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In a previous issue of this Review, Dean Trelease and Deltas W. Lee examined 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. Since this issue appeared Dean Trelease has discovered a new exception to Wyoming's "no change" statute in the cloak of the statute which created the Wyoming Fish and Game Commission. Pursuing this discovery, Dean Trelease has found other exceptions to the "no change" statute by laying the water laws aside and searching the powers of irrigation and other districts.

## TRANSFER OF WATER RIGHTS--ERRATA AND ADDENDA--SALES FOR RECREATIONAL PURPOSES AND TO DISTRICTS

*Frank J. Trelease\**

A recent issue of the *Land and Water Law Review* carried an extensive study of the laws of Wyoming relating to the transfer of water rights.<sup>1</sup> The article detailed the history of Wyoming's "no change" statute ("Water rights . . . cannot be detached from the lands, place or purpose for which they are acquired . . ."),<sup>2</sup> noted a number of exceptions to its application and set out case studies of the way in which the law and its exceptions had operated.

The senior author listed ten exceptions to the restraints imposed by the statute, nine of them statutory. In his conclusion he noted that these exceptions had not yet swallowed the rule and stated,

The remnants of the no-change rule may interfere with future desirable transfers . . . . Two of today's (and tomorrow's) most important problems remain unprovided for. One is the use of water for recrea-

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1. Trelease & Lee, *Priority and Progress—Case Studies of the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1 (1966).
2. WYO. STAT. § 41-2 (1957).

tion, 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.<sup>3</sup>

An eleventh exception has been brought to light, not by research but by chance. It makes most of this quotation erroneous. In 1939 the legislature created the Wyoming Game and Fish Commission, a strong department that was to become a model in many other states,<sup>4</sup> endowed with broad powers over almost all aspects of fish and wildlife management. Among these appears the following: "To acquire . . . waters in the name of the state by purchase, lease, agreement, gift or devise suitable for the purposes herein enumerated and to develop, improve, operate and maintain the same for the following purposes: (1) Fish hatcheries, rearing ponds, . . . (2) Management of . . . fishes and the restoration, propagation or protection of the same . (3) Public . . . fishing . . . areas . . . ."<sup>5</sup>

If this statute is to be given any meaning, it must operate as still another exception to the no-change rule, adding the Fish and Game Commission to the list of cities, railroads, steam power plants, industries and the highway department, as another privileged entity permitted to purchase water for its needs.<sup>6</sup> If water may be purchased for fish hatcheries and the maintenance of public fishing areas, clearly the water rights must be detached from their original place and purpose.

Neither the records of the Fish and Game Department nor of the State Engineer's office disclose any example of the exercise of this power. However, the state has become the owner of water rights appurtenant to lands which the Fish and Game Commission purchased for public fishing areas. The water rights have been exercised only for minimal

3. Trelease & Lee, *supra* note 1, at 69-70.

4. LARSON, HISTORY OF WYOMING 466, 468 (1965).

5. WYO. STAT. § 23-15(b) (1957).

6. Trelease & Lee, *supra* note 1.

irrigation of the lands, to prevent their loss by abandonment or forfeiture. According to the statute, there is no reason why they may not be operated and maintained strictly for the suitable operation and maintenance of the public fishing areas—in other words, left in the stream, though protected by priority from upstream junior diverters. If the Commission had land for a public fishing area, but insufficient water, there would seem to be no reason why it could not purchase the right of an upstream appropriator and transfer it down to the public area, there to run in the stream for the restoration and protection of the fish. If no other damage to other appropriators would result, it might purchase a water right and change its place of diversion and use to a reservoir open to public fishing. It might purchase reservoir capacity for maintaining minimum levels and flows in a public area.

The statute goes on to give the Commission power “To sell or exchange . . . water . . . which is no longer of any practical use to the commission, and cover all funds received from such sales into the Wyoming game and fish fund.”<sup>7</sup> In some cases in which the Commission purchases irrigated land as a public fishing area, it could recoup part of its costs and still preserve the water for its purposes by selling the water right to a downstream user.

It can thus be seen that most of the “important problems” raised by the senior author of the article do not exist. “To that learned author, a thorough-going reprimand.”<sup>8</sup>

It is possible to profit by mistakes. This one led to the question of what else might be discovered, if instead of looking at the water laws, the powers of agencies and organizations were searched. Mining this vein produced a bonanza. Look first at the powers given to the common irrigation district: “To acquire by purchase or otherwise irrigation works, water rights . . . .”<sup>9</sup> Public irrigation districts and public irrigation and power districts have the “right and power to . . . purchase . . . any ‘irrigation works,’ ” which are defined as including “all water rights.”<sup>10</sup> A water conservancy dis-

7. WYO. STAT. § 23-15(c) (1957).

8. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 n.215 (1942), criticizing the author of PROSSER, TORTS (1941).

9. WYO. STAT. § 41-282(g) (1957).

10. WYO. STAT. §§ 41-330(2), 41-325(3) (1957).

district may "take by appropriation, grant, purchase, bequest, devise or lease, and to hold and enjoy water, water works, water rights and sources of water supply; . . ."<sup>11</sup> A water and sewer district may "appropriate and otherwise acquire sources of supply of water . . ."<sup>12</sup> A watershed improvement district formed for the purposes of storage, conservation, development and utilization of water<sup>13</sup> has general power to acquire by purchase any property in furtherance of its purposes.<sup>14</sup>

All these powers were granted to the various types of districts by legislation subsequent to the 1909 no-change statute.<sup>15</sup> Again, to give the words of the statutes any meaning they must be held to make exceptions to the no-change statute and add the districts to the list of privileged purchasers of water. At the time the present irrigation district law was passed in 1920<sup>16</sup> the only exceptions to the no-change rule were contained within the statute itself, permitting condemnation of water rights for public and semi-public domestic and transportation uses by cities and railroads.<sup>17</sup> The Wyoming irrigation district is a public corporation, "conferring a benefit, not alone upon the private individuals within the district, but also upon the people of the state as a whole . . ."<sup>18</sup> The same section authorizing it to acquire water rights "by purchase or otherwise" gives it authority to exercise the power of eminent domain.<sup>19</sup> It seems quite log-

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11. WYO. STAT. § 41-91(b) (1957).

12. WYO. STAT. § 41-479.13(10) (Supp. 1965).

13. WYO. STAT. § 41-354.2 (Supp. 1965).

14. WYO. STAT. § 41-354.13 (Supp. 1965).

15. Wyo. Laws 1920, Spec. Sess., ch. 2, § 16; Wyo. Laws 1937, ch. 123, § 7; Wyo. Laws 1957, ch. 101, § 13; Wyo. Laws 1959, ch. 188, § 13; Wyo. Laws 1961, ch. 215, § 2; Wyo. Laws 1961, ch. 215, § 13.

16. Wyo. Laws 1920, Spec. Sess., ch. 2.

17. Wyo. Laws 1909, ch. 68. It seems impossible to assume that 1920 statute meant that the district could purchase only purchasable rights, for at that time no such class of rights was known to exist. The first statutory exception, which freed reservoir water from the restriction, came a year later. Wyo. Laws 1921, chs. 140, 141 and 161. The case holding that the no-change statute could not constitutionally be applied to rights acquired prior to 1909 was not decided until 1939. *Hughes v. Lincoln Land Co.*, 27 F. Supp. 972 (D. Wyo. 1939).

18. *Sullivan v. Blakesley*, 35 Wyo. 73, 76, 246 Pac. 918, 921 (1926); see also *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 174 (1896).

19. WYO. STAT. § 41-282(4) (e) (1957). All of the other districts mentioned also have powers of eminent domain: conservancy districts, WYO. STAT. § 41-91(c) (1957); public irrigation and power districts, WYO. STAT. § 41-331 (1957); watershed improvement districts, WYO. STAT. § 41-354.13(c) (Supp. 1965); water and sewer districts, WYO. STAT. § 41-479.13(19) (Supp. 1965).

ical to assume that the legislature intended to place these public corporations in the same favored position occupied by public and quasi-public municipal and railroad corporations.<sup>20</sup>

In the previous article, one case study presented the efforts of the Wheatland Irrigation District to firm up its Laramie River water supply by purchasing the water rights of the Ringsby ranch on Rock Creek. The District eventually purchased the entire ranch and transferred to its lands the pre-1909 rights and the reservoir rights.<sup>21</sup> Appropriations with priority dates of 1920 and 1921 form an important part of the ranch's water supply. These were left on the ranchlands, in the belief that they were not transferable.<sup>22</sup> Yet the exceptions to the no-change rule operate in two ways: some water rights are made transferable,<sup>23</sup> and some users are given power to buy any water right.<sup>24</sup> The irrigation district law makes an exception of the latter type and gives the district the power to acquire water rights by purchase.<sup>25</sup> On the face of the statute there is no restriction on the type of water right than can be purchased, nothing to prevent the Wheatland Irrigation District from transferring the late water

20. Little of legislative intent can be gleaned from the form of the statutes. Sometimes the legislature made exceptions to the no-change rule by amending the statute or its companion sections relating to preferred rights, sometimes it has done so by referring to but not amending the statute, sometimes it has made no mention of it. The original form of WYO. STAT. § 41-2 (1957) stated the rule without any express exceptions, Wyo. Laws 1909, ch. 68, but sections 2 and 3 of the same act set out the domestic and transportation preferred use exceptions. Reservoir rights were freed from the restriction by Wyo. Laws 1921 chs. 140 and 141, and a companion act, ch. 161 amended the original section to refer only to rights to the direct use of the natural unstored flow of streams. Other amendments not here material were made by Wyo. Laws 1941, ch. 25, § 1, and the flat statement of the no change rule was modified by adding, ". . . except as provided in [Wyo. STAT. §§ 41-3 and 41-4 (1957)] pertaining to a change to a preferred use." When amendment of permits and certificates was permitted "for the purpose of correcting errors or otherwise," Wyo. Laws 1945, ch. 118, § 1, the second section of the act added to § 41-2 the phrase, "and except as provided in Section 1 of this act." The steam power plant and industrial purpose exceptions were made by addition to the list of preferred uses in § 41-3, Wyo. Laws 1955, ch. 227, § 1; Wyo. Laws 1957, ch. 116, § 1. The submerged lands exception had tacked on to it the curious statement, "That the provisions of this act shall be valid notwithstanding the provisions of [§ 41-2]," Wyo. Laws 1951, ch. 60, § 2. The "Owl Creek" statute and the highway construction statute do not amend or refer to § 41-2, Wyo. Laws 1947, ch. 116; Wyo. Laws 1959, ch. 148.

21. Trelease & Lee, *supra* note 1, at 40-46, 49-51.

22. Except perhaps under the "Owl Creek statute." See Trelease & Lee, *supra* note 1, at 57-61.

23. *E.g.*, pre-1909 rights, reservoir rights, rights attached to uneconomical or submerged lands.

24. *E.g.*, cities, railroads, industries, the State Highway Commission.

25. WYO. STAT. § 41-282(4)(g) (1957).

rights from the haylands on the ranch to the croplands on the Wheatland flats.

Unless this analysis can be demonstrated to be unsound, a twelfth and quite important exception exists to the no-change rule, and only the quasi-mythological belief that Wyoming water rights are inseverably tied to land and use, ignoring exceptions,<sup>26</sup> holds back irrigation and other districts from purchasing water rights, regardless of date, for the purpose of firming up the supply needed for their consumers. It goes without saying that a fair price will have to be paid for such rights. In most cases it will be freely negotiated, but powers of eminent domain insure that unconscionable prices will not be charged. Obviously these purchases will be made only when the value of the water to the district is greater than that it produces for the seller. Just as obviously, a change of the water to the district under such circumstances will produce greater wealth for the State of Wyoming and will more nearly approach the realization of maximum benefits from the use of her water resources.

If Wyoming districts, water officials and courts accept this, still more errors will be shown to exist in the previous article: "For the most part, Wyoming agriculture still lies in the mortmain grip of the pioneer . . . [T]he irrigation district [is] denied privileges that are freely granted to cities, railroads, steel companies and power companies."<sup>27</sup> Although myths die hard, perhaps when the dead hand is seen to be only that of a ghost, its grip may be broken.

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26. Trelease & Lee, *supra* note 1, at 73-75.

27. *Id.* at 70-71.