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COMMENT

THE NATURE OF A RESERVOIR RIGHT

The appropriation doctrine of water law is based on the economic principle of maximization of use of the natural resource for the maximum public benefit. Under this doctrine, the reservoir serves as an integral part in the human effort to distribute water to use as efficiently as possible. The appeal of a reservoir lies in its function—storage of water from which a constant, reliable supply can be made available to the beneficial user, relieving that user of the need to rely on the natural stream for a direct, and more precarious supply. The user controls his source to meet his demands, rather than adapting his schedule to the character of the source.

Modern societal demands for a controlled constant supply are great. Modern industry utilizes production techniques which require a stable supply of resources used in production. Temporary delays caused by the failure of an essential water supply result in higher production costs and higher prices. The continued recurrence of such delays would undermine the attractiveness of the area as an industrial site, inhibiting the influx of industry into the area while encouraging local industry to search elsewhere for a more suitable location.

Agricultural use of the reservoir can provide the rancher or farmer with a buffer against the late summer drought, or a source of storage of extra water for insurance against the possibility of a dry year. The reservoir eliminates waste of water by preventing the flow of excess or unused water during the early part of the irrigation season, storing this excess until later in the season, or from year to year until it is needed.

The growing concentration of masses in the cities most emphatically underscores the importance of reservoirs. The number of people in one locale prohibits individual appropriations by direct flow. The necessity is obvious. Flood control, soil conservancy, recreation, and fire control are a few of the other functions served by reservoirs. Though these functions meet basic needs for our society, and the
reservoir is basic to our society; there is no compilation of the bits and pieces of information available in statute and case law which circumscribe the exact nature of a reservoir right. The appropriation states have made essential provisions in their statutes pertinent to the creation and maintenance of a reservoir right. Case law from these different states has molded the right into a more definite shape. The nature remains to be probed.

THE RIGHT TO STORE WATER

The right to store water, under appropriation law, is the right to appropriate, that is, divert and collect water for later application to a beneficial use. In most of the appropriation states, the law requires a person desiring to appropriate water to file a formal application for a permit before his water right will be given any legal significance.

Colorado requires no permit to establish an appropriation. Montana requires no permit, but requires the posting of public notice of the appropriation at the site of the diversion within ten days after diverting and appropriating water from a non-adjudicated stream. In Montana, special procedure is required to obtain appropriations from an adjudicated stream. But these procedures for permits or for posting of notice are fundamental to all water rights, direct or storage. The storage right is a distinct right as to several features.

Generally, the states require, for the purpose of public safety, that the builder of a reservoir file with the state water official detailed plans and maps of the reservoir to be built, if the reservoir is to be greater than a specified minimum size allowed for stock watering ponds. The water official

must approve these plans before construction may begin. A few states give the state water official the power to appoint an assistant who will supervise the construction, if, in the eyes of the state water official, such supervision is necessary in the interest of public safety.

Montana seems to be the singular exception to these practices. In Montana, the procedure is reversed. No maps or plans must be filed for state approval. No provision is made for supervision of the construction of any reservoir. A person may build a reservoir. Water may be stored within the reservoir. The state is required to act only in the event that a complaint impuning the safety of the facilities is filed with the state water commissioner. Then the water commissioner must inspect the facilities. If, at that time, the facilities are found to be unsafe, the commissioner may require the reservoir owner to reduce the quantity of water contained within the reservoir to that amount which the reservoir can safely contain. If the reservoir owner refuses to comply with the order, or fails to comply, the commissioner may estimate the costs of the works, empty the reservoir, take bids on the repair work, authorize the repairs, and bill the reservoir owner for the work done. The bill may then be collected as any other tax debt.

This Montana procedure has its advantages in that it minimizes red tape and governmental intrusion into the affairs of the individual citizen. The major disadvantage would seem to be that there is too great a chance for economic waste. Without a doubt, inspection of and supervision of the construction of every reservoir built costs a great deal more than no inspection or supervision of construction until a complaint is filed. However, the value of insurance is speculative. The overall cost to society in the long run may be greater if no inspection is made to prevent the construction of a public hazard until such time as a complaint is filed,


if the complaint is timely. The waste is evident even in the event that this least advantageous possibility occurs. The reservoir owner must pay additional sums to correct an error in construction which could have been avoided, had the state required plans to be approved initially. A second consideration may be of more importance. The most likely person to file a complaint will be the neighboring landowner whose land, property, and perhaps, life may be threatened by a poorly constructed reservoir wall. Yet, the neighboring landowner may be reluctant to complain of an unsafe condition, if he knows it exists, or he may in fact have contributed to the existence of such circumstances, as he is likely to be a shareholder in the reservoir company with an interest in economizing at the expense of safety. If such a situation should exist, the attendant threat to the safety of riparian property downstream will not be uncovered until such time as the reservoir ruptures, resulting in even greater economic waste.

A problem which is unique to securing a reservoir right is the problem of establishing a date of priority as early as possible after the formation of the necessary intent to secure the appropriation from a particular source. States requiring an application to be filed for a permit to appropriate have generally stated that the appropriation is complete at the time of the application of the water to a beneficial use.9 To prevent an appropriator from losing his priority to a later appropriator who is able to complete his appropriation before the earlier appropriator can complete his diversion and application, the rule of relation back has been created and applied. Most states hold that once a diversion is complete, and the water has been beneficially applied, the appropriation is complete, and the date of priority of the appropriation will relate back to the date of making formal application for a permit.10

9. UTAH CODE ANN. § 73-3-1 (1953); IDAHO CODE ANN. § 42-217 (1947).
In the case of an appropriator who wishes to construct a large reservoir, the filing of an application must include plans, blueprints, and maps which may require several months, perhaps years, to prepare. The appropriator may complete his plans and file his application only to find that another person has just filed an application for part or all of that water he had intended to appropriate, the other person having learned of his intent to so appropriate for storage before forming his own intent to appropriate. In this situation, unless there are exceptional circumstances, it is possible that he who first formed the intent to appropriate, and who proceeded with due diligence to file an application, loses the earlier priority to the person who forms the later intent to use the same water and puts the water to direct use where detailed plans and lengthy preparation for application are unnecessary.

Perhaps in most states the problem is by-passed through administrative action and discretion. But a more certain, and much more predictable situation does exist in two states which have provided by statute that the party wishing to build a reservoir of a certain capacity or larger, supplied by a particular source, can file a preliminary notice of intent to appropriate, and file a later formal application with full plans. In Texas, the notice of intent is the "Presentation."11 In New Mexico, it is the Notice of Intent.12 In these states, priority relates back to the date of filing of the notice of intent.

A case which illustrates the problem of relation back in this situation is the 1943 Utah case of Tanner v. Bacon.13 Tanner owned a power plant near Provo and wished to appropriate 100 c.f.s. of water to run through his plant. At the same time, and for two years previously, the state of Utah, the City of Provo, the Provo Water Users Association, and the federal government were drawing up plans and expending $25,000 on surveys and investigations for using the same water Tanner had applied for. The city had planned a reclamation project reservoir for an additional municipal supply and for a supply of water beyond the city’s needs, to be made

available to surrounding farmers for irrigation. Due to the complexity of the project, the city had been unable to complete and file an application until after Tanner had filed his. The State Engineer initially denied Tanner his permit on the grounds that the Governor of Utah had already reserved the water for another purpose. The District Court overruled the State Engineer, noting that Tanner had filed his application first, and that his date of priority should be as of the date of that filing. Upon issuance of the permit to Tanner, the other interested parties filed protest, and another hearing was held. As a result of this hearing, the State Engineer recalled Tanner’s permit, again denying Tanner his earlier priority on the basis of two state statutes permitting the State Engineer to deny issuance of a permit upon application on the grounds of public welfare, and giving a preference to municipal use and agricultural use over industrial use. On these particular statutes as they applied to this particular situation, the District Court upheld the decision of the State Engineer, upon Tanner’s appeal, on the grounds that to allow Tanner the earlier priority would deprive the city of water, and thus be detrimental to public welfare.

*Tanner v. Bacon* is hardly reliable precedent for a large irrigation company seeking to assert its rights against a smaller irrigator or group of irrigators. It may be most difficult for the larger concern to prove that its one large reservoir is of greater interest to "public welfare" than several direct flow ditches. If in the instant case, Tanner had been asserting his right against another power plant who intended to impound its water and produce power, rather than to rely on the direct flow supply, would the court have denied Tanner his earlier priority date? This case demonstrates the desirability of statutes such as Texas and New Mexico employ, and the corresponding predictability.

**The Application of Stored Water**

Once the water right has been acquired, and the water has been diverted and stored, the reservoir owner becomes concerned with the problem of application of the water to beneficial use. The storage of water is not of itself, a
beneficial use. The storage of water in and of itself is not to be confused with carry-over storage, which is the storage of excess for a planned purpose. The storage of a carry-over supply may raise the question of storage for storage sake, but courts have consistently held that carry-over has its purposes, and is therefore a beneficial use. In Van Tassell Real Estate & Livestock Co. v. City of Cheyenne, the court held that the fact that the city failed to immediately apply the water stored to beneficial use in no way invalidated the appropriation. The court felt that the several purposes which the water served while stored, such as water as insurance against the out-break of fire, more than adequately met the requirements of the beneficial use rule. In Colorado, where over-appropriation was common, and the available water supply is insufficient to meet all the demands placed upon it, the court is perhaps more stringent in its application of the beneficial use rule, as typified by Highland & Ditch Co. v. Union Res. Co.:

It is unnecessary to enter into a discussion of the evidence further than to state possibly, excepting a portion of the [water] awarded, it appears that appellee has never applied the water stored in his reservoir to the irrigation of land. Diversion and storage are not sufficient to constitute an appropriation. In addition, the water so diverted and stored must be beneficially applied; that is, in this instance, it must have been applied to lands for the purpose of irrigation.

While the storage of excess, or carry-over, water may not be directly involved in the question of application of an appropriation to beneficial use, it is a consideration in the question of whether storage is, in and of itself, a beneficial use. The Colorado rule is probably the general rule, as there is not likely to be an allowance of excess in a time of scarcity, when the aid of the rules of law is sought in the assertion of one right over another.

17. 53 Colo. 483, 127 P. 1025 (1912).
18. Id., 127 P. at 1025.
If the storage of water is not the final goal of the storage right, the purpose for which the water was stored becomes the next consideration. The purpose may be a municipal, an industrial, or an agricultural use. In all the states applying appropriation law, the reservoir owner may sell or lease the water or part thereof to others who will convey the water from the reservoir to the place of application to use by means of ditch, pipeline, or bed of a natural stream.\textsuperscript{19} The water so distributed may become inseverably attached to the land by deed,\textsuperscript{20} or may become an appurtenance transferable from plot to plot upon the approval of the water official, who must determine that such a transfer will not be injurious to other rights, and that the application is a beneficial use.\textsuperscript{21} The use to which the water is being changed does not necessarily have to be the same use to which it was put before.\textsuperscript{22}

A few states provide by statute for secondary permit for appropriations from reservoirs. In Arizona,\textsuperscript{23} Nevada,\textsuperscript{24} Nebraska,\textsuperscript{25} Oregon,\textsuperscript{26} and Washington\textsuperscript{27} the state mandatorily requires any person who wishes to appropriate water impounded in a reservoir for application to a beneficial use to apply for a secondary permit before such a diversion and application is made. The secondary permit, then, serves the same purpose for appropriations from reservoirs as the permit serves for appropriation for a direct flow right.

Originally, the Wyoming statute providing for secondary permits was considered to be mandatory, that is a secondary permit was required to make an appropriation from a reservoir. The statute read: "Any party desiring to appropriate

\textsuperscript{19} ARIZ. REV. STAT. ANN. § 45-151 (1953); IDAHO CODE ANN. § 42-912 (1947); KAN. STAT. ANN. § 42-391 (Supp. 1961); NEV. REV. STAT. § 533.525 (1960); N.M. STAT. ANN. § 75-5-24 (1953); N.D. CENT. CODE § 63-04-17 (Supp. 1965); OKLA. STAT. ANN. tit. 82, § 21 (Supp. 1967), tit. 82, § 34 (1951); ORE. REV. STAT. § 541.010(1) (1953); S.D. CODE § 61.0121 (Supp. 1960); TEX. REV. CIV. STAT. art. 7553 (Supp. 1965); WASH. REV. CODE ANN. § 90.16.100 (1962); WYO. STAT. § 41-44 (1967); see also, TRELASE, WATER LAW 263 n.2 (1967).

\textsuperscript{20} N.M. STAT. ANN. § 75-5-24 (1953); NEV. REV. STAT. § 553.445 (1960); WYO. STAT. § 41-44 (1957).

\textsuperscript{21} ARIZ. REV. STAT. ANN. § 45-172 (1953); IDAHO CODE ANN. § 42-222 (1947); ORE. REV. STAT. § 540.510 (1953).


\textsuperscript{23} ARIZ. REV. STAT. ANN. § 45-151 (1953).

\textsuperscript{24} NEV. REV. STAT. § 533.440 (1960).

\textsuperscript{25} NEB. REV. STAT. § 46-242 (1960).

\textsuperscript{26} ORE. REV. STAT. § 537.300(2) (1953).

\textsuperscript{27} WASH. REV. CODE ANN. § 90.03.370 (1962).
such stored water shall apply . . . .” However, in 1939, the state legislature amended the statute to read “may apply.” The Wyoming Supreme Court later ruled that the pre-1939 statute creating the secondary permit was permissive, that the word shall should be read may. Thus, in Wyoming, while a party wishing to appropriate water impounded in a reservoir may be urged to secure a secondary permit for the purpose of record and of notice, he is not required to do so in order to acquire a legally sufficient claim to such water as he does appropriate from a reservoir.

Once such a permit is acquired, where required, or once the water has been diverted to the place of use, and beneficially applied where no secondary permit is necessary, the right becomes an appurtenance to the land, and will pass with the title of the property to which it has been beneficially applied, unless severed from the land by deed and transferred to another appropriator for use on other land. In thirteen of the appropriation states, all water rights are thus transferable. In Nebraska, Oklahoma, and South Dakota, direct flow rights are inseverably appurtenant to the land for which the water was appropriated for application to beneficial use, unless the change in point of diversion, place of use, or purpose is desirable for the benefit of public welfare as determined by the state water agency. In Nevada, both direct flow and reservoir rights are so restricted. In Wyoming, the statute reads that no direct flow from a natural unstored source shall be severed and transferred from the land for which the water was appropriated. There are

exceptions to this rule in other sections of the Wyoming Water Act, in effect leaving appropriations after 1909 for the direct flow for irrigation purposes the sole right inseparably attached to the land.\textsuperscript{38} (The Wyoming "no change" statute was passed in 1909, and it has been held that the statute in no way restricts pre-1909 rights.)\textsuperscript{39}

This restriction of no-change on the direct flow rights in the four states, Nebraska, Oklahoma, South Dakota, and Wyoming, should cause the direct flow appropriator saddled with such an inflexible right to take note that a reservoir right is freely transferable. There is sufficient precedent established that a direct flow right may be exchanged for a reservoir right.\textsuperscript{40} Thus, the direct flow appropriator may achieve transferability by exchanging with a reservoir company his direct flow right for a storage right, if such a transfer will not be injurious to other appropriators. If the injury to another is likely, absolute denial of transfer, today, would be unlikely, as the amount of water consumed by the use prior to transfer can be computed, and the right should be transferable to that extent.\textsuperscript{41}

When the water user is ready to take delivery of his water from the reservoir, he is faced with the immediate problem of transportation of the water to his land. The user will be most fortunate if he can channel the water from the reservoir directly upon his land. It is most probable, however, that the user's land will not be directly adjacent to the reservoir. The user may find it possible to use the bed of a natural stream as a course for transporting his water to his land. Such action is allowed in the various states, and the process is closely regulated by the state, whose water official must be notified in advance, before the reservoir water is released and commingled with the water of the natural stream, as the official must close all diversion works' headgates between the point of release and the rightful user's

\textsuperscript{38} Wyo. STAT. § 41-3 (1957).
\textsuperscript{39} Letter from George F. Guy, Attorney General, State of Wyoming, to State Board of Control, May 12, 1956, as referred to in Trelease & Lee, supra note 31, at 36.
\textsuperscript{40} Wyo. STAT. §§ 41-5 to -8 (1957); Petition of Wheatland Irr. Dist., State Board of Control, Order No. 16, pp. 1-26, Nov. 13, 1964, cited by Trelease & Lee, supra note 31, at 46.
\textsuperscript{41} Trelease & Lee, supra note 31, at 46.
ditch, ensuring that the user receives all of his due appropriation.\textsuperscript{42}

Most states provide by statute that an appropriator who must cross the land of another in order to transport the water by canal to his land has a right to a right of way across the intervening lands.\textsuperscript{43} He may enforce that right by condemning that land needed under the power of eminent domain, and constructing canals over that land upon payment of just compensation for the land taken.\textsuperscript{44}

\textbf{Ownership Questions}

Ownership of the physical facilities of the reservoir is an important consideration. It is generally held that an appropriator of water stored in a reservoir owns only a right to the use of a specified amount of water, unless his deed to the right gives him an interest in the reservoir. In either instance, the appropriator of stored water will be assessed an annual fee proportionate to his equity interest in the water as his equitable burden of cost and maintenance of the reservoir.\textsuperscript{45}

In Wyoming, section 41-34 of the 1957 \textit{Wyoming Statutes} provides that the sale of any portion of the capacity of any reservoir shall carry with it an interest in the physical plant in proportion to the user's interest in that stored water. Yet, in Anderson v. Wyoming Devel. Co.,\textsuperscript{46} the plaintiffs were attempting to obtain a decree from the court enjoining the defendants from further sale of land which would subdivide the plaintiffs' already inadequate share of the company's reservoir. The claim for relief was based partially on the assertion that in selling the plaintiffs' land with a specified water right attached, the defendants had sold the plaintiffs an interest in the facilities of the reservoir; and when the quantity of land sold equaled that amount of land which could be adequately irrigated from the defendants' reservoir, the company had divested itself of all interest in the reservoir.

\textsuperscript{43} \textit{See TRELEASE, WATER LAW} 63 n.2 (1967).
\textsuperscript{44} \textit{Utah Code Ann.} \textsection 775-1-6 (1953); \textit{Idaho Code Ann.} \textsection 42-1006 (1947); \textit{Mont. Const. art. 3, \textsection 15(a) (1889); Tex. Rev. Civ. Stat. art. 7583 (Supp. 1965).}
\textsuperscript{45} For a more detailed discussion, \textit{see TRELEASE, WATER LAW} 257-59 (1967).
The court refused to acknowledge the fact that the plaintiffs had received anything other than the interest for which they had contracted, which was no interest at all in the reservoir facilities. The court made no mention of 1931 Wyoming Revised Statutes, section 122-1601 (presently, section 41-34, supra). However, the court mentioned language similar to that used in section 122-1601 in another statute section 91-707 [which statute was not carried forward to the 1957 compilation]; and the court noted that the language had been carried forward from the 1895 adoption by the state of Wyoming of the Carey Land Act. The court then denied application of that provision to the situation under consideration, on the grounds that the Wyoming Development Co. was not a Carey Land Act corporation. Thus, the issue presented by section 41-34 of the 1957 Wyoming Statutes has never been resolved.

The apparent conclusion would be that the Wyoming appropriator of reservoir water can secure an interest in the physical plant of the supplying reservoir only by specific contract, regardless of the language of the statute.

There are relatively few problems of preferred priority for the reservoir owner. The reservoir right is generally equated to the direct flow right in preference by priority in time. There are some exceptions to this general rule. Originally, the Colorado statute provided:

Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to . . . store away any of the unappropriated waters of the state not thereafter needed for domestic or irrigation purposes . . . .

The basic assumption had been that the meaning of the statute was to make a direct flow right preferable to a storage right.

In 1935, the statute was amended to additionally read:

provided, that after April 18, 1935, the appropriation of any water for any reservoir hereafter constructed, when decreed, shall be superior to an appropriation of water for direct application claiming a date of priority subsequent in time to that of such reservoir.

47. Colo. Laws § 1682 (1921) [Emphasis supplied].
Seemingly, it would be apparent that the legislature believed that, prior to April 18, 1935, all reservoir rights were inferior to subsequent as well as prior direct flow rights for domestic and irrigation purposes.49 Yet, the Colorado court held, in 1936,50 without reference to the amendment to the statute, that a reservoir right acquired prior to 1935 was equal in all respects to a direct flow right, with regard to preference by priority, and that the direct flow right created subsequently in time to the reservoir right was always intended to be subsequent to the reservoir in priority. Although this holding seems to conflict with a fair reading of the statute, such an interpretation does mold the law to meet the more flexible needs of modern technology. There are other states, however, that still stipulate a preference for one right over the other. Nebraska provides that during the irrigation season, when the water is needed for direct application, no reservoir shall be allowed to impound under its appropriation.51 Texas gives the application for a reservoir right a preferred position over a simultaneous application made for a direct flow permit.52

As to forfeiture, the reservoir is treated as a direct flow right would be treated,53 with the reservation that perhaps the courts will go to greater lengths to avoid an automatic forfeiture of a reservoir right.54 Due diligence may be less diligence than that required of a direct flow appropriator;55 a reasonable time may be longer.56

In Utah, a special procedure is required before a reservoir right will be declared abandoned.57 The reservoir owner must be notified of the complaint of non-use, and a hearing must be held in which the owner is given the opportunity to explain his intent. The water commissioner must then determine whether the owner has shown cause as to why he should not be deprived of his appropriation due to non-use.

51. NEB. REV. STAT. § 46-241 (2) (1960).
52. TEX. REV. CIV. STAT. art. 7545 (Supp. 1955).
PROBLEM AREAS IN THE LAW PERTAINING TO RESERVOIRS

The area of law governing the creation and existence of the reservoir is in many instances out-dated. The statutes were written in the late nineteenth or early twentieth century. That portion of the law which was litigated, pertinent to reservoirs, was interpreted and established as precedent before many new developments in engineering were conceived. In some cases the law was given a sufficiently flexible interpretation, allowing technology room for growth. In other cases, conditions within the state molded the interpretation of the law, such as the over-appropriation by water users in Colorado. In the large majority of instances, however, the law has never been tried in court, and the consequences of acts by an appropriator for storage are, in these instances, speculative.

An appropriator by direct flow wishes to convert his direct flow right to storage. The general rule is to allow a change in use whenever good reason can be shown to support the desired change, and there is a showing by the user desiring the change that no injury to other appropriators will result. 58

In Colorado, there seem to be some conflicts. The Colorado court has held that it is well recognized that a decreed water right is a valuable property right subject to sale and conveyance, and that the change of use may be permitted by proper court decree, though only in instances where it is shown that the rights of other users of the water are not affected injuriously. 59 It would seem, then, that for good reason an appropriation for a direct flow should be allowed to be changed in use to a storage right.

In Handy Ditch Co. v. Greeley & Loveland Irr. Co., 60 in 1915, the Colorado Supreme Court held that the Handy Ditch Co. could not store its direct flow appropriation. The basis for this decision can be found in the distinction that Colorado has drawn between the direct flow right and the storage right. 61 The two rights were separately ordered and administered by their priorities. The storage right was thus separated

58. See supra note 32.
60. 86 Colo. 197, 880 P. 481 (1929).
from the direct flow because the direct flow was a preferred right which was entitled to satisfaction before any storage right could be filled. The court, in this case, felt that to allow Handy Ditch Co. to store its direct flow appropriation would be giving the company a reservoir right with the same priority as the direct flow right, to the injury of reservoir rights which had been established before the company decided to store its direct flow appropriation, but whose priority by date would be later than the direct flow priority of the company's direct flow right. In City & County of Denver v. Northern Colorado Water Cons. Dist., 62 the court applied this rule of prohibiting the storage of direct flow appropriations as a basis for denying the city a decree for 1600 c.f.s. of water from sources on the western slope. The city had attempted to combine the two means of diversion into one project. Originally, the city had hoped to divert 1600 c.f.s. from these sources by direct flow. It was discovered, however that the city could build a tunnel of half that capacity through the mountain to the eastern slope, storing the remainder or the 1600 c.f.s. in a reservoir at the head of the tunnel until the flow of the source decreased sufficiently that the stored water could drain from the reservoir into the tunnel, thereby giving the city a more continuous supply, and saving the city $10,000,000 in expense which would have been needed to construct a direct tunnel of 1600 c.f.s. 63

Again, in 1961, 64 the court reversed a decree granting a storage right to an appropriator seeking to store a direct flow appropriation which he had purchased to supplement his inadequate supply from his original source. Again, part of the grounds for the refusal to grant the decree was the Colorado court's determination that a direct flow right could not be stored, nor could it be the basis for a storage right.

It is not too difficult to see that this rule developed as a result of the Colorado appropriator's success in originally obtaining decrees far in excess of his actual needs, so much so that at the end of the season the appropriator by direct flow would have substantial quantities of unused water left

63. Id., 276 P.2d at 1021 (Dissent).
over, which he was usually anxious to sell. Such over-appropriation is contrary to the basic principles of maximization for the greatest benefit, and of appropriation for application to beneficial use. Yet, the continuation of such an absolute rule as this, today, to the denial of all such transfers from direct flow to storage without loss of priority is an impediment to technological progress.

Idaho permits the transfer of a direct flow appropriation to storage, to no obvious disadvantage. In Big Wood Canal Co. v. Chapman, the canal company had several direct flow appropriations senior to Chapman's rights, but the company had canal capacity of only 2500 and 2700 c.f.s., while the company's appropriations were for 3000, 3000, and 1.4 c.f.s. The company solved its problem by storing its excess over the canal capacity until it was able to carry the excess, a solution very similar to that attempted by the City and County of Denver in the case mentioned above. The Idaho court dismissed the complaint as irrelevant as to whether the permits were in excess of the carrying capacity of the canals or whether the company stored the direct flow appropriations, or a part thereof, until needed; the criteria by which the validity of the company's appropriation was measured was whether the water appropriated was put to beneficial use. The company was able to show and convince the court that it had put its whole appropriation to beneficial use. In contrast to the Colorado rule, this rule lends more flexibility to the law, encouraging development of more economical and efficient means of reaching the same end.

There remains for discussion the subject of carry-over or excess storage. Most state statutes permit the storage of excess water, flood waters, or waste water. Herein, several problems arise. Do the statutes intend that the appropriator shall be allowed to store water in excess of his present (annual) needs to the extent that he will have sufficient water to carry him through the average cycle of dry years? Should the appropriator be allowed to store enough water to tide him through this usual period of dry years and an excess supply

65. MEAD, IRRIGATION INSTITUTIONS 174 (1909).
in addition, as insurance against the infrequent, long dry spell, such as occurred in the 1930's? Or does the statute permitting the storage of excess mean to allow the storage of that amount of water flowing in a stream which will flow through and out of the state, unused?

Montana views excess as that amount which flows through the state unappropriated. In Donich v. Johnson,\(^68\) the Montana court ruled:

Between irrigating seasons the water of Montana's numerous streams mostly go to waste, and, generally speaking, in high water time, which usually is in June, tremendous quantities of flood waters run away without serving any useful purpose. The construction and maintenance of secure reservoirs for the conservation of these waters, therefore, is of very high public importance.\(^69\)

Thus, Montana takes the view that excess water is water which would otherwise "go to waste."

Colorado takes the approach that water may be stored only to the amount needed.\(^70\)

It is unnecessary to enter into a discussion of the evidence further than to state that possibly, excepting a portion of the [water] awarded, it appears that appellee has never applied the water stored in its reservoir to the irrigation of lands. Diversion and storage are not sufficient to constitute an appropriation. In addition, the water so diverted and stored must be beneficially applied; that is, in this instance, it must have been applied to lands for the purpose of irrigation.\(^71\)

Wyoming\(^72\) and Arizona\(^73\) follow Montana's view of excess. Colorado takes its view, perhaps, in the light of the fact that most streams in Colorado are already fully appropriated, to the extent that it may be said, in Colorado, that there is no excess water which will flow through and from the state, unused.

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68. 77 Mont. 229, 250 P. 963 (1926).
69. Id., 250 P. at 965.
71. Id., 127 P. at 1025.
73. Santa Cruz Res. Co. v. Ramirez, supra note 67.
The reservoir owner may wish to appropriate a large quantity for storage to meet his annual needs; but, he may wish to economize by building a reservoir of a capacity equal to half of his annual need, to be filled twice in one year. If such be the case, the reservoir owner will be frustrated in Colorado, and in Montana. He will have difficulties as to certainty in Wyoming. The question seems never to have been raised in other jurisdictions.

In 1908, in *Windsor Canal Co. v. Lake Supply Ditch*, the Colorado court refused to allow a reservoir owner to fill his reservoir more than once annually *on the same appropriation*. An appropriation to impound water was limited to the capacity of the reservoir. In considering the definition of capacity, the court discarded the distinction "on the same appropriation," and finally produced the black letter rule that a reservoir could be filled only once a year. This rule has been applied many times since, most recently in 1961, in *Orchard City Irr. Dist. v. Whitten*.

Plaintiff asserts the right to store the maximum quantity of water under each of its reservoir decrees. Otherwise stated, it claims the right to store 3,400 acre feet of water under the 1907 decree and 2,870 acre feet under the 1937 decree—a total of 6,270 acre feet to be stored in a reservoir with a capacity fixed and determined by both decrees to be 3,400 acre feet. Such being the decreed physical facts, plaintiff's claim amounts to an assertion of the right to fill the reservoir more than once a year.

In following the *Windsor Canal Co.* case, the court held:

While the Windsor case involves the storage of water from only one source of supply, we nevertheless regard the holding there as decisive of the right to refill the reservoir whether the sources of supply be single, dual, or multiple.

And, the result is the deprivation of more efficient use of the water, due to mechanical application of the law.

In Montana, the supreme court held in *Federal Land Bank v. Morris* that a reservoir owning two rights under

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75. *Orchard City Irr. Dist. v. Whitten*, *supra* note 64.
76. Id., 361 P.2d at 135.
77. Id., 361 P.2d at 137.
78. 112 Mont. 445, 116 P.2d 1007 (1941).
two separate decrees of different priorities may appropriate under these rights, but only in the priority given by each decree. The latest priority must await the satisfaction of other earlier priorities which are junior rights to the reservoir owner’s earlier decree. The fact that the allowance of such appropriations would mean refilling the reservoir a second time annually was disregarded, as long as the refill was a second, separate priority.

Wyoming law is unclear as to this issue. In *Van Tassell Real Estate & Livestock Co. v. City of Cheyenne*, the Wyoming supreme court ruled:

Limitation to capacity of ditch seems to have been the general rule, when appropriations commenced for mining purposes. . . . But, when the principles of appropriation were extended to irrigation, a different rule grew up, since it was frequently impracticable for a landowner to construct his diversion works, and therefore make beneficial use of the water, all at once.

The court went on to point out that capacity was no longer the measure of an appropriation, but, rather, the measure was the amount which could be put to beneficial use. The court then passed to other considerations, to decide that the excess water in contention was being put to a beneficial use by the mere fact that it served as fire protection for the city. Yet there is no discussion here, nor elsewhere in Wyoming case law, of the Wyoming position on the “one fill” rule.


80. *Id.*, 54 P.2d at 913. *See also Laramie Rivers Co. v. La Vasseur*, 65 Wyo. 414, 202 P.2d 680 (1949). The Wyoming court noted that due to the uneveness of the basin bottom of the reservoir No. 2 of the Wheatland Irrigation District there was a large body of water of approximately 10,000 acre feet which was in fact “dead water.” This dead water was contained in two pools which would not drain, despite attempts to cause drainage through the opening of a trench between the two pools. As a result, the effective capacity of the reservoir was reduced from 53,000 acre feet to 43,000 acre feet. However, the court declined to cut the Irrigation District appropriation on the basis of abandonment. The argument of multiple fill was not used; nor was it mentioned by the court. In effect, however, the court was allowing an additional fill every year in which the Irrigation District took its full appropriation. As the reservoir had a capacity of only 43,000, then every time the water commissioner diverted 53,000 acre feet into the reservoir in one year he was granting an appropriation in excess of capacity by 10,000 acre feet. Unfortunately, the court did not, and was not called upon to, decide the issue on the basis of the Colorado one-fill rule.

81. *Van Tassell Real Estate & Livestock Co. v. City of Cheyenne*, *supra* note 79, at 915.
In respect to excesses, it is the general rule that a reservoir owner who stores excess water must, upon demand by another appropriator with a need, supply the other appropriator with sufficient water from the excess, to the amount of the excess, to satisfy the other’s need. How much of the reservoir owner’s water is excess? How much of the owner’s carry-over supply stored against future dry years is vulnerable to such a request from another appropriator with a need? May the reservoir owner refuse to reduce his supply stored for the unusually long drought? How much of his insurance must he give up to meet the demands of another appropriator with a need? To allow every one with a need to take from the store of excess water would hardly make the construction of a reservoir worthwhile, as it would be impossible in many instances to build up a store against the dry year, next year, much less to build up a store as insurance to see the owner through the drought cycle of predictable recurrence and duration. To the other extreme, it would be contrary to the maximization principle to allow the reservoir owner to store unreasonable amounts against the longest drought, which may never occur, while another appropriator with a present urgent need must do without.

CONCLUSION

In summary, it should be reiterated that the reservoir has contributed much to the attempt to apply water more efficiently to maximize the benefit obtainable. In most instances, the law has been molded to facilitate the storage of water where it is needed. In a few instances, the law should be modified; measures should be adopted to allow more efficient development of the concept of storage. The limitation of the appropriation to a single fill without exception is an example of law which has inhibited the development of the uses to which a reservoir could be put. Perhaps as technology advances, the pressures of change will bring about the extermination of the impediments to the maximization of use.

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82. WYO. STAT. § 41-39 (1957); Santa Cruz Res. Co. v. Ramirez, supra note 67; N.M. STAT. ANN. § 75-5-16’ (1958).