and transportation purposes, which included municipal purposes, water for the use of steam engines and general railway use, for culinary, laundry, bathing, and refrigerating purposes, for the manufacture of ice, and for steam and hot water heating plants.[19]

2. *Pre-1909 Rights.* In 1939 Federal District Judge Kennedy decided the case of *Hughes v. Lincoln Land Co.*[20] The case involved a change by a single appropriator of a territorial water right from one tract of 90 acres to another tract of the same size, apparently without damage to other appropriators. Judge Kennedy noted that *Johnston v. Little Horse* permitted the transfer of a water right to another person and held that there could logically be no inhibition against an appropriator applying his right to the use of water to different fractions of lands which he himself owns. The 1909 statute was cited to the court, but the judge said,

> [C]onsidering the fact that in *Johnston v. Little Horse Creek Irrigation* [*sic.*] *Co., supra,* it is held that the right to the use of water based upon a prior appropriation for beneficial purposes is a property right, it would seem that no statute which the State might subsequently pass could abridge that property

19. Wyo. Laws 1909, ch. 68, § 2 (now WYO. STAT. § 41-3 (1957)).
20. 27 F. Supp. 972 (D. Wyo. 1939).

> right or reduce its value without intrenching upon the constitutional right of the owner.[21]

The constitutional provision to which the judge refers is undoubtedly the 14th Amendment to the United States Constitution, which provides that no state may deprive any person of his property without due process of law. The Wyoming Supreme Court has never passed upon this question, although the point was raised in *State v. Laramie Rivers Co.*[22] The court quoted Judge Kennedy's opinion but found it unnecessary to decide the point. The question is not free from doubt. Although it is generally true that a statute which destroys a valuable vested property right is unconstitutional, on the other hand it is possible to enact a statute in the exercise of the police power that regulates and restricts property rights in the public interest. It is not certain how the Wyoming court would classify this statute, and since the federal constitution is involved, the United States Supreme Court would probably have the last word on the subject. However, four Wyoming Attorneys General have ruled that the 1909 statute can have no application to rights acquired before its enactment, and an administrative practice with some force of precedent has been created by the State Board of Control in the two cases in which these rulings were applied.[23]

3. *Rotation.* In the 1909 session of the Legislature, after the above statute was passed, another statute was enacted which permitted water users to rotate in the use of water to which they are collectively entitled.[24] It is arguable that this is not a true change in the place of use of water, but nevertheless such a rotation agreement does permit, during temporary periods, water appropriated to some lands to be used on other lands.

4. *Reservoir Rights.* In 1921 the Legislature amended the 1909 statute so that it read, "Water rights for the *direct use of the natural unstored flow* of the stream cannot be detached

21. *Id.* at 973-74.
22. 59 Wyo. 9, 136 P.2d 487 (1943).
23. See the case studies of the University of Wyoming, Pioneer Canal Company Rights; and Wheatland Irrigation District, Ringsby Rights, *infra* notes 129, 150, 183 and 187.
24. Wyo. Laws 1909, ch. 108, § 1 (now WYO. STAT. § 41-70 (1957)).

from the lands, place or purpose for which they are acquired . . . .'"[25] In a separate act it provided,

> The reservoir water and rights acquired under reservoir permits and adjudications shall not attach to any particular land except by deed, or other sufficient instrument conveying such water or water rights, executed by the owner or owners, of such reservoir, and such water and water rights, except when attached to particular land as aforesaid, may be sold, leased, transferred and used in such manner and upon such lands as the owner of such rights or partial rights may desire, provided, that such water must be used for beneficial purposes.[26]

5. *Amendment of Permits.* In 1913, just fours years after the basic statute, the Legislature passed an act which on its face seemed to make any unadjudicated water right, represented by permit only, freely transferable. That statute read as follows:

> That the State Engineer be and he is authorized, at any time either before or after the completion of any ditch, upon the written application of the owner of any permit, supported by such affidavits and evidence as shall be sufficient to satisfy the State Engineer, to amend such permit by changing the descriptions of land therein and to correct any misdescriptions or erroneous description in such permits as to any lands irrigated or to be irrigated under the said permit; Provided, that such change in the description of lands shall be made before the adjudication of the water right by the State Board of Control, and Provided, further, that such change shall not increase the acreage of lands to be irrigated as described in the permit.[27]

The authors do not know how this section was construed or applied, but it is certainly susceptible to the construction that before adjudication the water might be transferred from one piece of land to another, since changing the description

25. Wyo. Laws 1921, ch. 161, § 1 (now WYO. STAT. § 41-2 (1957) [emphasis added]).
26. Wyo. Laws 1921, ch. 141, § 2 (now WYO. STAT. § 41-37 (1957)).
27. Wyo. Laws 1913, ch. 123, § 1.

of land is spoken of quite distinctly from correcting misdescriptions or erroneous descriptions, and since the second section of the act spoke of permits being "amended" or "corrected" as if these were different things. In 1929, however, this was clarified and the part of the statute appearing before the provisos was changed to read, " The State Engineer is hereby authorized, upon the written request of the owner, to correct any errors which are found to exist, in any permit . . . ."[28]

However, in 1945 the Legislature again changed the statute to permit transfers of water from land to land by a statute so curiously worded as to almost conceal its true meaning and intent. Omitting the procedural parts, that act reads:

> The State Engineer is hereby authorized, upon written petition of the owner, to amend any permit to appropriate water prior to adjudication by the State Board of Control for the purpose of correcting errors or otherwise, when in his judgment such amendment appears desirable or necessary; provided that the total area of lands may not exceed the area described in the original permit.
>
> The State Board of Control is hereby authorized, upon the written petition of the owner, to issue amended certificates of appropriation for water rights that have been adjudicated, for the purpose of correcting errors or otherwise, when in the judgment of the said Board it appears desirable or necessary; provided that the total area of the lands may not exceed the area described in the original certificate of appropriation; and provided further, that the amended area may not exceed the area actually irrigated under the original right; and provided, further, that the rights of other appropriators not be injuriously affected thereby.[29]

Under a reasonable construction of this statute the permit or certificate for any water right could have been amended by changing the land description to other lands if it appeared desirable or necessary to the water officials. In fact, the practice was much more limited. The 1951 *Manual of Regu-*

28. Wyo. Laws 1929, ch. 102, § 1.
29. Wyo. Laws 1945, ch. 118, § 1 (now WYO. STAT. § 41-213 (1957)).

lations and Instructions issued by the office of the State Engineer contained regulations for petitions for amended certificates of appropriation. Although Regulation 2 required the petitioner to show that he was the owner of all the lands and water rights, Regulation 9 provided that in a case where the appropriation was to be changed from lands owned by another, the consent of the present owner of the lands had to accompany the petition. Regulation 5 required the petitioner for a change in land to show that the land to which the water rights were attached had become seeped or otherwise unfit for the production of crops, apparently the only ground which the Board of Control deemed "desirable or necessary."[30]

In 1957 this statute was amended by requiring that any petitioner for an amendment must be the owner of all the land involved in said petition,[31] and the 1958 regulations of the State Engineer were revised accordingly.[32] This was a step backward, narrowing the original exception, but in 1961 it was again broadened, and the requirement that the petitioner own all the lands was waived where all the lands are situated in an irrigation district and the district consents and makes proper adjustments in the assessments levied against the lands.[33]

6. *Agreements Between Appropriators.* In 1947 the legislature passed the following statute:

> § 41-5. The owners of appropriative rights in and to the use of waters of any natural Wyoming stream, spring, lake or other collection of still water, where either (a) the source of the appropriation is at times insufficient to fully satisfy such appropriation, or (b) a fuller conservation and utilization of the state's water resources can be resultantly accomplished, may arrange by agreement between themselves for the delivery and use of either storage or direct flow water from another source.
>
> § 41-6. Any water made available to the owner of an appropriative right by reason of any such exchange

30. Manual of Regulations and Instructions, 35, 36 (Wyoming State Engineer, 1951).
31. Wyo. Laws 1957, ch. 9, § 1, (now WYO. STAT. § 41-213 (1957)).
32. Manual of Regulations and Instructions, 24, 25 (Wyoming State Engineer, 1958).
33. Wyo. Laws 1961, ch. 214, § 1 (now WYO. STAT. § 41-213 (Supp. 1965)).

> agreement shall be delivered for the use of such appropriator in accordance with the agreement providing for such exchange, and its use shall be without prejudice to, but in the enjoyment of, the rights of such appropriator under his original appropriation.
>
> § 41-7. Each such exchange agreement shall be filed for record in the office of the state engineer, on such form as he may require.
>
> § 41-8. Performance of each such exchange agreement shall be enforced by the water administrative officials of the State of Wyoming in accordance with the terms and conditions of such agreement and pursuant to affecting regulations promulgated by said state engineer or the state board of control, provided that such water use shall be so administered as not to adversely affect the rights of other appropriators.[34]

This statute, though general in its terms, was specifically designed to cover a special case that arose in the Owl Creek Reclamation Project, and which is explained in the case study of that project.[35]

7. *Submerged Lands.* The post-war building program of the Bureau of Reclamation called for the construction of several large reservoirs in Wyoming which would submerge irrigated lands along the river bottoms within the reservoir site. As a result a series of acts were passed (the first dealing with specific reservoirs) which finally culminated in the following provisions:

> The state board of control is hereby authorized, upon the written petition of the owner, or owners of an adjudicated water right, or water rights appurtenant to lands submerged or to be submerged by the Glendo, Boysen and Yellowtail Reservoirs or any other reservoir completed since January 1, 1952, or that may be constructed in the future, in the State of Wyoming, to issue amended certificates of appropriation of water and to change the point of diversion and means of conveyance for such adjudicated appropriations of water for the irrigation of other

34. Wyo. Laws 1947, ch. 116, §§ 1-4 (now WYO. STAT. §§ 41-5 to -8 (1957)).
35. *Infra* p. 55.

lands in the State of Wyoming outside of the reservoir basin in lieu of the submerged lands, without loss of priority; provided,

1. That the appropriation shall be from the same source of supply;

2. That the irrigated acreage shall include only new lands lying within the State of Wyoming having no original direct flow water right and the area shall not exceed the acreage of lands irrigated by the right to be changed;

3. That such change of water rights be made within five (5) years from the date that construction of the reservoir dam has been completed, provided, if such change is not applied for by the owner or his successors in interest within said five (5) year period such water rights shall become automatically abandoned and the water shall be distributed in order of priority on the stream, provided, however, such automatic abandonment shall apply only to lands inundated at and below the high water line of reservoirs.

4. That the change can be made only on condition that it not injuriously affect the rights of other Wyoming appropriators.

The state board of control shall, at its next regular meeting after receipt of a petition for such change, cause a public hearing to be held on the petition before the superintendent of the water division in which such appropriation is located, and notice of said hearing to be advertised in at least one issue of a newspaper having general circulation in the community where the water right involved is located. The petitioner shall pay the cost of such advertisement prior to the time of hearing and provide a stenographic record of the proceedings, which shall be transmitted by the division superintendent to the state board of control with his report thereon. A fee of two dollars for issuance and recording of each amended certificate of appropriation of water shall be collected by the state board of control at the time of filing of the petition and the board shall also require a deposit of sufficient funds to cover the cost of preparing and recording a certified copy of the order of said board granting the petition; pro-

> vided that the fees for recording shall be returned to the petitioner in case the petition is not granted.
>
> The owner or owners of lands coming under the provisions of this act may sell or convey such lands submerged or to be submerged by any such reservoir with provisions in the deed or other conveyance that the water rights appurtenant thereto may be detached and transferred as provided herein.[36]

In 1961 this exception was broadened by amending the second proviso to read as follows:

> 2. That the irrigated acreage shall include not only new land within the State of Wyoming having no original direct flow water right but also lands within the same drainage area having water rights from another source and which have a need for supplemental water, but in no event shall such right and use so changed exceed in amount of water that of the rights which are being changed.[37]

8. *Steam Power Plants.* In 1955 the preference statute was amended by adding steam power plants to the list of preferred water rights,[38] which up to that time had included only domestic and transportation purposes. However, the preferred use of steam power plants was given the right to condemn only water rights initiated after the passage of the act.

9. *Industrial Uses.* In 1957 industrial purposes were added to the list of preferred rights, but it was provided that the preferred use of both steam power plants and industrial purposes should not have the right of condemning other water rights.[39] This then was not a true preference, like that granted to domestic use, but merely gave steam power and industrial enterprises the right to buy water rights on the open market. The statute was presumably enacted in this form because preferred rights are a well-recognized exception to the general statute prohibiting changes in use of water.

10. *Highway Purposes.* In 1959 the Legislature authorized the State Highway Commission to acquire by purchase,

36. WYO. STAT. § 41-9 (1957).
37. Wyo. Laws 1961, ch. 159, § 1 (now WYO. STAT. § 41-9 (Supp. 1965)).
38. Wyo. Laws 1955, ch. 227 § 1 (now WYO. STAT. § 41-3 (1957)).
39. Wyo. Laws 1957, ch. 116, § 1 (now WYO. STAT. § 41-3 (1957)).

lease, or gift the right to use any Wyoming water right for a period of not to exceed two years for highway construction purposes.[40] Any person injuriously affected by such a temporary change is to be duly compensated, and the State Engineer must ratify and approve the transaction. In order to insure that no damage results to other appropriators, anyone who cannot satisfy in full his water rights during the time water is being diverted for highway purposes has the absolute right to cause the highway use to be shut off until the appropriator's right is satisfied or it is proven that shutting down the highway diversion has no effect on it.[41]

C. Procedures for Making and Regulating Changes

Most, but not all, of these statutes making exceptions to the no-change rule have set out a procedure for accomplishing the change and securing approval of the water officials. Changes to a preferred use, including to steam power or industrial uses, require the approval of the Board of Control after some minimum proceedings.[42] A public notice is to be given, although how and where is not specified. This is followed, "if necessary," by an inspection and hearing by and before the proper division superintendent, who reports to the Board, which issues an order. If the change is approved, "proper instruments shall be drawn and recorded."[43] A change accomplished by the amendment of a permit may be made by the State Engineer without notice to anyone, but if the water right has ripened into a certificate of adjudication by the Board of Control, the Board can make a change only after one published notice in a newspaper having general circulation in the community, and after a public hearing.[44] A change of an adjudicated water right from submerged land follows this same pattern.[45] "Exchange agreements" are simply recorded in the office of the State Engineer.[46] Temporary shifts of use to highway purposes are made by filing an application for the State Engineer's ratification and ap-

40. Wyo. Laws 1959, ch. 148, § 1 (now WYO. STAT. § 41-10.1 (Supp. 1965)).
41. Wyo. Laws 1959, ch. 148, § 2 (now WYO. STAT. § 41-10.2 (Supp. 1965)).
42. WYO. STAT. § 41-4 (1957).
43. *Ibid.*
44. WYO. STAT. § 41-213 (Supp. 1965).
45. WYO. STAT. § 41-9 (1957).
46. WYO. STAT. § 41-7 (1957).

proval of the agreement between the owner of the water right and the State Highway Commission.[47]

These statutes left several types of transfers unregulated. They were silent as to changes of pre-1909 water rights and of reservoir rights. No statutory regulation was provided for other alterations in the exercise of the water right that did not involve a shift in use or user. For example, an appropriator may change his point of diversion by digging a new ditch to the same land, or using a different existing ditch.[48] It is also possible for a reservoir appropriator to change the place of storage and the location of his dam and reservoir,[49] and even to change the nature of using the water by changing a direct flow right to a storage right.[50] The water officials originally assumed control of these changes by administrative regulations providing for petitions to the State Engineer in the case of water rights under permits, and to the State Board of Control where the right is an adjudicated one.[51] The validity of these regulations was somewhat doubtful, since no statutes specifically authorized them, though they might be sustained under the general constitutional powers of the State Engineer and the Board.[52]

To quell these doubts, the 1965 legislature required a person desiring to change his point of diversion or means of conveyance to petition for approval of the change, addressing the State Engineer if his water right was under permit, or the Board if the right had been adjudicated. The petition must be accompanied by maps and a statement of whether any other appropriator from the same source will be injured in any way. Either the petition must be accompanied by a statement of consent by appropriators who divert between the old and new points of diversion and the owners of the ditches or facilities involved in the proposed change, or a hearing must be held after 30 days notice by registered mail to those persons.[53]

47. WYO. STAT. § 41-10.1 (Supp. 1965).
48. Groo v. Sights, 22 Wyo. 19, 134 Pac. 269 (1913).
49. Lindsey v. McClure, 136 F.2d 65 (10th Cir. 1943).
50. Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne, 49 Wyo. 333, 54 P.2d 906 (1936).
51. Manual of Regulations and Instructions (Wyoming State Engineer, 1958).
52. WYO. CONST. art. 8, §§ 2, 5.
53. Wyo. Laws 1965, ch. 138, § 1 (now WYO. STAT. § 41-10.4 (Supp. 1965)).

This new statute is untested, but it appears on its face to contain several flaws and to leave several gaps. Although no petition shall be granted if the rights of other appropriators are injuriously affected, there is no public notice to all such persons, but only to those owning intervening ditches or the facilities involved. If an irrigator whose return flows satisfy downstream rights were to change his point of diversion upstream and out of the basin, the injured persons would receive no notice unless the petitioner notified the Board that injury was likely to result and the Board gave them notice. Changes of place of use but not of point of diversion, by extending a ditch or serving land from a different lateral, are not covered. Further, the new legislation creates some confusion because it is far from clear whether it is intended to become the exclusive remedy and to supersede the existing procedures for changes in preferred use, rights on submerged land and for amending permits and certificates.

III. THE LAW IN OTHER STATES

A. States Permitting Changes

In the absence of statutes it has always been the rule that an appropriator may change the use of water from one place to another as long as the rights of others are not impaired. Just as the doctrine of prior appropriation itself originated in the California gold fields, following the customs of the "Fortyniners," the doctrine that such rights were moveable also arose from the practice of the early miners, who extended their ditches to new "diggings" as the older placers became worked out. The California law was settled in a series of early cases, holding that an appropriative right is appurtenant to the land on which it is used,[54] but that it is not inseparably annexed to the land and may be sold alone or moved to another location by its owner.[55]

This was the law that spread throughout the West and became codified in early water law statutes. Despite the requirement that no other person holding the water right should

54. *E.g.*, McDonald & Blackburn v. Bear River & Auburn Water & Mining Co., 13 Cal. 220 (1859).
55. Maeris v. Bicknell, 7 Cal. 262 (1857).

suffer as a result of the change, abuses did occur in practice, as noted by Elwood Mead in his book.[56] The various states met this problem in essentially two different ways. In some, which had set up efficient administrative agencies for regulating the appropriation and distribution of water or which were adopting codes with these features, laws were enacted giving these agencies the power to approve or disapprove transfers and changes, after proceedings at which all interested parties were represented. In this group of states are Arizona,[57] California,[58] Idaho,[59] Kansas,[60] New Mexico,[61] North Dakota,[62] Oregon,[63] Utah,[64] and Washington.[65] To these should be added Texas, which reached the same result by requiring an amended permit when such a change was made and gave the water officials power to approve the amended permit just as an original permit is approved;[66] and Colorado, which supplemented its system of judicial administration of water rights with a special court procedure for regulating changes in the point of diversion.[67] In Montana and Alaska changes are regulated only by the courts in lawsuits brought by persons feeling themselves aggrieved by the change.[68] Thus, in 13 states changes in the place of use of appropriated water can be made, subject to the limitation that no damage be done to other water users, and subject to various administrative and judicial procedures for determining that fact. In Utah and Washington special simplified procedures are provided for temporary changes.[69]

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56. MEAD, *op. cit. supra* note 14 at 174.
57. ARIZ. REV. STAT. ANN. § 45-172 (1956).
58. CAL. WATER CODE §§ 1700-1706.
59. IDAHO CODE ANN. § 42-222 (1948).
60. KAN. GEN. STAT. ANN. § 82a-708(b) (Supp. 1961).
61. N.M. STAT. ANN. § 75-5-23 (1953).
62. N.D. CENT. CODE § 61-04-15 (Supp. 1965).
63. ORE. REV. STAT. § 540.510 (1953).
64. UTAH CODE ANN. § 73-3-3 (1953).
65. WASH. REV. CODE ANN. § 90.03.380 (1962).
66. Clark v. Briscoe Irr. Co., 200 S.W.2d 674. (Tex. Civ. App. 1947).
67. COLO. REV. STAT. ANN. § 148-9-22 (1963).
68. MONT. REV. CODES ANN. § 89-803 (1947); Miocene Ditch Co. v. Campion Mining & Trading Co., 3 Alaska 572 (1908).
69. UTAH CODE ANN. § 73-3-3 (1953); WASH. REV. CODE ANN. § 90.03.390 (1962).

B. States Restricting Changes

In four other states—Nebraska,[70] Nevada,[71] Oklahoma,[72] and South Dakota[73]—restrictive statutes have been adopted. Kansas, Arizona, and North Dakota were originally in this group but have changed their laws.[74]

Nebraska's irrigation district act of 1895 requires all water distributed for irrigation to be attached to and follow the land to which it is applied.[75] While this made irrigation appropriations initiated since that date inseparably appurtenant to specific land,[76] it does not restrict rights acquired before the statute and they may be transferred for use on other property, subject to administrative control of the state irrigation authorities.[77]

In the other three states, restrictions on transfers of water rights have been adopted by substantially identical statutes providing that a water right shall remain appurtenant to the land on which it is used, but if for any reason it should at any time become impracticable to beneficially or economically use the water on the land to which it is appurtenant, the right may be severed from the land and transferred to other land without loss of priority if such change has the approval of the state water authorities and can be made without detriment to existing rights. In Nevada the statute applies to all water rights, in the others, only to rights for irrigation, leaving rights for other purposes freely transferable upon compliance with procedures for obtaining approval.

C. Procedures

Most of the states allowing changes, even under restricted conditions, provide for some form of notice to other appropriators who may be affected by the proposed change. In

70. NEB. REV. STAT. § 46-122 (1960).
71. NEV. REV. STAT. §§ 533.040, 533.325 (1960).
72. OKLA. STAT. tit. 82, § 34 (1961).
73. S.D. CODE § 61.0128 (Supp. 1960).
74. Kans. Sess. Laws 1891, ch. 133, art. 2, § 5; Ariz. Sess. Laws 1919, ch. 164, § 48; N.D. Sess. Laws 1905, ch. 34, § 31.
75. NEB. REV. STAT. § 46-122 (1960).
76. Farmers' & Merchants' Irr. Co. v. Gothenberg Water Power & Irr. Co., 73 Neb. 223, 102 N.W. 487 (1905).
77. NEB. REV. STAT. § 46-250 (1960); see United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

Colorado there are very elaborate provisions for four published notices, plus notice by registered mail to all water users between the old and new points of diversion, and notice by ordinary mail to all water users in the water division.[78] In most states notice by publication is enough, usually given in the same manner as is notice of an original application for a permit (a procedure unknown to Wyoming).[79] In California the extent and type of notice is left up to the water officials.[80]

In no state can a water right be changed from the place or purpose for which it was appropriated if damage to other appropriators will result. Although this has always been the law, it has been pointed out that in the early days the rule was often honored in the breach. Today it is strictly enforced in the proceedings for approval of changes. The rule against inflicting damage is not simply a variation of the rule of priority, because no change may injuriously affect any other appropriator, whether he is senior or junior to the person seeking to make the change.[81]

From the cases litigated in other jurisdictions, a catalog can be made of the common types of damage which will cause a change to be denied. A change from a non-consumptive use such as the use of water for mining or the production of power to a consumptive use such as irrigation will obviously injure appropriators farther down the stream.[82] However, if the water user is below the diversion points of objecting parties, obviously no damage can be done to the latter.[83] A senior water right that is fed by springs below an upstream junior's point of diversion cannot be changed upstream beyond the junior's headgate, if after the change there would be no water for the junior appropriator.[84] Similarly, a senior appropriator whose water is supplied by return flow from an upstream junior, cannot change his right upstream above the junior so as to

78. COLO. REV. STAT. ANN. §§ 148-9-23, 148-9-24 (1963).
79. See statutes cited *supra* notes 61-65, 71-73.
80. CAL. WATER CODE § 1703.
81. Handy Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 515, 62 Pac. 847 (1900).
82. Broughton v. Stricklin, 146 Ore. 259, 28 P.2d 219 (1933), *aff'd. on rehearing*, 30 P.2d 332 (1934).
83. Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935).
84. Crockett v. Jones, 42 Idaho 652, 249 Pac. 483 (1926).

deprive the latter of the water.[85] Conversely, where a junior water right is supplied by a senior's return flow, the latter's point of diversion cannot be moved downstream below the junior, nor can all the water be taken across a divide into another valley, so that the junior no longer receives the return flow.[86] A change of a direct flow right to a storage right, or of a storage right to another reservoir, might conceivably result in sufficient loss by evaporation to injure other appropriators.[87] Where a stream loses water throughout its length, a change of an upstream water right to a point far down stream cannot be made where it would throw all of the burden of stream losses upon other appropriators.[88] A change will be prohibited where it will result in extending the time of use of the water rights, so that more water in total quantity will be diverted.[89] Where a change would deplete the stream so as to increase the level of pollution and render potable water unfit for human consumption it will not be permitted unless compensation is paid to those put to the expense of purifying the water.[90]

In most of the jurisdictions that permit changes, the damage that will prevent a change must be injury to a water right. It is not a valid objection to a change in the place of use that the land from which the water will be transferred will be decreased in taxable value so that the benefits to highway districts, school districts, etc., will be decreased and the burden will be increased on other taxpayers within the taxing units.[91] Incidental detriment to ditch rights will not prevent changes. A change from a joint ditch, throwing the burden of seepage and transmission losses on other appropriators who use the ditch, has been held permissable in Colorado;[92] and in Nevada, one of two appropriators who formerly diverted water through a leaky slough has been permitted to

85. Vogel v. Minnesota Canal & Reservoir Co., 47 Colo. 584, 107 Pac. 1108 (1910).
86. *Ibid.*
87. Fritsche v. Hudspeth, 76 Ariz. 202, 262 P.2d. 243 (1953).
88. Haney v. Neace-Stark Co., 109 Ore. 93, 216 Pac. 757 (1923) (dictum).
89. Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co., 120 Colo. 423, 210 P.2d 982 (1949).
90. Moyle v. Salt Lake City, 111 Utah 201, 176 P.2d 882 (1947).
91. *In re* Robinson, 61 Idaho 462, 103 P.2d 693 (1940).
92. Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 116 (1951).

change to an efficient ditch over the objection of the remaining appropriator who must now bear the entire loss through the slough.[93] However, mutual ditch companies and irrigation districts will be protected from loss of revenues. In Idaho an appropriator who receives his water from a company or district must get its consent to the change,[94] and in Colorado a city that bought shares in an irrigation company and changed the water to municipal use and diverted it through another ditch was forced to continue to pay assessments on the shares.[95] But a California court was more strict and interdicted a change that would have taken the shareholder's water through another ditch and outside the company's service area.[96]

Actually, it seems quite rare in modern times for a change in water rights to be absolutely prohibited because of damage. In the usual case today, the change is partially allowed or other appropriators are protected against damage by conditions attached to the change. If return flows feed the stream, an appropriator may be allowed to change only the amount of his consumptive use to land from which no seepage will return. But if returns to the stream will be increased by the changed use, the new user should be given credit and allowed to divert more than the first consumed.[97] A water right to divert a specific amount cannot be changed *in toto* if it was needed only intermittently, and only the amount actually needed and used by the irrigator, and not the nominal amount of the decreed right, may be changed.[98] A water user who owns stock in a mutual ditch will be allowed to change his water to another canal only if he still remains liable for assessments to the company, so that other stockholders are not affected.[99] The Colorado court has said that a decree permitting a change should contain such conditions as are proper to counteract the possible loss or damage, and permission to make such change should be denied only in

93. Kent v. Smith, 62 Nev. 30, 140 P.2d 357 (1943).
94. IDAHO CODE ANN. § 42-108 (1948).
95. Brighton Ditch Co. v. City of Englewood, *supra* note 92.
96. Consolidated People's Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 269 Pac. 915 (1928).
97. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).
98. Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954).
99. Brighton Ditch Co. v. City of Englewood, *supra* note 92.

such instances where it is impossible to impose reasonable conditions to effectuate this purpose. What conditions and limitations should be imposed will depend upon the facts and surrounding circumstances of each particular case.[100] The Utah statute instructs the State Engineer not to reject an aplication for a change for the sole reason that such change would impair the vested rights of others, but to approve it as to part of the water involved or upon the condition that conflicting rights be acquired.[101] Where it was impossible to foretell accurately the effect of quite complex changes in the management of water rights for large areas, they were allowed on condition that a certain amount of water be left in the stream at a particular point for the use of other appropriators.[102] The water commissioner in charge of the stream can enforce such a condition and insure that no injury to lower appropriators will result.[103] In a very significant modern Colorado case, a change was allowed for an experimental period during which tests were to be made to determine the damage, if any.[104] Such experiments would take much of the guesswork out of approval of changes.

Courts have considered the issues that may properly be considered by the water officials in proceedings for securing approval of a change. Ordinarily, it would seem that in a proceeding largely directed at the issue of whether or not the vested rights of others are injured, the validity of a contestant's right is a proper consideration.[105] However, in Utah it has been held that in acting upon an application for a change the board or officer has no authority to determine the rights of the parties or to decide questions of priority.[106] For many years it was the rule in Colorado that the question of abandonment could not be considered in proceedings for a change of water rights. In one case a lower Colorado court criticized the rule, saying:

There is no time so opportune, and no other proceed-

100. Farmers Highline Canal & Reservoir Co., v. City of Golden, *supra* note 98.
101. UTAH CODE ANN. § 73-3-3 (1953).
102. East Bench Irr. Co. v. Deseret Irr. Co., 2 Utah 2d 170, 271 P.2d 449 (1954).
103. Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 154 P.2d 507 (1944).
104. City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952).
105. Reorganized Catlin Consol. Canal Co. v. Hinderlider, 80 Colo. 522, 253 Pac. 389 (1927).
106. United States v. District Court, 121 Utah 1, 238 P.2d 1132 (1951).

> ing so appropriate, for trying that issue as when, under a petition of this nature, all the ditches, owners, and claimants of water rights are in court . . . . That rule has become the excuse for many actions ostensibly to change the point of diversion of water appropriated, while the real purpose and effect is to revive or give life to and make effective a mere paper appropriation of water that has never been applied to beneficial use . . . .[107]

Today the question of abandonment is made material by court rule in every change in point of diversion proceeding.[108] The Colorado courts have also held that in such proceedings it may be necessary to determine the meaning of a contract between the parties.[109]

One other procedural point has been the subject of some disagreement in other states, the question of who has the burden of proof on the issue of whether damage will occur to another appropriator. Some courts hold that the person seeking the change must prove that no injury will occur, although this involves the very difficult proof of a negative.[110] Others hold that the party asserting that he will be injured has the burden of proof.[111] Even in the former group of states the courts do not make this burden unreasonably onerous,[112] and hold that the burden of the petitioner is only to meet the ground of injury asserted by the protestant.[113] A petition should not be denied on the basis of mere possibilities and potentialities, or on the grounds that injury might occur from a violation of the order permitting the change.[114]

Although the general rule is usually phrased as prohibiting only injury to the water rights of others, it is also recognized that a change must involve no injury to public interests. Nevada's statute seems to be the only one that specifically states the change must not be detrimental to the

107. Farmers' Highline Canal & Reservoir Co. v. Wolff, 23 Colo. App. 570, 131 Pac. 291, 294-95 (1913).
108. COLO. R. CIV. P. 99.
109. Reorganized Catlin Consol. Canal Co. v. Hinderliter, *supra* note 105.
110. Farmers' Highline Canal & Reservoir Co., v. Wolff, *supra* note 107.
111. Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 P.2d 370 (1933).
112. American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951).
113. City of Colorado Springs v. Yust, *supra* note 104.
114. American Fork Irr. Co. v. Linke, *supra* note 112; Brighton Ditch Co. v. City of Englewood, *supra* note 92.

public welfare.[115] However, the courts have said that the public interests are involved in proceedings for a change in water rights[116] and that no change should be allowed if damage to the public interest would result.[117] In Texas it has been said that the public policy of the state is involved in a proceeding to amend the permit to the same extent as in an original proceeding to obtain a permit.[118] No changes seem to have been denied on these grounds, but conceivably a change could be stopped if it threatened to seriously impair some interest of the public, as by destroying important fishing waters, or by blocking some important project promising greater benefits, or if it would dry up an important irrigation area and transport the water out of the state. Just as considerations such as these might lead to a denial of an original permit, so they might be believed important enough to cause a change to be denied.

IV. EXPERIENCE UNDER THE WYOMING LAW

Against this background, Wyoming's law can now be compared to that in other states. It is not as unique as its critics have suggested. Four other states have joined it in restricting transfers, although their restrictions take different forms. Three others once tried this form of regulation but have abandoned their experiments. While the thirteen states now treating all water rights as property, subject to sale and change in use and place of use, have been praised for their laws, they may not be in too superior a position since we now see that for many purposes and in many situations Wyoming water rights have the same advantages.

The primary question for this study is whether Wyoming water law, in the area of transferability of water rights, permits the highest economic use of Wyoming water. In determining whether changes made under the Wyoming statutes reach or approach this goal, it may be helpful to see what changes have been made, whether the remaining restraints on transferability have seriously hindered the efficient use

115. NEV. REV. STAT. § 533.370 (1960).
116. Corey v. Long, 111 Colo. 146, 138 P.2d 930 (1943).
117. United States v. Caldwell, 64 Utah 490, 231 Pac. 434 (1924).
118. Clark v. Briscoe Irr. Co., 200 S.W.2d 674 (Tex. Civ. App. 1947).

of the state's water or whether the exceptions have swallowed the rule and dwarfed the restraints.

Few reported cases have involved Wyoming transfers, and in order to evaluate the law it is necessary to go beyond the law books. The authors have therefore gone into the field to see what has been done within this legal framework.[119] Sample cases of transfers completed or attempted are here examined to see what has been and what can be done under each of the major exceptions to the no-change rule.

A. Municipal Uses

Town of Greybull. It will be recalled that the no-change statute of 1909 had built-in exceptions for preferred water uses. Domestic purposes headed the list and were particularized as drinking purposes for both man and beast, municipal purposes, culinary, laundry, bathing, and refrigerating purposes, including the manufacture of ice, and use for steam and hot water heating plants.[120] The experience of the Town of Greybull gives a typical example of an irrigation water right being changed to such preferred use.

In 1940 the Town, a municipal corporation located in north-central Wyoming, was seriously in need of water for domestic and municipal purposes. Its water supply had dwindled steadily for several years, while the demand had increased as steadily. Available water from the Greybull River was undesirable and unsatisfactory for domestic consumption, and the shortage required a curtailment of use by inhabitants and brought about an increasing fire hazard. On September 17, 1949, the Town of Greybull passed a resolution declaring a water shortage emergency to exist.

119. Most of the data contained in the following case studies was obtained from documents and correspondence on file in the office of the State Engineer, Cheyenne, Wyoming, with the cooperation of Mr. Floyd Bishop, State Engineer. The authors owe an especial debt to Mr. Earl Lloyd, who has been associated with that office for 38 years as Assistant State Engineer, State Engineer, and since his retirement, as consultant. Data for the Pioneer Canal Co. studies was obtained from the late Lewis J. Holliday, manager of the company from 1932 to 1963, and Mr. J. F. Ryff. Much information for the Wheatland Irrigation District study was obtained from the attorneys for the District, Jones & Jones of Wheatland, Wyoming, and from the studies of the Bureau of Reclamation. Many other people cooperated to make these studies possible, and to them, as well as to those named, we express our appreciation.

120. Wyo. Laws 1909, ch. 68, § 1 (now WYO. STAT. § 41-2 (1957)).

On the same date the Town entered into a contract of purchase of an irrigation water right from F. T. Kershner and Gladys G. Kershner in the amount of 2.21 cubic feet per second of water under Permit No. 430 with a priority of March 7, 1893. The land from which the water right was to be severed consisted of 155 acres located about 12 miles east of Greybull near Shell Creek. The appropriation was from Shell Creek through McDonald Ditch, otherwise known as Shell Canal. Greybull proposed to change the use from irrigation to preferred domestic, municipal and other uses. The point of diversion would also be changed so that the water could be conveyed through the Greybull Pipe Line, which has its point of intake about two miles further up Shell Creek from the headgate of McDonald Ditch and generally parallels Shell Creek down to Greybull.

In accordance with the required procedure, the Town of Greybull filed a petition with the State Board of Control on September 20, 1940, seeking a change from irrigation to domestic and municipal use, and a change in the point of diversion and means of conveyance to the pipe line. An objection and protest to the changes sought was filed on behalf of owners of land having adjudicated water rights from Shell Creek.

The most serious objections were (1) that since the statute defining the preferred rights provided that "existing rights not preferred, may be condemned to supply water for such preferred uses in accordance with the provisions of the law relating to condemnation of property for public and semi-public purposes . . .,"[121] condemnation proceedings were a necessary prerequisite to the proceedings before the Board of Control, and (2) that the water rights of the objectors would be adversely affected and injured since (a) not more than .5 cubic foot of water per second had been used on the land for a period of in excess of five years and therefore the remainder of the 2.21 cubic feet of water per second had been abandoned by the owners, and (b) at least 75% of the water diverted by the prior owners had re-entered the stream as return flow.

121. WYO. STAT. § 41-3 (1957).

The matter came before the Board of Control on November 14, 1940. The legal objections of the protestants were overruled, and the abandonment issue was resolved in the petitioner's favor. The Board found that the amount of return flow or accretion to the stream after diversion to the lands for irrigation was 40% of the diversion, or .884 cubic foot of water per second. The Board granted the petition and in its order it directed that the water rights for 2.21 cubic feet of water per second be severed from the lands, subject to the finding that the water right had not in the past depleted the stream in the full amount of the appropriation, so that .884 cubic foot of water per second must be left in the stream and allowing the remaining 60%, or 1.326 cubic feet per second, to be changed to the preferred use and diverted through the pipeline without loss of priority, but subject to the condition that the change should not injure the rights of other appropriators.[122] The meaning of the last proviso is unclear, since the most likely injury that could occur by such a transfer out of the watershed would be the loss of the return flow to other appropriators lower down on the canal or stream, and this was taken care of by allowing only a part of the appropriation to be changed. It is not clear what would happen if the finding of 60% consumptive use were later proven erroneous, or if some other type of injury was shown after the change was in operation.

The objectors appealed to the District Court of Big Horn County, which affirmed the order of the Board in every respect.

B. Transportation Uses

The Union Pacific Water Company. The second preferred use excepted from the 1909 no-change statute was designated broadly as transportation and further described as "water for the use of steam engines and for general railway use . . . ."[123] The case of the Union Pacific Water Company's operation at Hanna, Wyoming gives an example of an irrigation water right being changed to this preferred use.

122. Petition of Town of Greybull, State Board of Control, Order Record No. 10, p. 223-235, Nov. 14, 1940.
123. WYO. STAT. § 41-3 (1957).

The Union Pacific Water Company is a Wyoming corporation chartered to furnish water for domestic and transportation purposes, including water for municipal use and for the use of steam engines and general railroad use. The Company supplied water to its parent corporation, the Union Pacific Railroad Company, for use in its locomotives, and to the town of Hanna, a "company town" serving the railroad's coal mines. In 1943 the water available to the company became inadequate to properly supply the town and the railroad.

On June 9, 1943, the Company obtained an option to purchase 1.14 cubic feet of water per second from Cloyd A. Crone, Carry Crone Ryan, and Walter Ryan. The sellers held 447 acres of land in Carbon County, southwest of Hanna, and water rights in the amount of 6.39 cubic feet per second appurtenant to this tract for the irrigation of the land. The water rights were appropriations from Pass Creek, a tributary of the North Platte River, with a priority of 1884, and were diverted through the Crone ditch.[124] The agreement stipulated that the fraction of the water right purchased by the water company should be a "first right" and senior to the balance of the Crone right. The Company agreed to pay $5,000 to the owners as consideration for the water rights, upon obtaining a favorable order from the Board of Control and upon the expiration of the time for appeal.

In accordance with the terms of the option, the Water Company filed a petition with the Board of Control dated August 27, 1943, attaching to the petition consents to the change by all appropriators between the old and new points of diversion. One term of the consent was that the Water Company would leave one-half of the 1.14 cubic feet per second in the stream to compensate for loss of return flow from irrigation use. The petition was referred to the Division Superintendent who heard the matter on September 13,

124. The original appropriation was in the name of Albert Crone, and was for 6.57 cubic feet per second. When the transfer was negotiated it was necessary to allocate the water to various parcels of land held by the successors to Albert Crone. It was found the quantity was in error and the figure was reduced to 6.39 cubic feet per second. See Petition of Cloyd A. Crone and Carrie Crone Ryan, State Board of Control, Order Record No. 11, p. 51, Aug. 30, 1943.

1943, in Rawlins, and reported no objections to the proposed changes.

On September 28, 1943, the Board of Control gave final consideration to the matter and the petition was granted.[125] The entire amount of the 1.14 cubic feet per second was severed from the land. The Board found that .57 cubic foot per second of this represented the amount of accretion or return flow to the stream and ordered this amount to be left in the stream as just compensation for other water users on the stream. The remaining .57 cubic foot per second was ordered to be changed from irrigation to preferred use at Hanna, for municipal, domestic and general railway use, without loss of priority, and the entire 1.14 cubic feet per second was ordered to be senior to the remaining part of the Crone right. The Crone right was then reduced from 6.39 to 5.25 cubic feet per second and the irrigable acreage of the owners was reduced from 447 to 367 acres.

C. Pre-1909 Rights

1. *University of Wyoming, Pioneer Canal Company Rights.* The belief that the no-change statute has no retroactive effect and cannot constitutionally restrict the transfer of water rights perfected prior to its date, February 20, 1909,[126] has led to several sales of water rights that antedate the statute and to their transfer to lands other than those for which they were appropriated. One such case involved a part of the University of Wyoming's Agronomy Farm, west of Laramie. The farm is bisected by the Pioneer Canal and some portions of the tract lying under the canal are irrigated from it. Rights to participate in the Canal Company's appropriation are evidenced by shares of stock in the corporation. The Company's appropriation authorizes it to deliver water to 49,030 specifically described acres of land under the ditch although it has enough water for the irrigation of only about 7,500 acres. Stockholders may have water delivered to any of their acres within the service area.

125. Petition of Union Pacific Water Company, State Board of Control, Order Record No. 11, p. 56, Sept. 28, 1943.

126. See notes 20-23 *supra* and accompanying text.

In 1954 the University desired to conduct experiments in pump and spray irrigation on 15.6 acres of the farm lying above the ditch and outside the service area. Inquiry of the Canal Company indicated that water stock was available for sale, but that the water could not be used on that land. The stock was held by the Company as treasury stock, having been surrendered by the former owner to relieve him of the liability of paying annual assessments and water charges since he had ceased to irrigate the land for which it was issued. The University agreed to purchase the stock, ostensibly for use on 15.6 acres of the unirrigated area lying under the ditch and within the service area if the place of use could be changed to that above the Canal.

In April, 1954, the Pioneer Canal Company and the Trustees of the University of Wyoming petitioned the State Board of Control to have the description of the Company's service area amended by excluding from it the 15.6 acres under the ditch and including the 15.6 acres above the ditch. On May 12, 1954, the Board of Control gave preliminary consideration to the petition, and on June 23, 1954, the hearing before the Division Superintendent was held.

Before taking final action, the Board sought the advice of the Attorney General of the State.[127] His opinion, in full, was as follows:

> With reference to the Petition of the Pioneer Canal Company and the Trustees of the University of Wyoming, it is my opinion that the Board of Control may within the law grant the relief requested by the amendment to the original Petition.
>
> In view of the fact that the appropriations of the Pioneer Canal Company have priority dates of 1879 and 1884, they are not subject to the restrictions contained in Wyoming Compiled Statute, 1945, Section 71-401, which was originally enacted in 1909 and, in particular, are not subject to the provisions of

127. It is interesting to note that in the early correspondence relating to this case, the State Engineer was of the opinion that authority for the transfer, if any existed, had to be found in WYO. STAT. § 41-213 (1957), dealing with the correction of errors in the permits. After the letter from the Attorney General to the Board of Control, this view found no expression in the final order.

> that statute which provides that water rights may not be detached from the lands on which originally used without loss of priority.
> In this connection, see Johnston v. Little Horse Irrigation [*sic.*] Company, 13 Wyo. 208, 79 P.22, and Hughes v. Lincoln Land Company, 27 Fed. Sup. 972.[128]

On May 13, 1955, the Board of Control held a final hearing and granted the petition.[129]

2. *Pioneer Canal Company—Transfers Within Service Areas.* A seeming exception to the no-change rule, and one that is rather difficult to classify, is the mobility of water use that occurs within the service area of the Pioneer Canal Company, as mentioned in the University of Wyoming case. It may be only another example of transferability of pre-1909 rights, but it seems possible that it could occur in any area served by an irrigation district or mutual ditch company if the distributing agency is authorized to serve a large area with a direct flow appropriation but has water enough for only a fraction of the lands. The only clearly identified case in which the use of unstored water is openly switched about is that of the Pioneer Canal Company.

The Company was organized in 1879 for the purpose of constructing, operating and maintaining canals, ditches and reservoirs in Albany County, and of transporting, conserving and distributing water for agricultural and other purposes. The service area under the canal parallels the Laramie River from 25 miles south of Laramie to a point a short distance north of Laramie, and varies from one and one-half to four miles in width.[130]

In 1903 the State Board of Control adjudicated all water rights on the Laramie river. An appeal from this proceeding was taken to the District Court of Laramie County, which entered a judgment adjudicating the rights of the claimants

128. Letter from George F. Guy, Attorney General, State of Wyoming, to State Board of Control, May 12, 1955.
129. Petition of University of Wyoming and Pioneer Canal Co., State Board of Control, Order Record No. 13, p. 238, May 13, 1955.
130. Much historical data on the Pioneer Canal Co. may be found in Laramie Rivers Co. v. Watson, 69 Wyo. 333, 241 P.2d 1080 (1952), and State v. Laramie Rivers Co., 59 Wyo. 9, 136 P.2d 487 (1943).

to the river. The Pioneer Canal Company was decreed three appropriations, a direct flow right for 71.43 cubic feet per second with a priority of April 19, 1879, a storage right in Sodergreen Lake for 1,000 acre feet, of the same date, and a direct flow right for an enlargement of the canal for 210.48 cubic feet per second with a date of October 1, 1884. The first appropriations are very valuable rights, but since many other appropriations had intervened before the enlargement, it can be classified as a mere "floodwater right."

Each of these water rights was described as for the irrigation of 49,030 acres of land, which was identified. However, only a small portion of this land has been under irrigation at any one time either before or since the decree. Today the total number of acres being irrigated is about 7,500. The larger figure has been construed by the Supreme Court as a limitation of the area within which the company may deliver water.[131]

From the beginning the Pioneer Canal Company has not owned the land on which its water rights were to be used. Shares representing the water rights were sold to prospective water users owning land within the service area. Only persons holding shares in the company may use the water, each share representing a water right for one acre of land. The shares are designated as a "Certificate of Stock and Water Right" and the interest of the owner is stated on the shares as follows:

> This certificate is evidence of the ownership of an undivided interest in all water rights of said Company, in the ratio which the number of shares included in this certificate bears to the total number of shares of capital stock of said Company, and of the right to make an equal use, with other stock holders, of said water rights in the proportion afore-

131. State v. Laramie Rivers Co., *supra* note 130. The District Court decree gives conflicting figures on the number of acres under irrigation. In one place it is stated that the figure is 19,739 acres, without a description of the land, and in another 6,192.75 acres of described land. Apparently the original grandiose plan of the Company was to irrigate all of the 49,030 acres. The two direct flow water rights would entitle it to irrigate 19,739 acres at one cubic foot for 70 acres of land. Since the larger right with a late priority is such an uncertain source, apparently only 6,192.75 acres were irrigated at the time of the 1912 decree, and only 7,500 acres are under irrigation today.

> said, subject, however to the following restrictions and limitations . . . .[132]

Thus, the primary water rights involved are the appropriations by the Pioneer Canal Company and the right which a shareholder has is to participate in these appropriations in proportion to the number of his shares.

The Company's position that water rights may be transferred from one tract to another within the adjudicated area is indicated by a clause in the certificates of stock: "This certificate shall be transferable apart from the title to the land above described, only with the consent of the Board of Trustees of the Company, and upon the observance of such other conditions as are or may be imposed by law."[133] To date, nothing more than the formal sanction of the Board of Trustees has been deemed necessary. It is interesting to note that these transfers are completely unrestricted and are of the gross right, *i.e.,* they are made without regard to what may be the consumptive use in the particular case.

The former manager of the company, who served for 31 years, estimated that during his tenure the number of such transfers was between 15 and 25. Three recent examples may be noted. The first has already been discussed in connection with the University of Wyoming case. Prior to 1954 J. F. Ryff had held numerous shares in the company, some of which he surrendered to the company which then held them as treasury stock. These were held for sale to any person who might desire to use them within the service area. They were purchased by the University after the service area had been amended to include the land on which the water was needed. In another recent transfer, ten shares were sold by Eugene D. Gelatt, a rancher, to Consolidated Industries, Inc., a cemetery company, for consideration of $600 plus two cemetery lots. In addition to the change in place of use, some change took place in the manner of use. Formerly the water was used for agricultural purposes to irrigate haylands, while it is now being used to irrigate lawns, trees and shrubs. The cemetery is also irrigated with water from a well which is

132. Laramie Rivers Co. v. Watson, *supra* note 127, at 1088.
133. *Id.* at 1089.

very heavy in chemical solids, and the additional canal water is needed to wash the alkali from the ground, especially in the late summer. The last transfer occurred on May 1, 1963, when George J. and Marian J. Forbes sold 163 shares to the Laramie Country Club at $35.00 per share. Again, while irrigation can be used to describe both old and new uses, the old use was for agricultural purposes and the new use will be primarily recreational. Since the new golf course is not located on the Forbes ranch, a change in the place of use is also involved.

In none of these transfers was the Board of Control consulted and the practice has never been questioned in the courts.

As previously stated, the exact legal basis of this type of transfer is difficult to classify. In a lawsuit claiming mismanagement of the Company and unlawful preferences of the Company's water, *State v. Laramie Rivers Co.*,[134] some plaintiffs, non-stockholders who owned lands within the described 49,030 acre service area, claimed that the adjudication decree of 1912 attached the Company's water rights to their lands and gave them a right to demand service from the Company. In the course of denying this contention, the court mentioned the plaintiff's theory that the 1909 no-change statute attached the water to their lands. It noted that the federal court had held the statute inapplicable to pre-1909 rights,[135] and that the Nebraska courts had reached a similar conclusion on a comparable statute,[136] but found it unnecessary to decide this point. The statute, which says that water rights "cannot be detached from" lands, was held inapplicable to water rights that had never been attached to lands. In speculating on the reasons for designating a larger service area than could be watered, the court described practices in Colorado and other Wyoming cases. While it noted that Colorado decrees do not state the acreage irrigated, as required by Wyoming statutes, it indicated that the effect of an adjudication was the same in both states and that a decree of a water right to a Wyoming distributing organization which owned no land need not at-

134. 59 Wyo. 9, 136 P.2d 487 (1943).
135. Hughes v. Lincoln Land Co., 27 F. Supp. 972 (D. Wyo. 1939).
136. Farmers' & Merchants' Irr. Co. v. Gothenberg Water Power & Irr. Co., 73 Neb. 223, 102 N.W. 487 (1905). See also United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

tach the right to the particular land described. Transferability of the shares was not in issue. All the court decided was that the water rights could be used by shareholders owning only a small part of the service area and that the water rights were not appurtenant to all the land in the service area. But either theory mentioned by the court could sustain the practices of the Company and the saleability of the shares. Under the first theory we have merely another example of transferable pre-1909 rights, but under the second we have a new exception, and the non-appurtenant rights of landowners receiving unstored water from a distributing agency may be transferred and changed within the area the agency is set up to serve.[137]

3. *Wheatland Irrigation District, Ringsby Rights.* The most important case dealing with the transferability of direct flow water rights with priority dates before February 20, 1909 involves the Wheatland Irrigation District's purchase of the Ringsby Ranch, located many miles away in another drainage, and the transfer of the ranch's early water rights on Rock and Dutton Creeks to the District lands irrigated from the Laramie River.

The Wheatland Irrigation District has an interesting history, much of which bears on its need for the transferred water.[138] In 1879, John Gordon, who had seen the development around Greeley, Colorado, conceived of a similar project on the eastern plans of Wyoming Territory, to be irrigated from the lower reaches of the Laramie River. The Wyoming Development Company was formed to finance and build the project works. It constructed a tunnel between the Laramie and Sybille Creek and dug a large canal from the creek to an area fifteen miles long and five to ten miles wide, known as the Wheatland Flats. The Company obtained a water right for 633 cubic feet per second with a priority date of May 23, 1883. Few people lived in the area and settlers were encourag-

137. A quite recent statute seems to give similar privileges within irrigation districts. WYO. STAT. § 41-213(B) (Supp. 1965).

138. Early history of the Wheatland project is detailed in the following sources: Joe Elliott, The Wyoming Development Company, document on file in the law office of Jones & Jones, Wheatland, Wyoming; Frederick Thomas Carnes, The Wyoming Development Company, B.A. Thesis, University of Colorado, May, 1953; BUREAU OF RECLAMATION, FEASIBILITY REPORT, WHEATLAND UNIT, WYOMING (June, 1962).

ed to acquire lands under the Desert Land Act. In 1887 the town of Wheatland was established nearby. The river carries little water after early July, and in 1894 Reservoir No. 1, with a storage capacity of 5,360 acre feet, was constructed near the Flats and filled through the tunnel and ditches. A large reservoir, to be known as No. 2, with a capacity of 99,000 acre feet, was planned higher on the river above the tunnel. The application for a permit for this reservoir ran into an objection from the State Engineer that the storage was much too large for the area to be benefited. He insisted as a condition of granting the permit that two additional tracts, the Sybille and the Bordeaux, be included in the service area. After some changes in the plans, resulting in an estimated capacity of 120,000 acre feet, the reservoir was constructed in 1901 by the Wheatland Industrial Company, a related corporation formed to finance the expanded project. Actual operation disclosed that a large amount of dead storage in the irregular reservoir bed, not discovered in the surveys, reduced the usuable capacity to 60,000 acre feet. The two additional tracts both proved to be costly mistakes. The much reduced actual capacity caused the Sybille tract of 20,000 acres to be abandoned for lack of water after a canal had been constructed at a cost of $162,000.00. After $88,000 was spent to construct a long and winding canal to the Bordeaux tract, southeast of the Flats, it was discovered that only 3,000 acres could be irrigated instead of the originally estimated 10,000.

The two companies had been financed largely through eastern capital. As a business venture the project was a complete failure. The proceeds of sales of lands and water rights, a charge of $2.50 per acre to defray part of the cost of Reservoir No. 2 and annual operating and maintenance charges, were never sufficient to recoup the investment in the project, much less to show a profit. After a long campaign to place the ownership of the project in the hands of the water users, the Wheatland Irrigation District was organized as a quasi-municipal corporation in 1945, and in 1946 all assets and liabilities of the Wyoming Development Company and the

Wheatland Industrial Company were transferred to the District for a nominal consideration.

The irrigable area of the project was originally estimated at 58,000 acres. The direct flow water rights are for approximately this area and construction costs were based on this figure. Though these estimates of available lands were optimistic, they were not as inflated as the estimates of water supply. A recent survey shows 43,500 acres of irrigable and irrigated land, 2,900 acres irrigable but not irrigated and 4,000 irrigated but not classified as suitable for irrigation by modern standards.[139] Of this 50,400 acres, 46,000 to 48,000 were irrigated for many years. More recently, because of the water shortages and the federal government's encouraging farmers to place land in the "soil bank," the number has declined to an average of 36,000 acres irrigated per year.[140]

From the early days of the Wheatland project down to the present time, water shortage has been a constant problem. The average annual water supply for the 32 year period of 1928-1959 was 77,200 acre feet.[141] The average supply for the 12 years including the irrigating seasons of 1945 and 1956 was only 63,000 acre feet.[142] The estimated annual need is 97,500 acre feet, which means there was an annual shortage of 34,500 acre feet,[143] or in other words, only two-thirds of the needed supply was available in those years.

The shortage problem can be traced in part to the irregularity of the flow of the Laramie River, the inadequate storage capacity in the system which prevents the District from capturing surplus water available during years of high flow for use in drier years, the loss through seepage in the 80 miles of main canals and the many laterals and some past inefficient administration of irrigation water. In 1956 the District attempted some corrections in the system by enlarging Reservoir No. 1 to a capacity of 9,420 acre feet and by excavating

139. BUREAU OF RECLAMATION, FEASIBILITY REPORT, WHEATLAND UNIT, WYOMING (June, 1962).
140. *Ibid.*
141. BUREAU OF RECLAMATION, RECONNAISSANCE REPORT, SUPPLEMENTAL WATER SUPPLY, WHEATLAND AREA, WYOMING 22-23 (Feb., 1958).
142. *Ibid.*
143. *Ibid.*

a canal in the bottom of Reservoir No. 2, which decreased the dead storage space and enlarged its total capacity to 98,900 acre feet. But the major cause of shortage remained: the District's water rights, junior to those of many ranchers upstream, were insufficient to supply the project except in extraordinary years and the average flow was incapable of producing sufficient average annual supply, no matter how much the storage was increased.

For many years supplemental sources of water have been sought. In 1954 the Governor of Wyoming[144] instigated an investigation of possible methods of improving the water supply, which was prepared by a firm of consulting engineers and paid for by the Wyoming Natural Resource Board.[145] One alternative suggested in the engineering report was a transbasin diversion from Rock Creek. Not far above Reservoir No. 2, but almost sixty miles from the irrigated lands, a low divide separates Rock Creek, after it emerges from its canyon in the Medicine Bow Mountains, from the Laramie River. Investigation by representatives from the District disclosed there was a possibility that the Ringsby Ranch, on Rock and Dutton Creeks, might be for sale. On the ranch is the Canyon Ditch, which takes water from Rock Creek into the drainage of Dutton Creek, which empties into Cooper Lake, normally a closed basin. In times of extraordinary high water, Cooper Lake overflows into the Laramie River and deepening this channel offered a feasible method of getting Rock Creek water into the Laramie River above Reservoir No. 2. The Ringsby Ranch contains over 40,000 acres, about 15,000 of which are irrigated. Approximately two-thirds of the irrigated portion lies in the Dutton Creek drainage, the remaining third lying in Rock Creek drainage. The ranch has 31 direct flow water rights, 22 with priority dates before 1909 and 9 subsequent to that date. In addition it had several storage rights. Water use studies indicated that an annual average of 7,500 acre feet of water was available for transfer from the Ringsby Ranch to the Wheatland Irrigation District, assuming that the pre-1909 direct flow

144. At that time the Governor was the Hon. Milward Simpson.
145. J. T. Banner & Associates, Report on Proposed Methods for Augmenting Laramie River Basin Water Supplies (1955).

rights could be legally transferred from one point of use to another.[146] In 1958 the District purchased the ranch for $1,000,000, financed by a loan from the Wyoming Farm Loan Board. Studies by appraisers indicate that the purchase price included $250,000 for the early water rights, which means that the District in effect paid $33.33 per acre foot per year for each of the 7,500 annual acre feet available.[147]

In April, 1958, the District filed a series of petitions[148] to effectuate the changes in point of diversion and place of use. One was for the transfer of pre-1909 appropriations for 529 acres in the Dutton Creek Basin, which were irrigated with water from small tributaries of Rock Creek. Another was for the transfer of early appropriations from Rock Creek, used on 2,383.9 acres in the Rock Creek Basin. A number of irrigators of lands from Rock Creek, mostly below the Ringsby Ranch, formed the Rock Creek Water Association and filed objections to the petition. Carbon County, in which the Rock Creek lands are located, joined them.

The water users' objections were as follows:

(1) The Wyoming statutes prohibit the detachment of direct flow water rights from the lands for which they were appropriated;

(2) Even if it was admitted, for the sake of argument, that such water rights can be detached from the lands of the Ringsby Ranch, the petitioner could not sustain its burden of proving that no injury would occur to other appropriators by this action;

(3) The rights of other appropriators in the watersheds and drainage areas would be substantially and materially injured or prejudiced by the proposed changes in place of use, conveyance, diversion, time of use and manner of use;

146. Wayne D. Criddle, Transfer of Water from Rock Creek to Laramie River Drainage, June, 1958; Ringsby Ranch Steering Committee, Ringsby Ranch Water Yield Study, December, 1960. Both of these documents are on file at the law offices of Jones & Jones, Wheatland, Wyoming.

147. Marshall & Stevens, Valuation Report No. 23 (Dec. 31, 1959), on file at law offices of Jones & Jones, Wheatland, Wyoming; BUREAU OF RECLAMATION, REPORT ON THE WHEATLAND UNIT, WYOMING, MISSOURI RIVER BASIN PROJECT, PRELIMINARY FINDINGS FROM FEASIBILITY STUDIES 7-8 (1961).

148. Several of these dealt with transfer of the reservoir rights and are discussed *infra* notes 171-173 and accompanying text.

(4) The proposed changes would result in a decreased beneficial use of the waters of Rock Creek and its tributaries; and

(5) The changes proposed were contrary to public interests. The county's objection was that its tax revenues would suffer since the assessed value of the dry lands would be materially less than their value as irrigated lands.

Hearings were postponed until a consumptive use study and report could be made by a consulting engineer for the District.[149] The Board of Control sat for three days beginning January 3, 1964, hearing evidence and arguments, and later received briefs of the parties. On November 19, 1964, it issued its orders.[150] An Assistant Attorney General attended the hearings as counsel for the Board and the orders were unusual in that they contained both findings of fact and conclusions of law.

The material conclusions of law were that "Direct flow rights of water accruing prior to February 20 ,1909, the effective date of Chapter 68, Session Laws of Wyoming, 1909, now Section 41-2, Wyoming Statutes, 1957, may be transferred, if not injurious to the rights of others," and, "Any county tax loss as a result of changes here authorized is immaterial."

In the Dutton Creek Basin case, the Board found that the appropriations sought to be changed furnished no return flow to the Rock Creek Basin, and permitted the transfer of the total diversion under the rights,[151] a change in their point of diversion to the Canyon Ditch and their transmission to the Laramie River and use on the lands within the Wheatland Irrigation District. The only conditions attached to the order prevented interference with existing water rights on Dutton Creek not owned by the District.

In the case of the water rights used in the Rock Creek Basin, the Board found that the average stream flow deple-

149. Ringsby Ranch Steering Committee Report, *supra* note 146.
150. Petition of Wheatland Irrigation District, State Board of Control, Order Record No. 16, pp. 1-26, November 19, 1964.
151. The order was granted subject to the condition that the change should not affect the amount of water historically available to two other described water rights drawing from Dutton Creek.

tion resulting from the consumptive use of water on the Ringsby Ranch was 1.42 acre feet per acre each year, and that by allowing a margin for error and restricting the amount of water diverted, no other appropriator would be injuriously affected by the change. The order permitted the transfer of 50% of the basic appropriation of one cubic foot per second for each 70 acres and 25% of the excess water allotted under the Surplus Water Act,[152] and limited the time of diversions to May 1st to July 15th of each year. The points of diversions of the rights involved were changed to the Canyon Ditch.

The order was entered on January 15, 1965. An attempt to raise funds for an appeal failed, as most of the ranchers in the Association felt that the conditions in the order adequately protected their interests.

D. Reservoir Rights

The basic no-change statute of 1909 was directed at "water rights" without distinction.[153] The 1921 amendments restricted its application to "water rights for the direct use of the natural unstored flow of the stream," and added express declarations that reservoir waters and rights shall not attach to particular land except by deed, and that they may be sold, leased, transferred and used on any land.[154] A description of the difference between direct flow and storage rights may be helpful at this point.

Originally, the basic Wyoming water statutes of 1890, which created the first administrative procedure for obtaining water rights, made no such distinction and provided a single process for obtaining permits to appropriate water.[155] In 1903, a separate procedure was established for "primary permits" to construct reservoirs[156] and for "secondary permits" to "appropriate" [apply] the stored water to particular

152. WYO. STAT. §§ 41-182 to -188 (1957). Under this statute water flowing in excess of the total amount required by all appropriations existing on March 1, 1945, is surplus water. Each such appropriator is entitled to divert an additional one cubic foot per second for each 70 acres, or his proportionate share of surplus water, if he can apply it to a beneficial use. All permits for water rights granted after March 1, 1945, are subject to such surplus water rights.
153. Wyo. Laws 1909, ch. 68, § 1 (now WYO. STAT. § 41-2 (1957)).
154. Wyo. Laws 1921, ch. 161, § 1 (now WYO. STAT. § 41-2 (1957)).
155. WYO. STAT. § 41-201 (1957).
156. WYO. STAT. § 41-26 (1957).

lands.[157] The priority of the right to impound and store water was fixed as of the date of filing the application for the primary permit,[158] rights to the use of the stored water could be acquired by agreement between the storer and user, and the water could be used at such times and in such amounts as the water users might elect.[159] No limits were placed on the amount of water that could be stored and used by the appropriator on the land for which appropriated. In contrast, direct flow rights could only be used at the rate of one cubic foot per second for every 70 acres.[160]

Although the original statute providing for secondary permits was mandatory in form,[161] it was in fact permissive, at least where the owner of the reservoir was the same person planning to use the impounded water.[162] It was ignored by some reservoir companies whose stock represented a share in the stored water. Stored water is very often used as supplemental water to give the holders of junior appropriations from streams a supply for use later in the summer when stream flows are low. Secondary permits were not used by the owners and co-owners of many small reservoirs where flexible use of the supplemental water was desired. On the other hand, the Bureau of Reclamation filed applications for secondary permits for the waters of all its reservoir projects.

Presumably the 1909 no-change statute applied to these rights to stored water although it ran counter to many of the above practices. To legalize and formalize these practices, the legislature modified the statute in 1921.[163] In addition, it passed a supplementary law providing that the owner of the resorvoir was the owner of the right to impound the water and of the right to sell or lease a portion or all of his right;[164] that reservoir water and rights shall not attach to any particular land except by deed and except when so attached may

157. WYO. STAT. § 41-27 (1957).
158. WYO. STAT. § 41-35 (1957).
159. WYO. STAT. § 41-28 (1957).
160. WYO. STAT. § 41-181 (1957).
161. "The party or parties proposing to apply to a beneficial use the water stored in any such reservoir *shall* file with the State Engineer an application for permit, to be known herein as the secondary permit . . . ." Wyo. Laws 1907, ch. 86 § 16 [emphasis added].
162. Condict v. Ryan, 79 Wyo. 231, 335 P.2d 792 (1959).
163. Wyo. Laws 1921, ch. 161, § 1 (now WYO. STAT. § 41-2 (1957)).
164. WYO. STAT. § 41-34 (1957).

be sold, leased, transferred and used on such lands as the owner may desire;[165] that reservoir water was to be distributed by the water superintendent to the persons entitled to it in each season;[166] and that deeds for reservoir water and water rights and leases for periods for more than three years must be executed and acknowledged and recorded both with the County Clerk and the State Engineer, and all leases for shorter periods must be filed with the State Engineer.[167] Where such deeds exist, secondary permits have seldom been used.

Another element of flexibility was introduced by the last section of the 1921 statute, which required the owners of a reservoir impounding a greater quantity than needed for irrigation of their own lands to furnish such surplus water at reasonable rates to the owners of land capable of being irrigated with the water.[168] This supplemented an existing statute, which had in territorial days declared the owner of any ditch or reservoir having surplus water to be considered as a common carrier.[169] Secondary permits are not issued to temporary recipients of surplus water under this act.

In 1939 the secondary permit law was amended to clearly state its permissive nature, and its procedures were made applicable only "in the event secondary permit may be desired."[170] Nevertheless, State Engineers have consistently urged the owners of permanent or long term rights to impounded waters to secure secondary permits, in order to provide a record of their titles and to protect future purchasers of reservoirs and land irrigated from reservoirs.

1. *The Park Reservoir Company.* Many of these practices are illustrated by the experience of the Park Reservoir Company, the owner of the Big Goose Park Reservoir located near the city of Sheridan. The reservoir has a storage capacity of 8,908 acre feet. The original appropriation was for 5,055 acre feet with a priority date of January 7, 1908, and three enlargements, the most recent in 1957, have brought it up to the present size. All of its water rights were obtained

165. WYO. STAT. § 41-37 (1957).
166. WYO. STAT. § 41-36 (1957).
167. WYO. STAT. § 41-38 (1957).
168. Wyo. Laws 1921, ch. 141, § 5 (now WYO. STAT. § 41-39 (1957)).
169. WYO. STAT. § 41-47 (1957). For the operation of this statute, see Lake DeSmet Reservoir Co. v. Kauffman, 75 Wyo. 87, 292 P.2d 482 (1956).
170. WYO. STAT. § 41-27 (1957).

under primary permits and no secondary permits have ever been issued.

The water in the reservoir is represented by 8,000 shares of stock in the company, each share entitling the holder to approximately one and one-eighth acre feet of water, depending upon the amount of storage each year. These shares and the storage rights they represent are sold, leased and transferred freely, without petitioning the Board of Control for permission to do so. Two examples taken from the records of this company illustrate two different types of action: the transfer of a permanent water right; and the sale of water as such, accomplished by a "lease" of shares.

The first example involves seven shares of the Park Reservoir Company owned by Martha E. Stevens and used by her in the irrigation of her lands. In 1963, she sold these shares to Pannetta Brothers of Sheridan. Since the transfer, the Company has not delivered water to Mrs. Stevens' land, but has delivered water represented by the shares to different land owned by the purchaser.

The second type of transaction is exemplified by the Whitney Benefit Corporation of Sheridan, which owns 156 shares in the company and uses the water represented by the shares on a ranch owned by the Corporation. In some years the ranch does not use all its water and the unused amount is put up for sale. The purchasers are other ranchers and farmers whose lands lie within the general service area of the Colorado Colony Ditch, down which the stored water can be delivered. The price is determined by mutual agreement. Since the water is offered in the fall, its value may be high to persons needing late-season water to mature crops and prices have ranged from $1.00 to $3.50 per acre foot. The Company is notified that the shares have been "leased" and makes delivery of the water represented by the shares to the designated "lessee."

2. *Ringsby Ranch Reservoir Rights.* A transfer of the place of use of reservoir water on a fairly large scale was involved in the Wheatland Irrigation District's purchase of the Ringsby Ranch in order to augment its water rights.[171]

171. See notes 138-152 *supra* and accompanying text.

On the Dutton Creek drainage of the ranch, the Dutton Reservoir was constructed in 1904 and has been enlarged several times. It has three early rights from Dutton Creek. When the Canyon Ditch was built in 1920, the reservoir was again enlarged to store water transported from Rock Creek. The ditch also supplied King No. 1 Reservoir in the Dutton Creek drainage. The ranch had three late storage rights in two other reservoirs, Bosler and McFadden, in the Rock Creek drainage. In 1954 the predecessors of Ringsby constructed the Sand Lake Reservoir high on the headwaters of Rock Creek in the Medicine Bow Mountains. All of these rights totaled 10,762 acre feet, but the actual storage in average years has been considerably less than this figure due to the late priority dates of many of the rights.

When the ranch was bought by the District the reservoir waters were a large factor in the purchase. The water of Dutton and King No. 1 Reservoirs can be released from Dutton Creek to the Laramie River above the District's Reservoir No. 2, thence transported to the lands of the District. Water released from Sand Lake Reservoir can be diverted through the Canyon Ditch to Dutton Creek. McFadden and Bosler Reservoirs lie below the Canyon Ditch, so their waters cannot be directly transported to Wheatland, but the transfer can be accomplished by an exchange arrangement.[172] Water will be stored in the reservoirs in accordance with priority. When the water is needed by the District, it will divert the direct flow of Rock Creek into the Canyon Ditch and release an equivalent amount from the reservoirs. The appropriators downstream who are entitled to the direct flow water will receive the stored water instead.

The legal procedures for accomplishing these transfers are simple. No secondary permits have been issued for Sand Lake so that water was not attached to any particular land and could be transferred at will. Secondary permits had been issued for the other reservoirs and some of the water was used on lands owned by others. Petitions requesting the cancellation of the secondary permits on the Ringsby Ranch lands

172. This practice is permitted by WYO. STAT. § 41-42 (1957).

were filed with the Board of Control simultaneously with those requesting transfer of the pre-1909 rights. No serious objections to these petitions were raised as separate issues and the petitions were granted on November 19, 1964.[173]

E. Amendment of Permits and Certificates

The statute that authorizes the State Engineer or the Board of Control to amend the land description in the basic document evidencing the water right has been hedged with many restrictions.[174] The operation and practice of the statute is illustrated by two cases, one in which a transfer of the right to different land was permitted and one in which a proposed transfer was blocked.

1. *Horse Creek Conservation District.* This organization, which has the legal status of an irrigation district, has an appropriation for the Hawk Springs Reservoir and one from Horse Creek, a tributary of the North Platte River in Goshen County. Joseph H. and Olga Montague, and William A. and Ida Gibson owned a total of 308 acres of land under the Hawk Springs Ditch. They held a proportionate interest in the District's appropriation and their lands were included within the District. Thirty-two acres became seeped through leakage from the ditch and unfit to produce crops. The alkaline content of the land was high and the cost of reclaiming it would have been prohibitive because the elevation of the land was so low that it could not be drained by gravity.

About one mile east of these lands the owners held another tract of good quality. It was within the external boundaries of the District but was not entitled to water and was not charged with any liens of indebtedness or assessments for benefits. The owners proposed to the District that the water rights be shifted from the seeped land to the good land. The District agreed to this and on June 2, 1951, it filed with the Board of Control a petition entitled, "Petition to Correct Mis-Description in Permit 8514 by Amendment of Land Description Therein." On a recommendation of the Board, made for the purpose of protecting the bondholders of the District,

173. Petitions of Wheatland Irrigation District, Wyoming State Board of Control, Order Record No. 16, pp. 29-27, Nov. 19, 1964.
174. WYO. STAT. § 41-213 (1957), discussed *supra* notes 27-33.

the landowners entered into a contract with the District in which it was agreed that if the petition to transfer were granted by the Board, the District would petition the District Court of Goshen County to transfer the indebtedness of the seeped land to the new land and have the new land made subject to an assessment of benefits for construction costs. Such a petition was filed and the court found that the contract was in the best interests of the District and ordered the transfer of the water right and the assessment of the new tract in order to secure the bonded indebtedness of the District. The Board of Control then referred the "Petition to Correct Mis-Description" to the Superintendent of Water Division No. 1. A public hearing was held at Torrington on December 20, 1951, at which no one brought forth any objections. On April 16, 1962, the matter was heard by the Board of Control and the petition was granted.[175] Existing certificates of appropriation were ordered to be amended as requested and the District was ordered to supply water to the new 32 acre tract for irrigation, stock and domestic use.

In this case, the amount of water transferred was the gross amount of diversion from the ditch for the 32 acres, not just the amount consumptively used thereon. Here the withdrawals were from laterals from a ditch for the irrigation of land under the ditch, and each withdrawal from the ditch depleted the flow by the gross amount. Return flows were to Horse Creek and presumably no lower appropriators were injured since return flows would be approximately the same from both tracts and would reach the stream at approximately the same point, regardless of which tract was irrigated.

2. *Lincoln Land Company.* The Lincoln Land Company is a Nebraska corporation licensed to do business in Wyoming. It owns a large tract of land in Goshen County in southeastern Wyoming. Water for the land is obtained under two appropriations from the North Platte River through the Rock Ranch Ditch, owned and operated by the Company. The largest appropriation is for the irrigation of 2,595 acres with a

175. Petition of Horse Creek Conservation District, State Board of Control, Order Record No. 12, p. 294, April 16, 1952.

priority of Spring, 1884, the other is for an enlargement of the ditch to irrigate 911.5 additional acres with a priority of January 3, 1910.

The land is subdivided into 40-acre units, some of which have been sold for industrial purposes and some dedicated and platted as subdivisions. Most are occupied by tenant farmers. The Company intended to make further sales of the land but was hampered by what it considered an inequitable or uneconomic distribution of water rights on the land. Therefore, it proposed to make a reallocation of the water in a manner which would entitle all of the land retained by it to both early and late priority water, in other words, to intermingle the 1884 and 1910 rights and spread the water obtainable under each evenly across all of the land.

A petition for amendment of the Company's certificates of appropriation was filed on October 16, 1962. The Company set forth its reasons for desiring a more equitable distribution of water on the land in order to facilitate further sales of the land and also claimed some errors in the original surveys, the correction of which would accomplish approximately the same result.

The matter came before the Board of Control on November 24, 1962. No protest was entered and there was no showing that any injury to other appropriators would occur if the petition was granted. Nevertheless, on the same day an order was made denying the petition.[176] The Board conceded that the redistribution of the early and late water would be advantageous to the Company and would enable it to make further sales of land. But the Board found that there was no substantial error in the original survey and "that the petitioner is, in fact, seeking a re-distribution and re-allocation of both the Territorial Right . . ., and the later right . . . in order that the irrigable lands will have the early and late water rights." Despite the facts that all of the 40-acre units upon which the changes were to be made were owned entirely by the petitioner, that nearly all of the land serviced by the Rock Ranch's Ditch was owned by the petitioner and the

176. Petition of Lincoln Land Co., State Board of Control, Order Record No. 15, p. 82, November 24, 1962.

conceded advantage to the Company, the Board decided, "it does not appear to the Board that the petitioner should be permitted to change the historical allocation of water rights for irrigation of said lands by allowing territorially appropriated water to be used on lands which have only been irrigated by water under a permit which is more than 25 years later in priority." Apparently, the Board felt strongly that the original policy behind the 1909 no-change statute outweighed the powers granted to it under the 1945 statute permitting changes in the land description of water rights "when in the judgment of the said board it appears desirable or necessary . . . ."[177]

The Company eventually obtained most of its objectives under a later proceeding. A new "Petition for Amendment of Certificates of Appropriation" was filed on October 23, 1963, emphasizing the errors in the original surveys and requesting that the land actually irrigated by the two rights be more accurately described by ascribing the 1884 right to 30 acres in each 40 acre tract and the 1910 enlargement to 10 acres in each. Again there were no protests. At the hearing before the Division Superintendent, it was argued that the object of the petition was to confirm actual practices. The Attorney General objected that these 30 and 10 acre rights would be "wandering" within the larger area of each tract, and to meet this objection the petition and its accompanying maps were amended to identify the particular acres of the tract to which each applied. In most cases the 1910 right was made appurtenant to the north 10 acres and the territorial rights to the south 30 acres. An order granting the amended petition and so identifying the land entitled to each right was entered on November 18, 1964.[178]

The evidence was meager, and it is doubtful that this arrangement in fact merely confirms past practices. In any case, the order does change the description of both rights and applies each to land formerly covered by the other. To this extent it appears to represent a change in heart on the part

177. WYO. STAT. § 41-213 (1957).

178. Petition of Lincoln Land Co., State Board of Control, Order Record No. 16, p. 79, November 18, 1964.

of the Board and a willingness to allow a departure from the historical allocation of water.

As a practical matter, this awkward and complicated seeming arrangement will accomplish most of the purposes of the Company. As long as a tenant or a purchaser of a 40-acre tract holds it intact, it is improbable that any complaint will be made that one right is being applied to the wrong acreage, or that a water commissioner will follow the territorial water through the laterals to see that all of it is applied to the south 30 acres and that that part of the crop on the north 10 dries up. But if the north 10 acres should ever be severed, it would have only the 1910 right attached to it and have no call on the 1884 right.

F. "Exchange" Agreements between Appropriators

1. *Owl Creek Irrigation District.* Owl Creek is a tributary of the Big Horn River in north central Wyoming, entering the main stream north of Thermopolis. The creek's waters were over-appropriated by ranchers in its valley and supplemental water was badly needed to firm up the supply and give all the ranchers sufficient water in the latter part of the irrigation season. When the Bureau of Reclamation planned Boysen Reservoir as a major unit of the Missouri River Basin Project, it was seen that water stored in the reservoir could be released down the stream to Lucerne near Thermopolis and pumped through a pipeline up the Owl Creek Valley. Pumping costs made this feasible for only the lower half of the valley. Many of the water rights in this end were the earlier rights needing supplementation the least. To spread the benefits of the project, the suggestion was made that those ranchers in a physical position to receive pumped water might substitute it for the natural flow of the creek and release their water rights for use by junior appropriators in the upper valley above the pipeline outlet. In this fashion, the entire valley could receive benefits from the pumped water and all landowners could be assessed to pay operation costs, the costs of the pumping plant and a part of the costs of Boysen Dam.

In 1947 the Legislature passed statutes permitting agreements between appropriators for the delivery of water from

another source, where the source of their appropriations was insufficient or a fuller conservation and use of the state's water could be accomplished.[179] The project was then initiated and the Owl Creek Irrigation District was formed, covering all the lands involved. In 1955 the United States and the District entered into a contract under which the United States agreed to furnish water to all of the lands in the District. "Exchange agreements" were then made with the landowners in the lower valley. Typical of these is the one made by C. W. and Clare Axtell with the United States, which acted through S. M. Clinton, Regional Director of the Bureau of Reclamation.

The Axtells had two direct flow water rights to the same ditch, with priorities of 1896 and 1909, for the irrigation of a total of 27 acres of described land. After recitals referring to the statute and to the contract with the District, the agreement provided:

> In consideration of the United States' construction of the Lucerne pumping plant, as defined in the contract, and the delivery for the use of the undersigned of stored and natural flow waters of the Big Horn River under the terms of the contract, undersigned agree that the waters of Owl Creek to which they are entitled under their appropriative rights for the land below described, shall be made available to the United States for storage or for furnishing to other lands of the Owl Creek unit of the Missouri River Basin Project pursuant to the contract; it being understood that such exchange of water and its use shall be without prejudice to, but in the enjoyment of the right of the undersigned to their original appropriations in Owl Creek; and that such exchange of water may continue so long as pump water is made available pursuant to the contract to the below described lands for irrigation purposes. Nothing contained herein shall be construed as an abandonment or intent to abandon water for such lands.[180]

Since the agreements have been put into operation, the water formerly diverted through the Axtell's ditch is now

179. WYO. STAT. §§ 41-5 to -8 (1957) reprinted *supra* p.p. 15-16.
180. Exchange Agreement, dated Dec. 19, 1955, on file, office of State Engineer, Cheyenne, Wyoming.

delivered to the District at ditches far upstream and is distributed to lands in the District above the outlet of the pumped water.

2. *Wheatland Irrigation District—Ringsby Ranch.* The needs of the Wheatland Irrigation District, and its purchase of the Ringsby Ranch to provide a partial solution to its water shortage, have been described above.[181] The Board of Control has permitted the District to transfer the reservoir water formerly used on the ranch and to transfer the use of pre-1909 rights from lands riparian to Rock and Dutton Creeks, to the District's lands 60 airline miles away. About 7,500 acre feet per year can be realized from these transfers, perhaps one-fourth of the needed amount. Yet engineers estimate that this supply could be doubled (and the District's shortage halved) by also transferring the post-1909 rights.

The Canyon Ditch diverts from Rock Creek as it emerges from the Medicine Bow Mountains and takes the water around the foothills into the drainage of Dutton Creek. It has been enlarged several times and carries water rights totaling 34.63 cu. ft. of water per second, with priorities of 1920 and 1921, and 81.92 cu. ft. per second with a priority of 1944. All of the water is used outside of the Rock Creek drainage, so none of this diversion returns to Rock Creek for use by lower appropriators. Some of this water was applied to new land, but most of it is used to supplement the supply for lands irrigated from Dutton Creek and its tributaries. Dutton Creek's watershed is in the foothills and its spring flows are early and of short duration. Rock Creek is fed by the deep snowpacks high in the mountains and its runoff is later and more sustained. In its high water period, these junior priorities can divert large quantities which could be run down into the Laramie River and used for field crops in the Wheatland District instead of being applied to the hay lands and irrigated pasture near Dutton Creek.

Since these rights have not been transferred, this situation can be presented only as a potential case. In 1957, the opening negotiations between the District and the owners of the Ringsby Ranch took the form of an offer to buy only the

181. See notes, 138-152 *supra* and accompanying text.

water rights of the ranch. Attorneys for the District requested an opinion from a consultant on the legality of such a purchase. On this phase of the problem his opinion quoted the "exchange" statute and continued:

> The literal terms . . . seem to give unequivocally the right to make such an arrangement as is contemplated. Ringsby and the District are both appropriators from Wyoming streams. The source of the Laramie River is insufficient to supply the District's right. I think it can be assumed that the use of the water to grow crops within the Wheatland District would be a fuller conservation and utilization of the state's water than its use to grow hay at its present location. Therefore, an arrangement can be made between these appropriators for the delivery and use of storage and direct flow water from another source to the Wheatland District. The District would use it in the enjoyment of its right under its original appropriation, that is, it would not attempt to develop new land, but would use it as an additional and supplemental supply to insure adequate water on the lands presently within the District and give the area the basis of a sound, prosperous economy. [The opinion then noted that the later sections of the Act referred to "exchange agreements," and recited the Owl Creek situation.] Although this legislative history explains the reason for the term 'exchange agreement' in the later sections of this Act, I do not believe that the entire Act is limited to such arrangements. As demonstrated above, the arrangements between Ringsby and the District would come literally within every term of [the statute]. The Legislature is forbidden to pass local or special laws in any case where a general law can be made applicable. Article 3, Sec. 27, Wyoming Constitution. The statute, though it may have been designed to cover the Owl Creek situation, quite obviously has a broader application and covers other types of agreements, including the one contemplated between Ringsby and the District.[182]

The Natural Resources Board, which was investigating the proposal since its approval was required for a loan from

182. Letter from Frank J. Trelease to Wheatland Irrigation District, March 25, 1957.

the Wyoming Farm Loan Board, requested an opinion from the Attorney General and submitted, among others, the following question: "No. 3: Can the Wheatland Irrigation District, under the provisions of [Secs. 41-5, 41-6, Wyo. Stat. 1957] arrange by agreement with the Ringsby interests for the delivery and use of direct flow water from Rock Creek . . . for use on district lands in Platte County, Wyoming?" The answer was, "Yes, with qualifications." The qualifications were if "a plan could be worked out so that Rock Creek appropriations would not be injured," and that the statute providing for exchange agreements "is so broad in its wording that it is quite possible the courts would sustain the agreements between Ringsby and other water users on Rock Creek with the Wheatland District."[183]

After the purchase of the ranch had been consumated, there were no longer two parties to make an agreement. Assuming that the transfer could have been accomplished through an agreement before the purchase, it would be a strange phenomenon indeed if a purchase were to be a reason for prohibiting it, when the very purpose of the purchase was to enable the District to acquire a supplemental supply of water. Other water arrangements indicate that this unity of ownership would be no bar. The statute on rotation permits exchange of water between different appropriators, or "a single water user, having lands to which water rights of a different priority attach, may in like manner rotate in use . . . ."[184] The original case permitting change in place of use of water in Wyoming dealt with the sale of the water,[185] but a later case said that this permitted the owner of two tracts to change his appropriation from one to the other.[186]

Shortly before proceedings were started to effectuate changes from the ranch to the District, the question was again put to the Attorney General. That office had changed hands in the meantime and this time the reply was less favorable: "With respect to transfer of direct flow rights accruing sub-

183. Letter from Howard B. Black, Deputy Attorney General, to Natural Resources Board, March 26, 1957.
184. WYO. STAT. § 41-70 (1957).
185. Johnston v. Little Horse Creek Irrigating Co., 13 Wyo. 208, 79 Pac. 22 (1904).
186. Hughes v. Lincoln Land Co., 27 F. Supp. 972 (D. Wyo. 1939).

sequent to the 1909 Act, it is possible, of course, that under some facts and circumstances some such transfer might be worked out, but I am presently of the view that I do not have a sufficiently concrete proposal or set of facts which would warrant a conclusion that this statutory method of transfer might be utilized in working out the troubles of the Wheatland Irrigation District. Consequently, at this time I express no opinion with respect to the matter."[187] The proposals for changing the reservoir rights and the pre-1909 rights were again approved as legal. As a matter of tactics, the District chose to act only on those phases of the case on which the Board of Control had a clear legal opinion from the Attorney General and chose not to complicate its petitions for changing the reservoir and pre-1909 rights by joining this more doubtful proposal. No steps have yet been taken to secure "a fuller conservation and utilization" of the post-1909 rights.

As an aside, something very like this is planned by the District for some rights drawing directly from Dutton Creek. The Ringsby ranch was the principal user of Dutton Creek water and only two other small rights are owned by other ranchers, one in the foothills above Ringsby and one below at the mouth of the creek in Cooper Lake. The Ringsby rights call for 49.59 cubic feet per second for the irrigation of 2,752.7 acres. Instead of transferring these rights when it purchased the ranch, the Wheatland Irrigation District filed an application for a new appropriation of 252 cubic feet per second of Dutton Creek (surely its maximum conceivable flow) through the Dutton Creek-Laramie River Ditch (which will be the deepened drain of Cooper Lake into the river).[188] The plan of operation is to let all of the Creek's flow, except that needed for the other two small rights, run into the river and down to the District as supplemental supply. Despite the late priority of this right (July 10, 1958) it will receive practically all of the water in the creek since the District will never call

187. Memorandum, Norman B. Gray, Attorney General, to Steering Committee, July 5, 1960.

188. Application No. 17-4/241, filed July 10, 1958, office of the State Engineer. The Ringsby rights from Dutton Creek bear priority dates from 1884, 1904 and 1908.

for the Water Commissioner to regulate its junior rights in favor of its senior ones.

G. Submerged Lands.

Glendo Reservoir. Although the statute allowing the water rights appurtenant to lands submerged by reservoirs to be changed to other lands has been in effect in one form or another since 1951,[189] not much activity has taken place under it. The Boysen Reservoir on the Big Horn River, completed in 1951, covered only one tract of irrigated land and the United States, through the Bureau of Reclamation, purchased the water right along with the land, but never transferred it to a new use. The Yellow Tail project farther down the Big Horn and the Fontenelle project on the Green River are not yet complete. However, Glendo Reservoir on the North Platte River, completed in 1958, covered 3,116 acres of formerly irrigated land and both types of transfers contemplated by this law will be applied to the water rights.

One type of transfer was made by J. Byron Wilson, who owned a large amount of land in the upper end of the reservoir site. He had one small tract of 167 acres on the south side of the river, irrigated by a territorial water right from the Platte Valley Ditch No. 1. When this land was condemned as part of the Glendo flowage, he received a dry land price for the land and retained the water right. He changed the point of diversion and place of use to an equivalent acreage of retained land on the north side of the river, above the maximum reservoir level.[190]

The other type is illustrated by a petition filed by the Bureau of Reclamation,[191] but not yet acted upon. The rest of the irrigated land overflowed by Glendo was condemned at its full value as irrigated land and the United States obtained title to the appurtenant water rights as well as to the land. The petition requests that the place of use of these rights be changed from the lands riparian to the river to

189. WYO. STAT. § 41-9 (1957).
190. Petition of J. Byron Wilson, State Board of Control, Order Record No. 14, p. 269, Nov. 20, 1958.
191. Filed in the office of the State Engineer Oct. 15, 1962.

lands in the vicinity of North Bear Creek near Cassa. The plan of operation calls for the pumping of water from the reservoir over a low divide to the Bear Creek basin, whenever the river is at a stage that would have allowed the old ditches to draw water. The title to the water rights will be transferred to the irrigation district distributing the project water. In this fashion the Bureau of Reclamation will acquire early priority direct flow water rights to add to the project's late priority stored water supply.

Up to the present time only the Bureau of Reclamation has undertaken construction of the large reservoirs that have involved consideration of this statute. However, the wording of this section appears to broad enough to allow individual owners to construct reservoirs on their own land and then petition to have their water rights transferred for use on the land outside of the reservoir basin. This provision could encourage small projects and the construction of private reservoirs that will cover irrigated lands, by avoiding the loss of irrigated land and retaining for the new project the early priority of the water right for the submerged land.

H. Steam Power Plants.

Pacific Power and Light Company. In 1955 steam power plants were added to the list of preferred uses to which water rights could be transferred and were given limited powers of eminent domain. In 1957 this power was taken away, so that the "preferred" status of this use today means only that this industry is one which is privileged to buy water rights on the open market.[192]

The only case in which this has been done involves the Dave Johnston Plant of the Pacific Power and Light Company, approximately six miles east of Glenrock in Converse County. The company distributes electricity through its system over five states including Wyoming. In order to meet growing demands, Pacific found it necessary to construct a large steam power electric generating plant. The plant has an initial capacity of 100,000 kw. To satisfy the need for cooling and condensing water required by the plant, Pacific pur-

192. See notes 38 and 39 *supra* and accompanying text.

chased 2.70 cubic feet per second on April 11, 1956, from Gus F. Engelking and Jessie C. Engelking for one dollar and other good and valuable consideration.

The appropriation which has a priority of September 9, 1896, was taken from the North Platte River through the Keck and Olson Ditch and was used for irrigating 189.3 acres of land west of Glenrock. Pacific proposed to change the use from irrigation to preferred use for steam power plant purposes and to change the point of diversion and means of conveyance downstream to the intake for the plant.

A petition for approval of these changes was filed on April 16, 1956, and the Board of Control referred the matter to the Division Superintendent on May 11, 1956. Notice of hearing was published on May 31, 1956, and the hearing was held at Douglas, Wyoming, on June 29, 1956. No protest was filed and no one objected to the changes at the hearing.

On November 21, 1956, the petition received final consideration by the Board of Control and was granted. The appropriation of 2.70 cubic second feet was detached from the land on which it had been used for irrigation and changed to preferred use for steam power plant purposes, without loss of priority. The change in means of conveyance and point of diversion from the Keck and Olson Ditch to the plant was also allowed. The order was entered on July 3, 1957.[193]

The order makes no mention of what portion of the 2.70 cubic feet per second was returned to the stream after its use for irrigation before the sale, nor what portion would be consumptively used by the steam power plant. It permitted a change of the gross amount of the diversion, rather than of the depletion. Perhaps this is due to a tacit assumption or unstated finding that the consumptive use would not be increased. Nor did the Board include in its order the statement sometimes used in other types of cases, that the change in use and point of diversion must not injure other appropriators.[194] The change was made in a down stream direction and

193. Petition of Pacific Power & Light Co., State Board of Control, Order Record No. 13, p. 401, Nov. 21, 1956.
194. Town of Greybull case study, *supra* note 122 and accompanying text; United States Steel Corp. case study, *infra* note 19 and accompanying text.

apparently the consent of all intervening appropriators on the river between the old and new points of diversion was obtained prior to the hearing, as the petition stated that the company was attempting to obtain these and no person appeared to object to the petition. If consumption was increased, possibly down stream users could be affected, but even a large proportionate increase would be a minuscule part of the flow of the river at that point.

I. Industrial Uses

The United States Steel Corporation. Large deposits of taconite iron ore have long been known to exist in the neighborhood of South Pass, the famous pioneer crossing of the lower Wind River Mountains. In the late 1950's technological developments in metallurgy had made this type of ore economically exploitable and the United States Steel Corporation investigated the possibility of the development of a mine and mill in that area. Water would be needed for the operation and representatives of the company raised the question of its availability under Wyoming law. Representatives of Fremont County procured the passage of an amendment to the statute in the 1957 Legislature which added "industrial purposes" to the list of preferred uses for which water rights might be purchased.[195] When this became law the Columbia-Geneva Steel Division of the United States Steel Corporation began to take steps toward the construction of a mill near Atlantic City, Wyoming, adjacent to Rock Creek, a tributary of the Sweetwater River. The plans for water supply included the Upper Rock Creek Reservoir just above the mill site. Since Rock Creek and the Sweetwater were fully appropriated, the company obtained, on April 11, 1958, an option to purchase four irrigation water rights totaling 9.63 cubic feet per second of water from Lawrence A. Hay, Hazel A. Gibson and Josephine Williams for a consideration of $59,200. A deed conveying the water rights to the corporation was placed in escrow pending the exercise of the option by the corporation. The option was to be exercised on satisfactory proof of ownership of the water rights and land to which they were

195. WYO. STAT. § 41-3 (1957).

appurtenant, and prior to the entry of an order approving a change in use of the water.

The water rights consisted of appropriations from the Sweetwater River for the irrigation of 677 acres of land lying about two miles above the confluence of Rock Creek and the Sweetwater. The proposed plan of operation was to store water in the reservoir during the periods when the rights permitted the withdrawal of water from the Sweetwater. The ditches would be closed so that the 9.63 cubic feet per second of Sweetwater water normally diverted would be left in the stream as replacement water for that retained by the dam on Rock Creek. Thus the proposal called not only for a change in the nature of the use, of the place of use and of the point of diversion, but also for a change of the source of diversion, from one branch of the stream to another.

On April 14, 1958, the corporation filed a petition to have the irrigation water rights changed to preferred uses for industrial, domestic, municipal, steam engines and power plants as described in the statute. No protest was filed and no one opposed the change at the hearings. Notice was published in three consecutive issues of the Wyoming State Journal commencing May 27, 1958. On June 11, 1958, the hearing before the Division Superintendent was held at Jeffrey City, Fremont County, and the United States Steel Corporation exercised its option to purchase on July 7, 1958.

Four days later the Board of Control considered the matter and made an order granting the petitions.[196] The water rights were severed from the land on which they were formerly used and the water was allowed to remain in the Sweetwater River to replace water stored in the Upper Rock Creek Reservoir and to replace water previously available to other appropriators from seepage and return flow from irrigation under these appropriations. The order stated that the change was to be made without loss of priority, provided that it would not injuriously affect other appropriators on Rock Creek. The entire transaction was characterized by speed and accommodation for the corporation. The final order consisting of

196. Petition of United States Steel Corp., State Board of Control, Order Record No. 14, p. 31, July 11, 1958.

four large typewritten pages was drafted and entered in final form by the Board of Control the same day it was granted, a record perhaps unequalled before or since by that body.

J. Highway Construction.

In the construction of highways, much water is sprayed on the land in the process of "prewetting" to make it easier to move and handle the dirt with bulldozers, and roadbeds are sprinkled at several steps in the building process to hasten settling. For years, water for these purposes has been taken from the nearest stream, sometimes without any formality or payment, sometimes under informal sales and arrangements made with the owners of appropriations. The 1959 Legislature set up a procedure for formalizing and handling these arrangements.[197]

About 25 of these cases have been processed by the office of the State Engineer. Typically, the State Highway Department and the road contractor enter into a standard form of agreement with a rancher,[198] which specifies the maximum quantity that may be taken, or the maximum rate at which the water can be withdrawn, or both.[199] The standard form recites that the transfer is made for $1.00 and other good and valuable consideration, so actual prices are not usually of record.[200] The agreements run for the statutory two year period and each is accompanied by a sketch map showing the proposed point of diversion from the ditch or stream and the place of use.

These agreements are first approved by an Assistant Attorney General and filed with the State Engineer, who checks his files for the ownership of the water right by the seller. If the State Engineer approves a contract, he notifies the water commissioner in charge of the stream, who over-

197. WYO. STAT. § 41-10.1 (Supp. 1965).

198. To date all have been with ranchers except one such agreement has been made with a city and one with an irrigation district.

199. The largest stated quantity transferred to date has been 18,200,000 gallons, approximately 73 acre feet. A number of agreements express a rate of one cubic foot per second, which under continuous withdrawal could amount to two acre feet per day.

200. Some sales have gone as high as twenty-five cents per 1,000 gallons, $81.25 an acre foot. The consideration for one agreement was grading and graveling two-fifths of a mile of access road to a ranch house.

sees the diversion of the road contractors' share of the water. No protests have been filed by other appropriators against such agreements and no water user has followed the statutory procedure of causing the highway use to be stopped until his right is satisfied or it is proved that the highway withdrawal is not damaging him.

V. CONCLUSIONS

A. The Merits of the Present Law

The Wyoming law on the change of use and users of water rights is certainly not all bad. It certainly is not a bar to all transfers and all progress. It has good points as well as shortcomings. On the plus side it does permit the transfer of water rights in the most important areas of need. It takes care of the principal types of foreseeable future movements of water to higher economic uses—changes of irrigation water to municipal and industrial purposes. The power to purchase water rights is granted to some specific industries, such as railroad transportation, steam power production and highway construction, and many others are included in the generic term of "industrial uses." It is also probable that since most commercial users of water are located within and have a share of the water supply in the cities, their needs can be taken care of by expansion of "municipal" supplies, though they might not literally come within the definition of "industrial."

As for agriculture, Wyoming law permits the flexible handling of reservoir waters, the rotation of the use of water rights among different owners and the change by a single landowner from lands unfit for cultivation to better lands. In irrigation districts, areas served by insufficient junior water rights may be consolidated, with adjustments in the assessments. Although the Wyoming Supreme Court has not yet ruled on the question, a federal district court, four Attorneys General and a well established administrative practice indicate that the oldest and most valuable rights, antedating 1909, are freely transferrable. Water formerly used on lands put out of production by reservoirs may be transferred for the irrigation of new lands, used to supplement insufficient rights on currently irrigated land or used to further the pro-

ject for which the reservoir was built. Water rights may be rearranged under the Owl Creek statute to promote more efficient use and to enlarge irrigation projects and the basis of the assessments by which they are financed.

Ad hoc exceptions to the no-change statute have been made whenever the legislature has clearly seen that the statute would interfere with optimum use. The legislature has acted almost like a court handling specific cases. The need for legalizing the actual practices of reservoir owners came first. The steam power plant exception was made when a large metals company proposed an aluminum refinery powered by a plant that would utilize the coal fields near Sheridan. The general industrial exception was sparked by the prospect of attracting a large new iron mining and refining plant. The Owl Creek statute was passed to remove an obstacle to a Bureau of Reclamation project. The highway use statute was passed when the Interstate Highway program gently magnified this demand for water. The legislature, in the original submerged lands act, specifically named the reservoirs then proposed for construction by the Bureau of Reclamation, later, as new projects became active, it made a general exception. The statute permitting changes of water rights within districts, with adjustment of assessments, was passed at the behest of the Wheatland Irrigation District, which contains unwatered lands of good quality and has water rights for lands classified as unirrigable.

The no-change statute has not been allowed to create major diseconomies by blocking these particular projects or purposes, instead the legislature has permitted them, one by one. And though many of these acts were a grant or concession to a specific entity, each was in general terms and opened a door to others with similar needs.

B. The Disadvantages of the Wyoming System.

If the law works, it is hard to knock it. People could live with an awkwardly stated rule that "water rights cannot be changed from the lands, place or purpose for which they were appropriated, except that a change can be made wherever it is desirable." So if the exceptions have really swallow-

ed the rule, it might be an empty and meaningless process to simplify recodify and prettify the law. Yet while the exceptions have chewed large holes in the rule, much is left and a real reform of the law is needed. The "no-change except" rule still leaves much to be desired in its operation and still stands as a block to some desirable developments.

The original rule obviously ran counter to good sense and good economics. Mead, its author, saw defects and abuses in the transfer practices of his day. Unused paper appropriations were sold to the actual detriment of water users. But the cure he advocated was to burn down the barn to get rid of the rats. Even at its birth the no-change rule had to be modified to permit cities to grow and the railroad industry was then dominant enough to wrest freedom from its restrictions. Now the legislature has created ten statutory exceptions to it. Some of these have been amended, so that over the years sixteen legislative acts have been concerned with the problem. Some have legalized practices which ignored the rule. Most of them have granted privileges to important groups and industries. A policy so malleable, that has yielded to so many and such varied pressures, deserves a thorough reconsideration. If so many exceptions must be made to it, the question arises whether it is still a desirable one. The basic policy of tying water rights to the land in Wyoming is now over 50 years old. That policy should now be re-examined to see whether it is suitable to guide and shape water use and development in Wyoming during the next 50 years.

The remnants of the no-change rule may interfere with future desirable transfers. New beneficial uses, unforeseen and hence not excepted, may arise at any time, just as the need for the highway use exception was created by the Interstate program. Two of today's (and tomorrow's) most important problems remain unprovided for. One is the use of water for recreation, to maintain minimum or sustained reservoir levels for fishing and boating, to maintain a minimum flow or to restore natural flow in streams for sport fishing. Some day, not too far away, the economic advantages of these activities may outweigh the value of present uses. Public and private entities may be willing to pay a proper

price for the needed water, the owners of the water rights may be very desirous of receiving the money, but the law has no mechanism for consummating the transaction. Another use of water, much discussed as a possible major future need, is for the dilution of pollutants. Federal agencies now build storage capacity for this purpose into major dams,[201] and it is not unforeseeable that future quality control standards will be concerned not only with what goes into streams but also with the quantity of water in the stream.[202]

Moreover, the case studies of the present Wyoming law in action show that the state does not need to look to the future for departures from optimum use of water caused by this rule. For the most part, Wyoming agriculture still lies in the mortmain grip of the pioneer. The Ringsby rights dated after 1909 are still applied to rolling haylands and pasture while Wheatland's cropland needs the water.[203] Although few requests for transfers have been denied, few have been made, and it is only possible to speculate on how many transfers were never attempted, simply because no matter how desirable they might appear, the law was that they could not be made. Without further studies, it is also necessary to speculate on how much water is used to grow a partial crop of native hay that could be devoted to field and forage crops of much greater value. The pioneer pattern of agriculture is impressed upon the Wyoming land. For the most part the irrigated land is near the rivers, watered by gravity flow from ditches which follow the contour lines. Much good land lies above the ditches. Today pumps could put water on those lands and lands can be watered with pipes and sprinkler systems. While pre-1909 rights may be transferrable to solve many of these problems, post-1909 rights, upon which fall the heaviest burdens of stream variation and water shortage, are those most needing consolidation and supplementing.

201. Water Pollution Control Act, 75 Stat. 204, 33 U.S.C. § 466a(b)(1) (1964).

202. The Federal Water Pollution Control Act Amendments, 79 Stat. 903 (1965) require the states to establish water quality standards, or, if the state fails to act, their promulgation by the Secretary of Health, Education and Welfare. It is conceivable that to meet such standards an augmented flow could be a desirable alternative to extereme methods of purification or shutdown of an activity.

203. See notes 138-152 *supra* and accompanying text.

One of the greatest evils of the present practice is that of arbitrary discrimination. Every water right in Wyoming is for sale and can be transferred, if the right buyer can be found and if he or it can physically reach the water. Yet not every person can buy water. The farmer, the rancher and the irrigation district are denied privileges that are freely granted to cities, railroads, steel companies and power companies. To be sure, the farmer's plight will be alleviated if the transferability of pre-1909 rights is upheld in the courts, but if the statute is held to be a proper exercise of legislative prerogative, restricting the powers of the property owner pursuant to a properly chosen public interest, then he is barred from using the ordinary economic processes to improve his lot. A farmer with insufficient water cannot buy more, however great his need. A farmer with excess water cannot take advantage of a cash offer by another farmer, no matter how much more desirable the cash might seem to him.

A related evil is inherent in the administration of the exception permitting amendments to permits and certificates. Here is state interference of the worst sort. State regulation is proper when an individual's action may have an adverse effect on others. Thus public control to see that transfers do not injure other appropriators is quite proper. But if the state makes a decision that no one will be injured by a change in the place of use, a farmer owning two tracts of land and one water right ought to be permitted to make his own decisions as to the land he will irrigate, on the basis of which will give him the greatest return. This decision should be based on the individual's personal ideas on what is good for him, not on a bureaucrat's thought on what should be good for that individual.[204]

A number of uncertainties may cause practical difficulties and act as deterrents to transfers. Buyers of water rights may wonder whether they are buying anything but a lawsuit. It will take long and costly litigation, and possibly a loss of investment, to reach a final decision on the transferability of

204. *Ibid.* See also Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NATURAL RESOURCES J. 1, 8-10, 37-39 (1965).

pre-1909 rights, or on what type of arrangements come within the Owl Creek statute. Still another uncertainty arises from the practice of the Board of Control, in permitting changes, to duck the crucial issue before it. Since no change can be made if it would result in injury to another appropriator, and the most frequent type of injury comes from depriving downstream users of water which has historically come to them from return flows, most changes of agricultural uses are permitted only to the extent of the amount consumptively used by the transferor.[205] The amended certificate states the specific quantity to be changed. It should establish the right to make the change and be the buyer's muniment of title. Yet in many cases its force as such is weakened by the Board providing that its order is subject to the condition that the rights of no other appropriators be injured.[206] Perhaps this is inserted as a hedge against insufficient hydrological data upon which to base firm findings of consumptive use, perhaps as a hedge against other unforeseen types of damage. In either case, the certainty of the buyer's right is impaired. Where it is a railroad or city with powers of eminent domain, such a condition may leave it open to future suits for additional "just compensation." Where it has no such powers and it later appears that actual consumption was less than that predicted, could the matter be reopened and the permitted diversion adjusted downward? If some other type of damage appeared, could the order be rescinded? By contrast, the Board's action in the Wheatland case prevents such possibilities. Possibly because of the extensive hydrological investigations and evidence submitted in that case the Board expressly found that "no other appropriator will be injuriously affected by the proposed change . . . because of the restrictions

205. See Town of Greybull case study, *supra* note 122; Union Pacific Water Co. case study, *supra* note 125; Wheatland Irrigation District case study, *supra* note 150. But this is not done where the change will not affect consumption, as where the change is to another point on the same ditch as in the Pioneer Canal Co. study, *supra* note 129, or the Horse Creek Conservation District case study, *supra* note 175, or where consumption and point of return flows will be approximately the same for the new and the old use, as in the Glendo Reservoir case study, *supra* note 190. This rule does not apply to changes in place of use of reservoir water, it being apparently assumed that no one has a right to the return flows from this source.

206. Town of Greybull case study, *supra* note 122; United States Steel Corp. case study, *supra* note 196.

and limitations herein placed on the amount of water that may be diverted."

Although Wyoming water changes are regulated by administrative procedures and handled by competent men in the offices of the State Engineer and the Board of Control, these processes do not seem to match in effectiveness those of other states with administrative water agencies.[207] Having grown like Topsy in response to different pressures at different times, the procedures are uncoordinated and unevenly applied. Perhaps because cases have been so few, the need for extensive hydrological investigations by the agency has not been seen. Those produced as evidence by the parties have varied with the importance of the case and the vigor of the contest. In this respect, Wyoming's administrative procedure may not be even as good as Colorado's court actions, since that system at least forces substantial hydrologic investigations by the parties.[208]

C. The Future

If a reason is sought for the shape of the Wyoming law of water transfers, it may be hazarded that the answer lies in a strong "heirloom attitude"[209] of the Wyoming ranch and farm water user. He feels that water is his most precious asset, his heritage, his birthright. To sell it would be sinful. Laws against sin are much in favor. In part this attitude may come from a misunderstanding, a fear that stability of water rights is at stake, that water will be "taken" from irrigators without compensation, as may be done in some eastern states. In part it seems to stem from desires to preserve the *status quo* of rural Wyoming, to prevent neighbors from selling out, to prevent the loss of tax revenues for counties and school districts in areas subconsciously feared to be marginal.[210]

207. Seastone & Hartman, *Alternative Institutions for Water Transfers: The Experience in Colorado and New Mexico*, 39 LAND ECON. 31 (1963).

208. *Ibid*; see also Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954); Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962).

209. Gaffney, Diseconomies Inherent in Western Water Laws: A California Case Study, Proceedings, Western Agricultural Research Council, Tucson, Arizona, January 23-24, 1961.

210. See Wheatland Irrigation District case study, *supra* note 150.

If this attitude lay behind the original no-change statute, it may also explain the circumvolutions of the present "no-change except" rule. It seems to be one that has pervaded successive legislatures and that is to some extent shared by the water officials.[211] Until it can be changed the prospects of a major change in the Wyoming law, completing a full circle to the repeal of the no-change law, seem doubtful. Nor has the legislature granted every request for relief by creating a new exception. Although in 1959 it requested a study somewhat along the lines of this paper,[212] at the behest of the Wheatland Irrigation District, Wheatland was not able to muster enough strength in the 1961 Legislature to get a modern law permitting and regulating changes. An attempt to give privileges of purchase to the State Game and Fish Commission for recreational purposes died in the 1965 session. The opportunity for a coalition of pressure groups that could force the change in the law seems to have been passed, since each amendment and exception has solved the problem of one group at a time and the more powerful groups are no longer interested. Perhaps even the farmers of the Wheatland District will leave the lists, for their problems may be solved by a far more expensive method—the Bureau of Reclamation is considering the district as a participating unit of the Missouri Basin project.[213]

Nevertheless, eventual change can be predicted. The people are more aware of the problem. The form of the law accentuates the negative and many Wyoming irrigators have shar-

211. Lincoln Land Co. case study, *supra* note 176.

212. Wyo. Laws 1959, ch. 187, § 1(i); see Severance of Water Rights from Wyoming Lands, Wyoming Legislative Research Committee, Research Report No. 2, (1960).

213. BUREAU OF RECLAMATION, REPORT ON THE WHEATLAND UNIT, WYOMING, LARAMIE DIVISION, MISSOURI RIVER BASIN PROJECT (Nov., 1964), revised June, 1965). The main purpose of the project would be to develop new and supplemental irrigation for use in the Wheatland area, plus recreation and fish and wildlife conservation. Additional water for the project would be obtained from the storage of flood flows, importations from the Ringsby Ranch, ground water pumping, seepage reduction from canal lining, water rights from inundated lands and improved methods of water delivery. The main physical feature of the project would be the Dodge Canyon Reservoir, with a total capacity of 251,500 acre feet, to replace the existing Wheatland Reservoir No. 2. Other significant features would include diversion facilities for Ringsby ranch waters, 53 wells and pumps, lining of 22 miles of the main canals, renovation of various existing features and pumps and distribution works for new lands. The estimated cost of the irrigation features of the Wheatland unit at July, 1964 price levels is $15,794,000.

ed with outsiders[214] the belief that Wyoming water rights cannot be detached from the land, place or purpose for which they were acquired. But the Wheatland case became a *cause celebre,* and the interest and education generated by it may cause the trickle of cases sampled here to swell to a stream, if not to a torrent. Wyoming is only approaching the stage of development reached by other states. Problems already reached and solved elsewhere have yet to arise. Studies in other states of the economics,[215] engineering techniques,[216] and administration[217] of water transfers will have an influence in Wyoming. Studies could be made in Wyoming to discover the real economic impact of restrictive practices and the opportunities that might open up with a change in law. Discrepancies and discrimination will ultimately be discerned and felt.

It is therefore not beyond hope that some day Wyoming's law will meet the ideal stated by an economist:

> Restrictions upon the transfer of water rights, just as those upon the transfer of any property, should be viewed with suspicion. As a general rule all transfers of water rights between individuals should be permitted except in cases where damage to third parties can be clearly demonstrated.[218]

Another heritage of the Wyoming rancher may some day outweigh the heirloom approach. No individualist is more rugged than he. No tenet is more basic to him that that which lies behind these words of the same author:

> To the extent that water rights are allowed to become real and personal property and to the extent that they are transferable, it would be possible to rely on the market and individual decision-making to allocate water resources to 'their highest use.' The arguments for treating water rights in this fashion

214. See notes 8-10 *supra.*
215. Gaffney, *supra* note 209; Anderson, The Water Rental Market: A Case Study, 13 Agricultural Economics Research 54 (1961), Hartman & Seastone, Water Allocation, Return Flows and Optimality Criteria, Department of Economics, Colorado State University (1963).
216. Flack, Water-rights Transfers—An Engineering Approach, Institute in Engineering-Economics Systems, Stanford University (1965).
217. Seastone & Hartman, *supra* note 207.
218. Milliman, *Water Law and Private Decision-Making: A Critique,* 2 J. L. & ECON. 41, 54 (1959).

are the same as those justifying the market process and individual decision-making in the use of all of our resources, *i.e.*, when they provide for maximum production and efficiency consistent with individual freedom of choice.[219]

219. *Id.* at 45.