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To Save and to Salvage; or Not - Salvage Water Regulations in Wyoming

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COMMENT

**To Save and to Salvage; or Not?
Salvage Water Regulations in Wyoming**

*Rebecca Zisch**

TABLE OF CONTENTS

I.	INTRODUCTION	405
II.	BACKGROUND	407
	A. <i>A Quick Primer on Wyoming Water Law</i>	407
	B. <i>The Priority System</i>	409
	C. <i>Beneficial Use and the Duty of Water</i>	409
	D. <i>Reuse and Recapture Doctrines</i>	411
	E. <i>The No-Injury Doctrine</i>	414
	F. <i>Change of Use Laws</i>	416
	G. <i>Imported Water Laws</i>	417
	H. <i>An Introduction to Salvage Water</i>	418
	I. <i>Senate File 0150: Proposed Wyoming Legislation Pertaining to Salvage Water</i>	420
III.	ANALYSIS.....	421
	A. <i>The Priority System</i>	421
	B. <i>Beneficial Use and the Duty of Water</i>	423
	C. <i>Reuse and Recapture Doctrines</i>	425
	D. <i>The No-Injury Doctrine</i>	427
	E. <i>Change of Use Laws</i>	430
	F. <i>Imported Water Laws</i>	432
IV.	CONCLUSION	433

I. INTRODUCTION

Water always was and always will be a scarce resource in the West.¹ Western states strive to maximize the number and extent of water uses while promoting

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¹ See, e.g., Sandra K. Davis, *The Politics of Water Scarcity in the Western States*, 38 SOC. SCI. J. 527, 527 (2001).

efficiency as an important conservation goal.² In doing so, Western states have been forced to find creative solutions addressing their water scarcity.³ This comment discusses one possible way Wyoming could maximize water uses while promoting efficiency: allowing appropriators to retain the right to use water salvaged under their original appropriation.

State water scarcity solutions take two primary forms: technological advances and regulations.⁴ Technological advances include updating and improving irrigation water delivery systems, improving headgate control, improving pipeline and ditch technology and materials, developing and improving water treatment and wastewater treatment capabilities, and improving water desalinization technology.⁵ Innovative regulatory solutions include recapture and reuse, effluent, wastewater, seepage use, return flow, and preferred use regulations.⁶ Allowing appropriators to retain the right to use water salvaged under their original appropriation would encourage adaptation to new technological advances, thereby promoting more efficient use of water.

Due to water's evolving nature and the need for this scarce resource, it is impossible to create a system of laws covering every current and future nuance.⁷ Water laws are infused with flexibility so they can adapt to technological and scientific developments allowing more efficient water use, such as adding new beneficial uses to those already statutorily listed.⁸ Thus, the laws leave latitude for additional innovations to improve water conservation and efficiency.⁹

Allowing appropriators to retain the right to use water salvaged under their original appropriation is one such possible innovation for Wyoming.¹⁰ The

² See Ronald A. Kaiser, *Texas Water Marketing in the Next Millennium: A Conceptual and Legal Analysis*, 27 TEX. TECH L. REV. 181, 193 (1996).

³ See, e.g., Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1873–74 (2005).

⁴ See *infra* notes 5–6 and accompanying text.

⁵ See U.S. DEPT. OF INTERIOR, BUREAU OF RECLAMATION, *WATER 2025: PREVENTING CRISES AND CONFLICT IN THE WEST 2* (2003), <http://biodiversity.ca.gov/Meetings/archive/water03/water2025.pdf>; Robert E. Clark, *Background and Trends in Water Salvage Law*, 15 ROCKY MTN. MIN. L. INST. 421, 422 (1969).

⁶ See *infra* notes 33–128 and accompanying text.

⁷ See generally WYO. STATE ENG'ER'S OFFICE: Mission Statement, <https://sites.google.com/a/wyo.gov/seol> (last visited Apr. 29, 2014) (“This includes the appropriation, distribution and application to beneficial use of water as provided under the prior appropriation doctrine, and to maintain the flexibility within that framework to meet the changing needs of the citizens of Wyoming.”).

⁸ See *id.*

⁹ See *id.*

¹⁰ Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND AND WATER L. REV. 308, 331 (1989).

Wyoming Legislature attempted to provide this right in Proposed Senate File No. SF0150 (proposed Wyoming salvage water legislation) in January 2013.¹¹ Although this particular bill died in the Senate Committee, the continuing problem of water scarcity makes it likely the Legislature will revisit the idea of granting appropriators the right to retain salvage water.

This comment argues that the proposed Wyoming salvage water legislation promotes the goals of efficiency and maximum utilization, and thus is something Wyoming should actively pursue. The proposed Wyoming salvage water legislation is consistent with the policy goals and objectives of existing Wyoming water laws, which should further animate the Legislature to pursue this creative water scarcity solution.¹² This comment first explains various principles of water law and their interaction with the proposed Wyoming legislation.¹³ These principles include the priority system, beneficial use and the duty of water, the no-injury doctrine, change of use, reuse and recapture, and imported water laws.¹⁴ Second, this comment describes what salvage water is and discusses the proposed Wyoming salvage water legislation.¹⁵ Finally, this comment advocates re-introducing a salvage water bill in Wyoming and discusses ways to improve the proposed legislation.¹⁶

II. BACKGROUND

A. *A Quick Primer on Wyoming Water Law*

In Wyoming, all water is owned by the State.¹⁷ The Wyoming State Engineer is the chief administrator of Wyoming water, charged with regulating and

¹¹ WYOMING LEGISLATURE, FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE 1, 320 (2013), <http://legisweb.state.wy.us/2013/SenateDigest.pdf>.

¹² See *infra* notes 150–221 and accompanying text.

¹³ See *infra* notes 17–128 and accompanying text. Water law is an incredibly expansive and complex topic. Within the bounds of this comment it would be impossible to set out a comprehensive background on water law generally. The background of this comment merely seeks to make the reader aware of various facets of water law, highlight the important components of water law, and provide mere basics for a sufficient understanding of water law such that the analysis of salvage water will be pertinent and comprehensible. There are a vast number of resources to garner a comprehensive or more extensive knowledge of water law to which the reader should refer if he or she desires a more encompassing knowledge of water law. A few resources for this purpose include: Squillace, *supra* note 10; A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* (Westlaw 2013).; and A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* (Foundation Press, 6th ed. 2009).

¹⁴ See *infra* notes 33–128 and accompanying text.

¹⁵ See *infra* notes 129–47 and accompanying text.

¹⁶ See *infra* notes 150–221 and accompanying text.

¹⁷ See WYO. STATE ENG'R'S OFFICE, ABOUT THE STATE ENGINEER'S OFFICE, <http://seo.wyo.gov/home/about>; James J. Jacobs et al., *Wyoming Water Law: A Summary* (1995), available at <http://library.wrds.uwyo.edu/wrp/90-17/90-17.html> (last visited March 20, 2014).

administering Wyoming water resources.¹⁸ Wyoming is divided into four water divisions to facilitate water administration.¹⁹ The superintendent of each of these divisions, along with the State Engineer, constitute the state Board of Control.²⁰ The Board of Control adjudicates and finalizes water rights and considers other water matters in Wyoming, such as changes in point of diversion, amendments, and corrections of water rights.²¹ The State Engineer wields significant power in effectuating Wyoming water laws.²²

Wyoming water law follows the doctrine of prior appropriation, otherwise known as “first in time, first in right,” under which the first to put water to beneficial use has the senior right.²³ Under the relation back doctrine, a water user’s priority date relates back to the time an intent to appropriate is first formed, not to when the appropriator applies the water to beneficial use.²⁴ Those holding “an earlier priority water right are allowed to receive their full portion of water before those with junior [later] rights may receive water under their right.”²⁵ Thus, when water is scarce, those with the lowest priority may not have any water with which to exercise their rights and will simply find themselves out of luck. Certain water uses have priority over others such as drinking water for humans and livestock, which has higher priority than water for municipal and industrial purposes.²⁶ Ultimately, water right holders cannot withdraw more than is necessary for their designated purpose and for irrigators, no more than one cubic foot per second for each seventy acres.²⁷

¹⁸ See *supra* note 17 and accompanying text.

¹⁹ Jacobs et al., *supra* note 17.

²⁰ *Id.*

²¹ *Id.*

²² WYO. STAT. ANN. § 41-3-909 (2013) (the power to prescribe rules, require reports, make investigations and regulations, establish standards, require abatement, and bring suit); § 41-3-910 (the power to determine the area and boundaries of districts); § 41-3-911 (authority to order interfering appropriators to cease withdrawals of water and hear complaints by appropriators).

²³ See *supra* note 17 and accompanying text.

²⁴ A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:62 (Westlaw 2013).

²⁵ WYO. STATE ENG’R’S OFFICE, *supra* note 17.

²⁶ Jacobs, *supra* note 17. Municipal water is defined as:

[W]ater withdrawn by populations in cities, towns, housing estates, domestic and public service enterprises. The public supply also includes water for industry that provides directly for the needs of urban populations and this demand also consumes high quality water from the city water supply system. In many cities, a considerable quantity of water is used in market gardening and for watering vegetable gardens and domestic garden plots.

UNESCO, *Municipal Water Use* (June 21, 1999), <http://webworld.unesco.org/water/ihp/publications/waterway/webpc/pag17.html> (last visited Apr. 29, 2014).

²⁷ WYO. STATE ENG’R’S OFFICE, *supra* note 17.

Before delving a little further into the background of water law generally, it is important to distinguish some key, and sometimes confusing, terminology: namely, junior versus senior rights, and downstream versus upstream rights. The junior/senior distinction refers to chronological priority of rights, whereas downstream/upstream refers to the appropriator's physical location without any reference to the sequence of priority.²⁸ The rest of the background section focuses on major water law concepts so readers have a basic idea of the intricacies of water law.

B. The Priority System

The Wyoming prior appropriation system is based on priority of appropriation under the adage "first in time, first in right."²⁹ For the appropriation right to remain active, "beneficial use is a continuing requirement which must be satisfied."³⁰ The "relation back" doctrine determines the priority date of a water right.³¹ The date of the manifestation of intent to apply the water to beneficial use, not the date of actual application of the water to beneficial use, determines the priority of a water right.³²

C. Beneficial Use and the Duty of Water

Wyoming establishes beneficial use as "the basis, the measure and limit of the right to use water at all times, not exceeding the statutory limit."³³ Appropriators cannot acquire a right permitting them to use more water than is reasonably necessary for beneficial purposes.³⁴ Therefore, determining the amount of water that can be beneficially applied plays a vital role in quantifying an appropriator's actual right.³⁵ Under this system, not only is beneficial use the sole and only basis

²⁸ BRAZOS RIVER AUTHORITY, *What are Senior and Junior Water Rights?*, <http://waterschool.brazos.org/post/senior-water-rights.aspx> (last visited May 4, 2014).

²⁹ See *King v. Bd. of Cnty. Comm'rs*, 2010 WY 154, ¶ 3, 244 P.3d 473, 474 (Wyo. 2010).

³⁰ *Hofeldt v. Eyre*, 849 P.2d 1295, 1298 (Wyo. 1993); *Basin Elec. Power Coop. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo. 1978).

³¹ *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 48 P.3d 1040, 1048 (Wyo. 2002).

³² *Id.* at 1049. Today, the date of filing for the permit application indicates a manifestation of intent.

³³ WYO. STAT. ANN. § 41-3-101 (2013); see *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505 (Wyo. 1983). The statutory limit is the duty of water. See *infra* notes 37–39, 42 and accompanying text.

³⁴ *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 571 (Wyo. 1939) (discussing whether or not to grant a change of use and how to quantify the use in determining the established right which may potentially be changed). "The volume of water to which an appropriator is entitled at any particular time is that quantity, within the limits of the appropriation, which he can and does apply to the beneficial uses stated in his certificate of appropriation." *Parshall v. Cowper*, 143 P. 302, 304 (Wyo. 1914).

³⁵ *Parshall*, 143 P. at 302.

of the appropriation, but priority of right is also dependent on the beneficial use.³⁶ An appropriator can lose his appropriation, and his priority, if he fails to put the water to beneficial use.

Another limiting measure for irrigation appropriations is the duty of water. The duty of water is “that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time which may be adequate to produce” maximum irrigation or crop growth.³⁷ Essentially, the duty of water limits excessive water use on crops in relation to what crops can actually use.³⁸ The duty of water puts a maximum appropriation allowance on water per what is considered beneficial.³⁹

Additionally, the duty of water quantifies and informs the beneficial use measurement.⁴⁰ The Wyoming Supreme Court’s case law and the Wyoming State Board of Control limit an appropriator’s right to a “sufficient and adequate” amount to fulfill the appropriation’s purpose.⁴¹ The fixed upper limit of the duty of water is statutorily set at one cubic foot per second for each seventy acres irrigated.⁴² The duty of water accounts for return flows and other factors, as the quantity available to an appropriator to divert does not solely reflect consumptive use.⁴³ The duty of water seeks to eliminate waste within the hydrologic system by any user, a reflection of the requirement to beneficially use water.⁴⁴ Any water lost in the system or lost to the appropriator but still returning to the hydrologic system is technically contrary to the duty of water.⁴⁵ This lost water is not put to beneficial use by its original appropriator and is therefore considered excessive, making it contrary to the duty not to waste water.⁴⁶

Wyoming’s traditional system calculated lost water into appropriations from the outset.⁴⁷ The ultimate goal of water law is to reduce waste and ensure maximum utilization and efficiency of water use.⁴⁸ If an appropriator eliminates wasted

³⁶ *John Meier & Sons, Inc. v. Horse Creek Conservation Dist. of Goshen Cnty.*, 603 P.2d 1283, 1288 (Wyo. 1979).

³⁷ *Basin Elec. Power Coop. v. State Bd. of Control*, 578 P.2d 557, 564 (Wyo. 1978).

³⁸ See, e.g., Jeff Gittins, *What is Duty of Water?*, UTAH WATER LAW AND WATER RIGHTS (Sept. 30, 2010), <http://utahwaterrights.blogspot.com/2010/09/what-is-duty-of-water.html>.

³⁹ *Id.*

⁴⁰ See A. DAN TARLOCK, *supra* note 24, § 5:69.

⁴¹ *Nichols v. Hufford*, 133 P. 1084, 1085 (Wyo. 1913).

⁴² *Id.* at 1086.

⁴³ *Basin Elec. Power Coop. v. State Bd. of Control*, 578 P.2d 557, 573 (Wyo. 1978).

⁴⁴ *Id.* at 574–75.

⁴⁵ *Id.* at 564.

⁴⁶ *Id.*

⁴⁷ *Id.* at 573.

⁴⁸ See, Kaiser, *supra* note 2.

water, that amount of water no longer counts as part of the appropriation.⁴⁹ Thus, the appropriator's quantified appropriation is reduced by that amount of water no longer wasted.⁵⁰ This is because the appropriation no longer needs to account for water loss, and the right is only to historic *beneficial* use.⁵¹ Unfortunately, the duty of water sometimes discourages innovation in efficiency and maximum utilization.⁵² For example, an appropriator's original right could be reduced if he makes his system or use more efficient as a water right is always limited by the duty of water and the amount of water beneficially used.⁵³

D. Reuse and Recapture Doctrines

The doctrine of recapture permits an appropriator who has diverted water for the purpose of his beneficial use to recapture, and ultimately reuse, his own runoff and seepage before it escapes his control or property.⁵⁴ The doctrine of reuse permits an original appropriator to retain possession and control of waste and seepage water from irrigation (or other uses) on his land and to reuse those waters for his own benefit without returning the water to the channels from which it was diverted.⁵⁵ The doctrines of reuse and recapture are usually referred to in tandem, and thus considered together.⁵⁶ Both doctrines entail saving water after applying it to use but before it leaves the appropriator's land, and reapplying the water to the appropriator's original beneficial use.⁵⁷ The doctrines of reuse and recapture promote efficiency and conservation.⁵⁸

⁴⁹ See *Basin Elec. Power Coop.*, 578 P.2d at 564.

⁵⁰ See *id.* at 563–64.

⁵¹ See *id.* (emphasis added).

⁵² See, e.g., Squillace, *supra* note 10, at 331–32.

⁵³ See, e.g., Squillace, *supra* note 10, at 331–32.

⁵⁴ *Montana v. Wyoming*, 131 S. Ct. 1765, 1768 (2011); *Fuss v. Franks*, 610 P.2d 17, 20 (Wyo. 1980); *Thayer v. City of Rawlins*, 594 P.2d 951, 955 (Wyo. 1979); *Binning v. Miller*, 102 P.2d 54, 59–60 (Wyo. 1940).

⁵⁵ *Montana v. Wyoming*, 131 S. Ct. at 1775.

⁵⁶ See, e.g., Christopher H. Meyer, *Recapture, Reuse, and Appropriation of Waste Water*, IDAHO DEP'T. OF ENVTL. QUALITY 2012 WATER REUSE CONF. 1 (2012), <http://www.deq.state.id.us/media/829256-meyers-presentation-reuse-conference-2012.pdf>.

⁵⁷ *Montana v. Wyoming*, 131 S. Ct. at 1775.

⁵⁸ See Meyer, *supra* note 56, at 2. As the Wyoming Supreme Court stated:

We would certainly discourage development and retard the full and efficient use of our precious water supply were we now to say that persons who save return flows and seepage before they reach a stream and put the water to beneficial use have no protection in law, that latecomers who subsequently seek rights from the stream itself can take the water as against the persons who have put it to beneficial use for years.

Bower v. Big Horn Canal Ass'n, 307 P.2d 593, 602 (Wyo. 1957).

Endeavors where an appropriator seeks to recapture and reuse water without initiating a new appropriation raise a legal question.⁵⁹ The prevailing issue is whether reuse and recapture preempt other basic principles of water law. Under these doctrines, reuse may increase consumption so long as there is no change to the use, place, purpose of use, time of use, or point of diversion.⁶⁰ The key constraints under these doctrines are that recapture and reuse can occur only within the land for which the original appropriation was made, and for the appropriation's original purpose.⁶¹ The doctrine of reuse and recapture can be subject to the no-injury doctrine.⁶² Thus, the reuse or recapture of water may be allowed only if doing so would not injure other appropriators.⁶³ However, in Wyoming, courts do not apply the no-injury doctrine when analyzing reuse and recapture.⁶⁴ Generally, an appropriator may use water that was recaptured, reused, or conserved on his own land without regard to the harm caused by others, so long as such use does not exceed his paper right.⁶⁵

The doctrines of reuse and recapture also relate to waste water as courts mix together concepts of seepage, drainage, waste, and return flow.⁶⁶ Waste water is excess water in an appropriation not needed to accomplish the beneficial use; for example, water that is not consumed in use.⁶⁷ Nonetheless, while it is excess, this waste water may still be a necessary part of the appropriation, such as water lost to percolation and evaporation, but which is vital to transport the water to its final destination for beneficial application. Wyoming does not statutorily regulate waste water, but the Wyoming Supreme Court has developed standards through case law.⁶⁸ An original appropriator can recapture and reuse waste water so long as the water has not left his property boundary.⁶⁹ If, however, waste water escapes the boundaries of the appropriator's land and, if undisturbed, would flow to a natural stream, then the water leaving the appropriator's land is eligible for appropriation

⁵⁹ Kaiser, *supra* note 2, at 244.

⁶⁰ See Squillace, *supra* note 10, at 339–40. An appropriator could apply for a new permit for the reused water contingent on no-injury but a more junior priority date would attach to that right and not the priority date of the original appropriation.

⁶¹ See A. DAN TARLOCK, *supra* note 24, § 5:17.

⁶² Squillace, *supra* note 10, at 340.

⁶³ *Id.*

⁶⁴ See *Fuss v. Franks*, 610 P.2d 17, 20 (Wyo. 1980); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957); *In re Boyer*, 248 P.2d 540, 546 (Idaho 1952). However, the no-injury doctrine still applies on its own, under its own analysis. See *infra* notes 192–208 and accompanying text.

⁶⁵ See Squillace, *supra* note 10, at 339–41.

⁶⁶ See Kaiser, *supra* note 2, at 243–44.

⁶⁷ See generally *Fuss*, 610 P.2d at 20. Thus waste water is essentially the amount of water which is the difference between the amount consumed and the amount diverted.

⁶⁸ See generally *id.*; *Bower*, 307 P.2d at 601; *Thayer v. City of Rawlins*, 594 P.2d 951 (Wyo. 1979); *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940).

⁶⁹ *Fuss*, 610 P.2d at 20.

by others for their uses.⁷⁰ Consequently, if an appropriator does not use the waste water, as soon as the water leaves the appropriator's boundaries, it reenters the system as either seepage or by uniting with another water body.⁷¹ When the water leaves the appropriator's boundary, it is deemed unappropriated and thus available for downstream users to divert.⁷² However, a downstream user cannot demand that an upstream user perpetually continue supplying waste water.⁷³ Rather, users of waste water take their chances that future supplies may be curtailed; because these users do not have a right to such water, they cannot have protected priority to it.⁷⁴ Furthermore, the priority date extends to waste water, thereby protecting the rights of senior appropriators who recapture and reuse their waste water.⁷⁵

Generally, the doctrines of reuse and recapture apply part of the no-injury analysis.⁷⁶ The proposed salvage water regulations require that any change by the original appropriator does not decrease the historic amount of return flows.⁷⁷ Appropriators salvaging water must maintain the same amount of return flows after salvaging the water as before salvaging the water.⁷⁸ If an original appropriator converts water previously lost forever to the original watershed, such as that attributable to phreatophyte consumption, and puts it to his beneficial use, this would not impact return flows or downstream appropriators as that water could never have formed part of their appropriation in the first place.⁷⁹ However, salvaging water affects return flows that previously returned to the hydrologic cycle.⁸⁰ For example, if an appropriator lines his ditch to reduce percolation and then consumes the amount of water he salvaged, this might decrease the previous return flows to the original watershed.⁸¹ This could harm and injure downstream

⁷⁰ *Id.* at 21.

⁷¹ *See Fuss*, 610 P.2d at 20; *Bower*, 307 P.2d at 601; *Thayer*, 594 P.2d at 955; *Binning*, 102 P.2d at 59–60.

⁷² *See Fuss*, 610 P.2d at 20; *Bower*, 307 P.2d at 601; *Thayer*, 594 P.2d at 955; *Binning*, 102 P.2d at 59–60.

⁷³ *Thayer*, 594 P.2d at 955; *Binning*, 102 P.2d at 61.

⁷⁴ *Thayer*, 594 P.2d at 955; *Binning*, 102 P.2d at 61.

⁷⁵ *Thayer*, 594 P.2d at 955. *See Binning*, 102 P.2d at 61; *Bower*, 307 P.2d at 601.

⁷⁶ *See Squillace*, *supra* note 10, at 340.

⁷⁷ *See infra* note 147 and accompanying text. *See also Squillace*, *supra* note 10, at 332. A change here does not refer to a change in use by the original appropriator. It simply refers to a change in the total amount the user is now consuming.

⁷⁸ *See infra* note 147 and accompanying text. There is no indication in the wording of the proposed statute that the proposed salvage water legislation will operate outside the normal confines of the dictates of the doctrines of reuse and recapture.

⁷⁹ *Squillace*, *supra* note 10, at 331.

⁸⁰ *Id.*

⁸¹ Salvaging water can almost be seen as synonymous with efficiency improvements as efficiency improvements are one of the main ways appropriators salvage water. *See generally* COLORADO AGRICULTURAL WATER ALLIANCE, MEETING COLORADO'S FUTURE WATER SUPPLY NEEDS:

users whose appropriations consisted of those return flows. While the no-injury doctrine may not be applied consistently to consumptive water uses, this judicial and legislative oversight could be remedied by including a balancing analysis of the no-injury doctrine for salvage water uses.⁸²

E. The No-Injury Doctrine

The no-injury doctrine is self-descriptive: a use that causes harm to another appropriator is not allowed.⁸³ This doctrine is essentially a tort concept in that one cannot use his property in a manner that unreasonably interferes with another's use of his or her property.⁸⁴ Changes in use, "place of use, point of diversion, purpose or time are permitted subject to the condition that the change must not impair uses by other water rights holders."⁸⁵ The doctrine applies most often when a water user wants to change his use.⁸⁶ The no-injury doctrine, however, is not confined only to change of use.⁸⁷

The no-injury doctrine also implicates and causes tension with the doctrines of reuse and recapture, particularly in relation to return flows.⁸⁸ Return flows generally refer to used but not consumed water that returns to a surface water

OPPORTUNITIES AND CHALLENGES ASSOCIATED WITH POTENTIAL AGRICULTURAL WATER CONSERVATION MEASURES (2008), http://coagwater.colostate.edu/docs/Meeting_CO_Future_Water_Supply_Needs_September_2008.pdf.

⁸² See Squillace, *supra* note 10, at 331. See also *infra* notes 192–208 and accompanying text.

⁸³ See A. DAN TARLOCK, *supra* note 24, § 5:76.

⁸⁴ *Property or Use of Property*, USLEGAL, <http://nuisances.uslegal.com/conduct-objects-activities-or-effects-as-nuisance/property-or-use-of-property/> (last visited Apr. 29, 2014).

⁸⁵ COMMITTEE ON WESTERN WATER MANAGEMENT WATER SCIENCE AND TECHNOLOGY BOARD COMMISSION ON ENGINEERING AND TECHNICAL SYSTEMS BOARD ON AGRICULTURE NATIONAL RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT 73 (1992), available at http://www.nap.edu/catalog.php?record_id=1803.

⁸⁶ Lawrence J. MacDonnell, *Montana v. Wyoming: Sprinklers, Irrigation Water Use Efficiency and the Doctrine of Recapture*, 5 GOLDEN GATE U. ENVTL. L. J. 265, 274 (2012) (stating that in *Montana v. Wyoming*, the court found the no-injury doctrine applies only to changes of point of diversion, purpose of use, and place of use); Squillace, *supra* note 10, at 331 n.157. See also *Montana v. Wyoming*, 131 S. Ct. 1765, 1768 (2011). See *infra* BACKGROUND, SECTION E.

⁸⁷ The proposed Wyoming salvage water legislation conforms with the statutory scheme for change of use. See *infra* notes 102–17, 209–19 and accompanying text. Accordingly, application of the no-injury doctrine in relation to salvage water is analyzed in connection with change of use. Note the proposed Wyoming salvage water legislation: "Any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right shall be approved by the Wyoming state board of control pursuant to [WYO. STAT. ANN. § 41-3-104] or the state engineer pursuant to [WYO. STAT. ANN. § 41-3-110]." See *infra* notes 145–47 and accompanying text.

⁸⁸ See generally Andrew Bennett, *Montana v. Wyoming: A Rising Tide of Water Issues*, 36-SPG ENVIRONS ENVTL. L. & POL'Y J. 115 (2013).

body, normally the same one from where the water was originally diverted.⁸⁹ Return flows also include water that returns through the groundwater system, such as percolating water.⁹⁰ Hence, return flows are essentially any water that returns to the hydrologic system and has therefore been available for diversion by others under existing rights.⁹¹ Courts have recognized the importance of protecting water rights based on return flows.⁹² “In general, downstream users that have established water rights based on stream conditions at the time of their appropriation have vested rights in the continuance of the return flows from the water rights of senior upstream diversions.”⁹³

One type of return flow is seepage water.⁹⁴ If seepage water would naturally flow to a stream when it escapes the boundaries of the appropriators’ land, then downstream users can appropriate that available water.⁹⁵ However, if seepage water remains upon the land for which water forming the seepage was originally appropriated, then the original appropriator has a right to use, reuse, and recapture such seepage water for his own use.⁹⁶ Adjoining landowners may not appropriate seepage water, and water users cannot acquire a prescriptive or permanent right to seepage water.⁹⁷ Priority applies, protecting the rights of a senior appropriator to recapture seepage water.⁹⁸ Seepage water users take their chances as to future supplies, assuming the risk their supply will be reduced; they cannot compel the upstream user to provide a certain amount of water through seepage.⁹⁹ The rule that an appropriator cannot acquire property rights in seepage water is

⁸⁹ TODD DOHERTY & ROD SMITH, WESTERN GOVERNORS’ ASSOCIATION, WATER TRANSFERS IN THE WEST: PROJECTS, TRENDS, AND LEADING PRACTICES IN VOLUNTARY WATER TRADING 33 (2012).

⁹⁰ DANIEL B. STEPHENS ET AL., INTRODUCTION TO QUANTIFYING RETURN FLOW TO GROUNDWATER: WHAT’S IN THE TOOLBOX? (2006), available at http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1047&context=ucowrconfs_2006.

⁹¹ See DOHERTY & SMITH, *supra* note 89.

⁹² *Bower v. Big Horn Canal Ass’n*, 307 P.2d 593, 602 (Wyo. 1957). See generally *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940).

⁹³ Jay F. Stein et al., *Water Use and Reuse: The New Hydrologic Cycle*, 57 ROCKY MTN. MIN. L. INST. 2, 6 (2011).

⁹⁴ See, e.g., Meyer, *supra* note 56; Michael Browning and Steve Bushong, *Ditch Lining: The Water Right Issue*, THE COLO. LAW. NAT. RES. NOTES 1155, 1155–56 (1992), <http://www.pbblaw.com/articles/Browning%20and%20Bushong%20%20Ditch%20Lining%20%20The%20Water%20Rights%20Issue%20%2800011293%29.PDF>.

⁹⁵ *Fuss v. Franks*, 610 P.2d 17, 21 (Wyo. 1980).

⁹⁶ *Id.* at 20.

⁹⁷ *Bower*, 307 P.2d at 602 (Wyo. 1957); *Binning*, 102 P.2d at 60. A prescriptive right is “the acquisition of title to a thing ... by open and continuous possession over a statutory period.” BLACK’S LAW DICTIONARY 589 (4th ed. 2011).

⁹⁸ *Thayer v. City of Rawlins*, 594 P.2d 951, 955 (Wyo. 1979). See *Binning*, 102 P.2d at 60; *Bower*, 307 P.2d at 602.

⁹⁹ *Thayer*, 594 P.2d at 955; *Binning*, 102 P.2d at 61.

limited to preventing appropriations based upon the seepage water of another appropriator.¹⁰⁰ Individual appropriators have the right to recapture seepage water for beneficial use that comes from exercising their own appropriated right.¹⁰¹

F. *Change of Use Laws*

The change of use or place of use process requires appropriators to complete certain procedures. Section 41-2-104 of the Wyoming Statutes outlines the procedures for change of use or place of use.¹⁰² Changing uses or the place of use is not impossible under the statute, but it does require an appropriator to take additional steps and expend extra effort.¹⁰³ One factor required before allowing a change of use of a water right is ensuring the change of use does not decrease the historic amount of return flow.¹⁰⁴ That is, the proposed change in use or place of use cannot injure downstream users or other appropriators by reducing the return flow.¹⁰⁵ Additionally, the right to change the place of diversion may not result in an enlarged use as to either amount or time.¹⁰⁶ Furthermore, the quantification of one's right of beneficial use must not exceed the historic rate of diversion or the historic consumptive use.¹⁰⁷

A key Wyoming case dealing with change in water use is *Basin Electric Power Cooperative v. State Board of Control*.¹⁰⁸ In *Basin Electric*, the Wyoming Supreme Court held that if an appropriator "either by misuse or failure to use, has effectively abandoned either all or part of his water right through noncompliance with the beneficial-use requirements imposed by law, he could not effect a change of use or place of use for that amount of his appropriation which had been abandoned."¹⁰⁹ After *Upper Laramie Users, the Wheatland Irrigation District, the Middle Laramie Water Users Association, and other interested parties contested*, the State

¹⁰⁰ *Hagie v. Lincoln Land Co.*, 18 F. Supp. 637, 641 (D. Wyo. 1937).

¹⁰¹ *Id.*

¹⁰² WYO. STAT. ANN. § 41-2-104 (2013).

¹⁰³ *See id.*

¹⁰⁴ *Garber v. Wagonhound Land & Livestock Co.*, 2012 WY 89, ¶ 26, 279 P.3d 525, 532 (Wyo. 2012). *See Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339, 344 (Wyo. 1983); *Town of Pine Bluffs v. State Bd. of Control*, 649 P.2d 657, 658 (Wyo. 1982); *Thayer v. City of Rawlins*, 594 P.2d 951, 957 (Wyo. 1979); *Basin Elec. Power Coop. v. State Bd. of Control*, 578 P.2d 557, 561 (Wyo. 1978); *State ex rel. Christophulos v. Husky Oil Co. of Del.*, 575 P.2d 262, 274 (Wyo. 1978).

¹⁰⁵ *Garber*, 279 P.3d at 532; *Green River Dev. Co.*, 660 P.2d at 344; *Town of Pine Bluffs*, 649 P.2d at 658; *Thayer*, 594 P.2d at 957; *Basin Elec. Power Coop.*, 578 P.2d at 561; *State ex rel. Christophulos*, 575 P.2d at 274; *Groo v. Sights*, 134 P. 269, 273 (Wyo. 1913); *Johnston v. Little Horse Creek Irrigating Co.*, 79 P. 22, 24 (Wyo. 1904).

¹⁰⁶ *Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 54 P.2d 906, 910 (Wyo. 1936).

¹⁰⁷ WYO. STAT. ANN. § 41-3-104(a) (2013); *Garber*, 279 P.3d at 528.

¹⁰⁸ 578 P.2d 557 (Wyo. 1978).

¹⁰⁹ *Id.* at 564.

Board of Control denied Basin Electric's petition to transfer certain historic closed basin return flows.¹¹⁰ The court affirmed, concluding that water is not beneficially used when it is diverted but not consumed and subsequently trapped in a closed basin.¹¹¹ Hence, this water cannot be changed to a new use.¹¹²

The court recognized in dicta, however, that there “may be circumstances where the beneficial use of water exceeds the actual consumptive use” and there may be circumstances where the “definition of consumptive use can be expanded to include the actual needs for proper irrigation beyond the less-inclusive concept of consumptive use.”¹¹³ The court recognized that proper determination of beneficial use requires flexibility in defining consumptive use.¹¹⁴ The court further held that while incidental losses are excluded when calculating beneficial use appropriations, that measurement is a question of fact depending on the circumstances of each case.¹¹⁵ Accordingly, incidental losses can be included in calculating beneficial use under some circumstances.¹¹⁶ Accounting for incidental losses is, therefore, conducted under the change of use statute as opposed to classifying incidental loss amounts as completely new appropriations.¹¹⁷

G. *Imported Water Laws*

Imported water is any water not originally part of the stream or basin at issue.¹¹⁸ Wyoming law allows a water importer the right to reuse and dispose of imported waters without interfering with any other rights in the appropriator's original water system, as imported water is not part of the original hydrologic system.¹¹⁹ Hence, the ability to reuse imported water is not relinquished when unconsumed water discharges into a watercourse, as would be the case if the water were native to the stream or basin. A water importer can reuse and recapture his imported water even if the recapture takes place after the water has left the physical

¹¹⁰ *Id.* at 559.

¹¹¹ *Id.* at 568. A closed basin is an area “where topography prevents the outflow of water,” with no outlets and only internal drainage. Charles Frazier, *Closed Basin*, HOME GROUND, http://test.ourhomeground.com/entries/definition/closed_basin (last visited Apr. 26, 2014).

¹¹² *Basin Elec. Power Coop.*, 578 P.2d at 570.

¹¹³ *Id.* at 567–68.

¹¹⁴ *Id.* at 568.

¹¹⁵ *Id.*

¹¹⁶ *Id.* Thus an appropriator should not lose the right to salvage water simply by default because such water *is* included as beneficial, therefore entitling the appropriator to that water despite whether or not they find a way to more efficiently use the water.

¹¹⁷ This essentially means the elasticity of consumptive use includes salvaged water.

¹¹⁸ Squillace, *supra* note 10, at 330.

¹¹⁹ *Thayer v. City of Rawlins*, 594 P.2d 951, 955 (Wyo. 1979); Squillace, *supra* note 10, at 330.

boundaries of the original appropriation.¹²⁰ If one salvages native water, then rules applicable to imported water in relation to the doctrine of reuse and recapture would not apply.¹²¹ However, if one salvages imported water, the limitations of the no-injury doctrine would not apply because they do not apply to imported water.¹²² Imported water users are treated more favorably than appropriators of water native to the watershed, as other water users cannot come to rely upon the use of someone else's imported water.¹²³

Although no one except the importer himself can establish legal rights to imported water, others can use the water so long as it is available.¹²⁴ The importer owes no obligation to those making use of imported water escaping into the hydrologic system.¹²⁵ Ultimately, a downstream appropriator cannot salvage imported water, even if that water leaves the importer's property and place of appropriation, because downstream appropriators can never gain a legal right to use imported water.¹²⁶ Thus, the right of an importer to salvage water is already clear.¹²⁷ A subsequent appropriator who makes use of the importer's excess imported water has no right to that water because only the importer can establish a legal right to use and reuse the imported water.¹²⁸

H. An Introduction to Salvage Water

Salvage water is water recovered by human effort for additional use from existing uses or losses within the original watershed.¹²⁹ Salvage water includes water previously lost in the appropriation, including water that returns to the hydrologic system, such as water previously lost through percolation.¹³⁰ Salvage water also includes recovered water previously lost to the appropriator and the hydrologic system, such as phreatophyte-consumed water.¹³¹ An appropriator

¹²⁰ See generally *Thayer*, 594 P.2d 951.

¹²¹ Note the absence of any indication to the contrary in the proposed Wyoming salvage water legislation. WYO. STAT. ANN. § 41-3-102(d) (Legislature of the State of Wyoming, Bills 2013). Absent an express provision indicating the measures to be taken on a particular issue, it can be inferred that the current Wyoming water system will be followed on that issue.

¹²² *Thayer*, 594 P.2d at 955.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Squillace, *supra* note 10, at 330.

¹²⁶ See *id.*

¹²⁷ See *id.* at 339 n.203.

¹²⁸ See *id.* at 330.

¹²⁹ *Id.* at 331 n.158.

¹³⁰ See *id.* at 331.

¹³¹ See Jack G. Koogler, *Phreatophytes and Water Salvage*, NEW MEXICO WATER RESOURCES RESEARCH INSTITUTE 42, <http://wtri.nmsu.edu/publish/watcon/proc4/Koogler.pdf>. Phreatophytes are plants that, due to their deep roots, tap into the groundwater system and consume groundwater

can salvage water through reduction of: (1) seepage loss, (2) evaporation, (3) phreatophyte consumption, or (4) percolation into the soil.¹³² For example, an appropriator might conduct water through pipes or other artificial conduits, thereby preventing seepage and evaporation losses.¹³³ Another example of salvage water is developing a marshy spring into a flowing stream, thus increasing the flow of water.¹³⁴ Reducing transmission losses, treating sewage, recycling or reclaiming water, and desalinating water also constitute salvaging water.¹³⁵ Municipalities salvage water when they use treated wastewater effluent for irrigation of parks and open spaces or enclosed pipe delivery systems that reduce evaporation.¹³⁶ For both conducting water through pipes and treating wastewater effluent, the user does not lose the treated and/or reclaimed water.¹³⁷ Rather, the original user gets additional use from the same amount of water through greater efficiency.¹³⁸ This is because the water is no longer being lost to the appropriator somewhere along the chain, or he is getting an additional use of the water by reusing it a second time after treating it.¹³⁹

Water can be salvaged for the same use as the original appropriation, or for a new or additional use.¹⁴⁰ The latter, however, subjects the salvaged water to certain change of use requirements both generally and in Wyoming specifically.¹⁴¹ The water under the original appropriation which is recycled, essentially getting two or more rounds of use, is the “salvaged water.”¹⁴² As salvaged water is not

as opposed to surface water. See Elke Naumburg et al., *Phreatophytic Vegetation and Groundwater Fluctuations: A Review of Current Research and Application of Ecosystem Response Modeling with an Emphasis on Great Basin Vegetation*, 35 ENVTL. MGMT. 726 (2005). Examples of phreatophytes include alfalfa, cottonwood, and willow. T.W. Robinson, *Phreatophytes*, GEOLOGICAL SURVEY WATER-SUPPLY PAPER 1, 1 (1958) (“...much of the water undoubtedly can be salvaged by converting consumptive waste to consumptive use. There are two basic methods: reducing of consumptive waste by diverting water from the plants to other uses, and increasing the efficiency of water use by substituting beneficial for nonbeneficial plant species.”).

¹³² Clark, *supra* note 5, at 433.

¹³³ Leslie M. Larsen et al., *Abandoned or Escaped Waters—Foreign Substances in Abandoned Waters*, 62 CAL. JUR. 3D WATER § 108 (2013).

¹³⁴ *Id.* There are obviously environmental repercussions that would arise from developing a marsh, or likewise from eliminating phreatophytes, such as streambed erosion, increased evaporation, and increased size of the streambed. Addressing these environmental concerns, however, is beyond the scope of this comment and instead the focus is simply on the appropriator creating opportunities for salvage water within her appropriation.

¹³⁵ Clark, *supra* note 5, at 433.

¹³⁶ Stein, *supra* note 93, at 26 (describing the example of salvage water when municipalities treat wastewater effluent for irrigating parks and open spaces).

¹³⁷ *Id.* at 9–10.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Squillace, *supra* note 10, at 331–32.

¹⁴¹ See *infra* note 147 and accompanying text.

¹⁴² See Squillace, *supra* note 10, at 331 n.158.

considered “new” water within the original watershed, the use of salvage water has traditionally been subjected to the appropriation system and the priority system.¹⁴³ This means salvage water, as part of the original appropriation, gets the priority date of the original appropriation.¹⁴⁴

I. Senate File 0150: Proposed Wyoming Legislation Pertaining to Salvage Water

The proposed Wyoming legislation regarding salvage water was Senate File No. SF0150, which Senator Hines and Representatives Barlow and Kasperik introduced in the Senate on January 22, 2013.¹⁴⁵ Section 41-3-102 of the Wyoming Statutes enumerates the preferred uses of water and lists their order of preference.¹⁴⁶ To this, the proposed Wyoming legislation would add subsection (d), reading:

It is the declared policy of this state to encourage the conservation and full beneficial use of water. Consistent with this policy, holders of water rights who salvage water may retain the right to the salvaged water for subsequent beneficial use. Any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right shall be approved by the Wyoming state board of control pursuant to [Wyo. Stat. Ann. § 41-3-104] or the state engineer pursuant

¹⁴³ See *Extending the Use of Water*, N.D. WATER L. (Feb. 27, 2013, 2:48 PM), <http://www.ag.ndsu.edu/ndwaterlaw/acquiringwater/westernlaw/othertopics>.

¹⁴⁴ See *infra* notes 152–57 and accompanying text.

¹⁴⁵ FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE, *supra* note 11, at 320.

¹⁴⁶ WYO. STAT. ANN. § 41-3-102 (2013). The full text of this statute currently reads:

- (a) Water rights are hereby defined as follows according to use: preferred uses shall include rights for domestic and transportation purposes, steam power plants, and industrial purposes; 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 except as hereinafter provided.
- (b) Preferred water uses shall have preference rights in the following order:
 - (i) Water for drinking purposes for both man and beast;
 - (ii) Water for municipal purposes;
 - (iii) Water for the use of steam engines and for general railway use, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), for steam and hot water heating plants, and steam power plants; and
 - (iv) Industrial purposes.
- (c) The use of water for irrigation shall be superior and preferred to any use where water turbines or impulse water wheels are installed for power purposes; provided, however, that the preferred use of steam power plants and industrial purposes herein granted shall not be construed to give the right of condemnation.

to [Wyo. Stat. Ann. § 41-3-110]. As used in this subsection, “salvage” means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.¹⁴⁷

In short, under the proposed legislation, a user is allowed to salvage water and put that water to beneficial use on the place of the original appropriation while maintaining the original appropriation date for the salvaged water.¹⁴⁸ If the appropriator, however, wants to use the salvage water on other land, he must obtain permission, but the original appropriation date would still extend to that salvaged water.¹⁴⁹

III. ANALYSIS

When crafting new contours of water law, the legislature should focus on important policy considerations, including encouraging and ensuring efficient water use and maximum water utilization, while also considering equitable apportionment of this scarce resource. This comment investigates whether the use of salvage water in Wyoming is consistent with the fundamental elements of water law.¹⁵⁰ Ultimately, the proposed salvage water legislation comports with existing Wyoming water laws.¹⁵¹ This will ease the transitioning of salvage water into the current Wyoming water system regulations. More importantly, adding salvage water as a statutorily beneficial use promotes and enhances efficient water use, a central tenet to promote in Wyoming. The proposed Wyoming legislation was a good first step in the right direction, but it failed to address some vital issues. This comment will discuss improvements that should be made to the proposed legislation. Future salvage water legislation should specifically implement an analysis balancing injury to others under the doctrines of reuse and recapture for salvage water and address changes to the imported water structure.

A. *The Priority System*

The proposed Wyoming salvage water legislation does not explicitly identify the priority date attaching to salvage water. Practically, it is important to consider the priority date that would apply to salvage water rights. Future salvage water legislation should attach the priority date that will most benefit Wyoming’s goals of ensuring efficient water use, maximum water use, and equitable apportionment. If Wyoming’s current law establishing priority applied to salvage water, a salvager

¹⁴⁷ WYO. STAT. ANN. § 41-3-102(d) (2013).

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See infra* notes 152–221 and accompanying text.

¹⁵¹ *See infra* notes 152–221 and accompanying text.

could end up with a junior priority date of little value. Wyoming's policy goals are best served if salvage water has the same priority date as the original appropriation.

Under existing law, the priority date of salvaged water is unclear. Salvaged water may not fall within the required appropriation limitations. If the salvaged water does not constitute the original beneficial use or compose part of the historic consumptive use, this suggests there should be a more junior priority date for that salvaged water. In salvaging water that was being wasted by over-appropriation or where the actual need of the water was less than the duty of water, a junior date of the actual date of salvage would apply. Accordingly, the priority date for salvage water, not derived from incidental losses or like sources, would be the date the user expresses intent to salvage by filing an application to salvage that water with the Wyoming State Board of Control. Additionally, without the proposed salvage water legislation, if the appropriator changes the use of the salvaged water from the use of the original appropriation, he must apply for a change of use permit with an attendant junior priority date.¹⁵²

To best serve Wyoming's goals of ensuring efficient water use, maximum water use, and fair apportionment, an appropriator should have the priority date of the original appropriation attach to his salvaged water. The original appropriation established the right to use the water; salvage water is just a more efficient use of the original appropriation.¹⁵³ Further, the original appropriation represents and includes the intent to apply the full amount of the water to beneficial use despite incidental losses.¹⁵⁴ An appropriator's full amount of his original appropriation includes an amount that will be lost to incidental losses.¹⁵⁵ Thus, such an intent should allow the State Board of Control to grant the salvaged water the same priority date as the original priority date. Furthermore, extending the original priority date is one of the few practical ways to incentivize senior appropriators to salvage their water and increase efficiency within a hydrologic system.

Providing a later priority date for salvage water would effectively eliminate all incentive to salvage any water. Therefore, it is likely the practical implications and effect of the proposed Wyoming salvage water legislation will extend the original priority date to salvaged water in order to incentivize appropriators to salvage water in the first place. Salvage water would most likely be considered part of the original appropriation, as it was already encompassed in the original right and therefore would have the same priority date as the original appropriation.¹⁵⁶

¹⁵² FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE, *supra* note 11, at 320.

¹⁵³ Squillace, *supra* note 10, at 331.

¹⁵⁴ *Montana v. Wyoming*, 131 S. Ct. 1765, 1778 (2011).

¹⁵⁵ See *infra* note 169 and accompanying text.

¹⁵⁶ Consistent with this policy, holders of water rights who salvage water may retain the right to the salvaged water for subsequent beneficial use.

The proposed Wyoming legislation does not explicitly state this proposition, but for clarity's sake, it should. Extending the same priority date as the original appropriation to salvage water is the only way to promote the legislation's purpose: "[encouraging] the conservation and full beneficial use of water."¹⁵⁷

B. Beneficial Use and the Duty of Water

Under existing law, the duty of water can disincentivize conservation, because more efficient use may mean losing part of a water right.¹⁵⁸ The proposed legislation solves this problem by ensuring appropriators do not lose the amount of their originally quantified right when increasing appropriation efficiencies.¹⁵⁹ The proposed Wyoming legislation comports with the duty of water because it incentivizes users to improve their beneficial use.¹⁶⁰ The duty of water is a means of quantifying the amount of water needed to accomplish the proposed beneficial use of water for irrigation.¹⁶¹ The duty of water originated as a means of reducing waste by limiting the amount of an appropriation.¹⁶² The concept as developed in the real world, however, has been read as a dynamic requirement that might include the obligation to reduce the diversion of unneeded water.¹⁶³ This could cause a problem for a water salvager if he is not allowed to use his salvaged water because it is considered in excess of the duty of water.

Generally, salvage water is recovered from existing uses or losses by eliminating losses within an appropriation or use.¹⁶⁴ If water is lost through seepage, evaporation, or percolation, it is not being applied to the original appropriation's particular beneficial use. Some loss is inherent in appropriations; for example, losses during transport from the source to the place of beneficial use.¹⁶⁵ It is not possible to fully consume every drop of water diverted, for example, when growing crops.¹⁶⁶ Most of this incidental loss, such as percolation and seepage, re-enters the hydrologic cycle and downstream appropriators subsequently use this water.¹⁶⁷ An appropriator's beneficial use appropriation includes an incidental loss

¹⁵⁷ FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE, *supra* note 11, at 320.

¹⁵⁸ See *supra* notes 33–53 and accompanying text.

¹⁵⁹ See *supra* note 147 and accompanying text.

¹⁶⁰ See *supra* note 147 and accompanying text.

¹⁶¹ Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557, 564 (Wyo. 1978).

¹⁶² See *supra* notes 33–53 and accompanying text.

¹⁶³ See *supra* notes 33–53 and accompanying text.

¹⁶⁴ See Clark, *supra* note 5, at 422.

¹⁶⁵ See *Basin Elec. Power Coop.*, 578 P.2d at 574 (McClintock, J., dissenting).

¹⁶⁶ See COLORADO AGRICULTURAL WATER ALLIANCE, *supra* note 81, at 4-1.

¹⁶⁷ *Id.*

calculation.¹⁶⁸ Therefore, the total appropriation equals the amount beneficially applied plus the amount incidentally lost.¹⁶⁹

With modern methods, some of this lost water may be salvageable.¹⁷⁰ If this incidentally lost water is subsequently converted to a direct beneficial use, this salvaged water would increase the efficiency and maximum utilization of water within the system.¹⁷¹ Salvage water accordingly fulfills the important goal of improving efficiency of use by reducing losses.¹⁷² It also increases the overall amount of water that can be beneficially applied.¹⁷³ In one instance, salvaging water increases the overall amount of water available for appropriation within the hydrologic system by offsetting amounts previously lost forever in that system, such as water lost to phreatophyte consumption.¹⁷⁴ In another instance, salvaging water may increase the amount of water that can be applied to the appropriator's particular beneficial use by ensuring more water actually makes it to the appropriator's beneficial use itself as opposed to returning to the hydrologic system somewhere along the way, such as through percolation and evaporation.¹⁷⁵

Accordingly, improving efficiency of water use through salvaging water could increase administrative efficiency in quantifying appropriations, as incidental losses would not need to be calculated into the amount to grant the appropriation in the first place. It would also have the added bonus of simplifying the appropriation permitting process by reducing the difference between the amount diverted and the amount consumed in use, thus eliminating inclusion of an amorphous, inaccurate calculation for incidental losses.¹⁷⁶ Consequently, allocations would reflect a more administratively efficient quantification of water rights, promoting greater certainty and opening up more water for appropriation.

Despite all the practical advantages of salvaging water, appropriators may fear current water laws fail to provide any incentive to salvage water, as the duty of water limits an appropriation to the amount of water that can be put to beneficial use. If an appropriator improves the efficiency of his application by preventing

¹⁶⁸ See *supra* note 116 and accompanying text.

¹⁶⁹ *Basin Elec. Power Coop.*, 578 P.2d at 563 (majority opinion). See *supra* note 116 and accompanying text.

¹⁷⁰ See Squillace, *supra* note 10, at 331.

¹⁷¹ See *id.* at 332.

¹⁷² *Id.* at 331.

¹⁷³ See COLORADO AGRICULTURAL WATER ALLIANCE, *supra* note 81, at 4-1.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ As there is no clear, single way to calculate incidental losses, having to come up with a way to include incidental losses creates a lack of fairness because what is calculated as the need for one appropriator may be more than or less than a subsequent judgment of need for a different appropriator. See *supra* notes 41-53 and accompanying text.

incidental losses, he needs less water to apply to his beneficial use. Thus, the duty of water would indicate his appropriation should be reduced, and an appropriator would not get to make use of the water saved through his efficiency.

The proposed Wyoming salvage water legislation seeks to mitigate fears that efficiency and innovation could result in the loss of an appropriator's full original right.¹⁷⁷ The appropriator could apply the amount of water converted from loss to beneficial use on the original appropriation's land without fear of negative repercussion for improving water efficiency within his own system. The salvaged water constitutes part of the original beneficial use water allocation, as it is included in calculating the duty of water.¹⁷⁸ Regardless of whether water is salvaged from evaporation, percolation, plant consumption, or other salvage water sources, that loss was taken into consideration in granting the original right. An appropriator's granted right considers the duty of water; the appropriator does not violate the duty of water by increasing his efficiency and applying what he saved to an additional beneficial use. Therefore, an appropriator would maintain the right to the amount of water composing the totality of his original appropriation. Accordingly, the proposed Wyoming salvage water legislation emphasizes the duty of water in a way that serves Wyoming's goals of ensuring efficient water use, maximum water use, and fair apportionment.

C. *Reuse and Recapture Doctrines*

The proposed Wyoming legislation follows the path blazed by Wyoming Courts in not requiring no-injury analysis when water is recaptured on an appropriator's land.¹⁷⁹ The proposed Wyoming salvage water legislation codifies the general requirements of the reuse and recapture doctrines.¹⁸⁰ The proposed Wyoming salvage water legislation explicitly states that use of salvaged water must remain within the land under the original appropriation for the original purpose *unless* the Wyoming State Board of Control approves such changes.¹⁸¹ Legislation allowing the Board of Control to examine whether a water salvage operation would injure downstream users would better serve the goals of efficiency, maximum use, and fairness.

The proposed Wyoming salvage water legislation seems to have been written with the doctrines of reuse and recapture, waste water, and seepage in mind, as it

¹⁷⁷ WYO. STAT. ANN. § 41-3-102(d) (Legislature of the State of Wyoming, Bills 2013).

¹⁷⁸ See *supra* notes 33–53 and accompanying text.

¹⁷⁹ See *Fuss v. Franks*, 610 P.2d 17, 20 (Wyo. 1980); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957); *In re Boyer*, 248 P.2d 540, 546 (Idaho 1952).

¹⁸⁰ FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE, *supra* note 11, at 320.

¹⁸¹ *Id.* (emphasis added).

embodies these concepts. This is done in three ways. First, salvage water must not exceed the original permit or decree (amount diverted and consumed under the original appropriation) because the appropriator would be appropriating more water than stated in the appropriation.¹⁸² Second, salvage water must be used on the lands under the original appropriation.¹⁸³ Third, salvage water must be used only for the purpose and use of the original appropriation.¹⁸⁴ Essentially, the doctrine of recapture already allows reuse of salvaged water if it is used for the same purpose, on the same land, and does not injure downstream users.¹⁸⁵ The appropriator can salvage the water anywhere on his property or under his control, where he is applying the water, or along the diversion system transporting the water as long as these three requirements are met.¹⁸⁶ Furthermore, as the law of seepage water dictates, downstream users do not have an expectation or right to a particular amount of water always leaving the boundaries of an upstream appropriator.¹⁸⁷

However, the proposed Wyoming salvage water legislation does not account for appropriators decreasing historic return flows to the original source when salvaging water that historically returned to the hydrologic system for appropriation by others. Future salvage water legislation must explicitly detail the procedures for salvaging water in relation to historic return flows and what the appropriator should do if those flows decrease.¹⁸⁸ While it would be easiest to simply draw a bright-line rule prohibiting any salvage of water injuring downstream users, such a hard and fast rule is not the most effective way to increase conservation and the full beneficial use of water. A clear-cut rule does not allow room to look at individual circumstances and decide on a case-by-case basis what would be most

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See WYO. STAT. ANN. § 41-3-102(d) (Legislature of the State of Wyoming, Bills 2013).

¹⁸⁶ Areas which are under an appropriator's control but not on his property include the ditches to which an appropriator has rights, but which may run on land not belonging to the appropriator himself, but rather to others, before ultimately reaching the appropriator's property.

¹⁸⁷ *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957)

No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain

See also *In re Boyer*, 248 P.2d 540, 546 (Idaho 1952).

¹⁸⁸ It will not always be the case that an inquiry into the effects on historic return flows must be conducted before an appropriator can use their salvage water. This would be the case only for uses affecting historic return flows. So an inquiry would have to be made in the case of eliminating percolating water, but not in the case of water salvaged from evaporation or phreatophyte consumption.

beneficial for each particular hydrologic system. Injuries to downstream users should be permitted only after the Wyoming State Board of Control carefully balances all parties' interests on a case-by-case basis.¹⁸⁹

All laws inherently produce inequalities, whether they create bright lines or case-by-case analyses. A balancing test ultimately goes further towards leveling the playing field than a bright-line rule because all parties, whether large conglomerates or individual appropriators, will always get a voice instead of just sometimes getting a voice. In deciding whether to allow a decrease in historic return flows when salvaging water, the Board would consider: (1) the priority of the affected appropriations; (2) the length of time the affected appropriations and the original appropriation have existed; (3) the beneficial use to which the salvage water will be applied; (4) the need for the proposed use in comparison to the current beneficial use; and (5) the need for the affected use. Ultimately, the Board's careful and considerate evaluation of these factors should lead to decisions enhancing maximum efficiency and utilization of water, as well as decisions reducing the inequalities among parties, by always and consistently giving a voice to all interested parties.¹⁹⁰

D. The No-Injury Doctrine

The proposed Wyoming salvage water legislation comports with the no-injury doctrine because it subjects salvage water to water law change of use requirements.¹⁹¹ Any potential conflict is due to inherent flaws in the no-injury doctrine itself, not because of the legislation.¹⁹² Salvaging water has the potential to injure downstream users if that water historically returned to the hydrologic system. Future salvage water legislation should include a mechanism balancing the goals of efficient water use and maximum water use with the goal of fairness to water users.

A water appropriator is not entitled to change the place of diversion, purpose of use, or place of use if the change would injuriously affect another appropriator.¹⁹³

¹⁸⁹ While injury should be considered, it should not be determinative to stop proposed salvaged uses in all cases. Thus why a flexible rule on a case-by-case basis is needed to analyze the particulars of each circumstance to make the best and fairest determination. This analysis would be persuaded by what tier the salvaged water fell under. *See infra* note 208 and accompanying text.

¹⁹⁰ This would inform the no-injury doctrine analysis, or rather the no-injury doctrine would inform these case-by-case determinations, all considered together to come up with the most equitable solution while maximizing water use and increasing efficiency of water use.

¹⁹¹ *See supra* note 190 and accompanying text.

¹⁹² *See supra* note 190 and accompanying text.

¹⁹³ *See Groo v. Sights*, 134 P. 269, 272 (Wyo. 1913). *See also Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 54 P.2d 906, 910 (Wyo. 1936); *Johnston v. Little Horse Creek Irrigating Co.*, 79 P. 22, 24 (Wyo. 1904); *Frank v. Hicks*, 35 P. 475, 484 (Wyo. 1894).

The nature of salvage water is such that it was water previously lost to the original appropriator.¹⁹⁴ This water comes in two varieties. The first type of salvage water eluded beneficial application at any point in the system because it was, for example, consumed by phreatophytes or lost in natural processes such as evaporation. The second type of lost water was water historically returning to the hydrologic system where others could appropriate it for their own use, for example, seepage water. Water that others used because it re-entered the hydrologic system composes part of the original appropriator's right and is protected for the original appropriator's benefit, and not for the benefit of the downstream user's rights.¹⁹⁵ Downstream users can only ever get access to water if there is water that has not already been appropriated by any other users.¹⁹⁶ But removing this second type of water from the hydrologic system through salvage may cause injury to others if they have been using that water and have come to depend on it.¹⁹⁷

The only water certain to pass the no-injury test is water previously completely lost in and to the hydrologic system that is no longer lost to the system because of a more efficient appropriation, for example, water recovered from percolation and evaporation by means of installing pipes or a lining system in a ditch. Only this water always passes the no-injury test because it was water never available to any party or any other appropriators at any previous point of time. Consequently, no one could claim reliance on that particular water. If, however, the particular water salvaged was water previously returning to the hydrologic cycle, such as percolating and underground water, this subsequently salvaged water, and its appropriator, must comply with the no-injury doctrine.¹⁹⁸ Ensuring compliance with the existing no-injury doctrine in that latter case may disallow certain water salvaging efforts.¹⁹⁹ No-injury questions are considered on a case-by-case basis; future salvage water legislation should implement the same approach to considering whether a user can salvage water without injuring a downstream user.

The proposed Wyoming salvage water legislation disassociates itself from the no-injury doctrine. It unqualifiedly allows an appropriator to salvage water for the same use as the original appropriation without any consideration of

¹⁹⁴ Squillace, *supra* note 10, at 331 n.158.

¹⁹⁵ Basin Elec. Power Coop. v. State Bd. of Control, 578 P.2d 557, 570 (Wyo. 1978) (stating that an appropriator can acquire no right to excess waters).

¹⁹⁶ *See id.*

¹⁹⁷ *See* Squillace, *supra* note 10, at 331.

¹⁹⁸ *See Extending the Use of Water, supra* note 143.

¹⁹⁹ For example, lining ditches or installing a pipeline system would reduce seepage. This loss of percolation means that the amount of water originally returning to the hydrologic cycle is also reduced. This in turn implies that some appropriator down the line is injured because this water is no longer provided to the hydrologic cycle and is removed from this particular water system.

injury.²⁰⁰ If the only goal is efficiency of use, the proposed Wyoming salvage water legislation is laudable. Conversely, the proposed Wyoming legislation is contrary to advancing the goal of providing water to as many appropriators as possible.²⁰¹ Little or no water will ever make it to junior appropriators if numerous senior appropriators make their uses more efficient by salvaging water and reducing the total amount of water available in a particular water system. Therefore, the proposed Wyoming salvage water legislation, while potentially more efficient, allows fewer appropriators to use the total available resource.²⁰² Hence, the proposed legislation may lead to fewer appropriators having a water supply available to them and their beneficial uses.²⁰³ If Wyoming wants to balance both these objectives, salvage water legislation must include a no-injury qualification/application on a case-by-case basis, even when the use of salvage water is for the same beneficial use as that under the appropriator's original right.

The proposed Wyoming salvage water legislation requires state review if the salvager wants to change the purpose or place of use of his salvage water.²⁰⁴ This implies that the no-injury doctrine applies only if the salvager is going to change one of these elements.²⁰⁵ If, however, he is simply going to use more water on the original appropriation, the no-injury doctrine does not apply and the appropriator is not subject to any state review.²⁰⁶ Accordingly, the proposed legislation endangers downstream users. The proposed Wyoming legislation indiscriminately allows salvage of both forever-lost water and water that returns to the hydrologic cycle.

To maintain consistency with the current Wyoming water law structure, future salvage water legislation should require any appropriator wishing to use salvage water to submit a short application to the Wyoming State Board of Control specifically describing how or why his desired appropriation would not injure other users.²⁰⁷ The Board would make its decision whether to extend its

²⁰⁰ "Consistent with this policy, holders of water rights who salvage water may retain the right to the salvaged water for subsequent beneficial use." See *supra* note 119 and accompanying text.

²⁰¹ The goal being: maximizing the number and extent of water uses while promoting efficiency as an important conservation goal. See Kaiser, *supra* note 2.

²⁰² WYO. STAT. ANN. § 41-3-102(d) (Legislature of the State of Wyoming, Bills 2013).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Remember, the no-injury doctrine only comes up in the context of changes in place of use, point of diversion, purpose, or time. *Supra* notes 85–87 and accompanying text.

²⁰⁶ FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE, *supra* note 11, at 320.

²⁰⁷ This short application would be much akin to the change of use application. Thus, the Wyoming State Board of Control would be the appropriate party with which to file this application as they approve change of use requests pursuant to WYO. STAT. ANN. § 41-3-104 and using salvage water is more analogous to a change of use rather than a temporary water right which would go through the state engineer pursuant to WYO. STAT. ANN. § 41-3-110. See WYO. STAT. ANN. §§ 41-3-104(a), 41-3-110 (2013).

approval and thereby allow the use on a case-by-case basis. As the ultimate goal is balancing the injury with the positive aspects of salvaging water, a permit may issue even if there was some injury, as long as the Board considers the injury minor in comparison to the benefits of the salvage water use. The Board would ultimately issue a letter of decision to the applicant, announcing what its decision is and how it arrived at that decision. Information on how the Board reached its decision is important because it allows applicants to remedy potential flaws and reapply at a later date.

Creating a different standard for both forever-lost water and lost water that returns to the hydrologic cycle would protect downstream users, thus creating less discord in the entire system due to fluctuations in availability of water for downstream users. Future salvage water legislation should have two tiers. Tier 1 would allow appropriators to use salvaged water that was forever lost to the hydrologic system without having to apply or comply with the no-injury doctrine. If, for example, the appropriator put a pipe system in his ditch eliminating evaporation, he would automatically be allowed to utilize the increased water supply he has created.²⁰⁸ Tier 2 would allow appropriators to use salvaged water that previously returned to the hydrologic system, but only after application to and approval by the State Board of Control. The Board would issue such approval only after investigation, analysis, and application of a modified no-injury doctrine. This modified no-injury doctrine would balance the interests of: (1) the applicant and other downstream users, and (2) the goals of efficiency and maximum utilization on a system wide basis.

E. Change of Use Laws

The proposed Wyoming salvage water legislation embodies the *Basin Electric* dicta, overruling the portion of that decision disallowing the transfer of water lost in a closed system after use.²⁰⁹ *Basin Electric* held that failure to apply water to a beneficial use, by itself, effectuates and constitutes abandonment of that part of the appropriation considered wasted (misused or failed to use).²¹⁰ Dicta, however, advocated embracing a standard where beneficial use of water exceeds actual consumptive use, and expanding the definition of consumptive use to include actual needs for proper irrigation.²¹¹ The proposed Wyoming salvage water legislation allows a water right holder salvaging water to retain the right to that salvaged water for subsequent beneficial use, as opposed to classifying such

²⁰⁸ If anything had to be submitted to the Board, it would merely be a proof that this salvaged water was indeed previously water that was forever lost in the hydrologic system.

²⁰⁹ See WYO. STAT. ANN. § 41-3-102(d) (Legislature of the State of Wyoming, Bills 2013); *Basin Elec. Power Coop. v. State Bd. of Control*, 578 P.2d 557, 564 (Wyo. 1978).

²¹⁰ *Basin Elec. Power Coop.*, 578 P.2d at 564.

²¹¹ *Id.* at 567–68.

water as abandoned.²¹² In other words, the proposed legislation does not equate beneficial use with consumptive use.²¹³ Thus, appropriators are not required to classify salvage water as abandoned water simply because such water historically was not applied to the consumptive application of the beneficial use but rather was an incidental loss.²¹⁴ If an appropriator wishes to change the place or purpose of use of the salvaged water from that approved under the original appropriation, the proposed Wyoming legislation requires the salvager to comply with the change of use process.²¹⁵

Further, the proposed Wyoming salvage water legislation does not conflict with the requirement that a change of use does not enlarge the use either as to amount or time. By requiring an appropriator to follow the change of use process if he wants to use water for a different purpose or in a different place than that authorized under the original appropriation, the proposed Wyoming legislation expressly subjects salvage water to current Wyoming water law, namely the change of use requirements.²¹⁶ For the original appropriator, salvage water converts lost water to beneficially used water.²¹⁷ The diversion itself is not enlarged even if the consumptive use is. Because salvaged water was already included in quantifying the original appropriation, usually factored in as incidental loss, applying salvaged water to a beneficial use simply reallocates the distribution of water within the original right.²¹⁸ For example, for Tier 1 water, this could mean water is now applied to the beneficial use itself, such as consumption by plants, instead of being lost to evaporation. The use is not necessarily enlarged; the water is simply finding itself used at a different point along the line of appropriation, its use reallocated along the spectrum of the right itself.

The proposed Wyoming legislation comports with the change of use regulations. Salvage water rights are harmonious with the current water law

²¹² See *supra* note 147 and accompanying text.

²¹³ See *supra* note 147 and accompanying text.

²¹⁴ See *supra* note 147 and accompanying text.

²¹⁵ See *supra* note 147 and accompanying text (“use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right [must] be approved by the Wyoming state board of control pursuant to [WYO. STAT. ANN. § 41-3-104].”).

²¹⁶ *Garber v. Wagonhound Land & Livestock Co.*, 279 P.3d 525, 528 (Wyo. 2012).

²¹⁷ See Squillace, *supra* note 10, at 331 n.158.

²¹⁸ An example of this concept is found in the Special Master’s findings for *Montana v. Wyoming*, to which the U.S. Supreme Court agreed:

[T]he Special Master found several reasons to conclude that Wyoming’s pre-1950 users may switch to sprinkler irrigation. He found that the scope of the original appropriative right includes such a change so long as no additional water is diverted from the stream and the conserved water is used on the same acreage for the same agricultural purpose as before.

Montana v. Wyoming, 131 S. Ct. 1765, 1773 (2011).

system per the requirement of state review if the salvaged water is put to use in a different way or place. Not only are they compatible, but the proposed Wyoming salvage water legislation explicitly incorporates the existing water system, expressly subjecting the proposed Wyoming salvage water legislation to existing change of use laws.²¹⁹

F. Imported Water Laws

The proposed Wyoming salvage water legislation does not specifically address imported water, as water users of imported water already have the right to salvage their imported water.²²⁰ If future legislation truly wants to achieve its objective of encouraging the conservation and full beneficial use of water, the legislation should include a statement about the implications of salvaging imported water. Applying a balancing test to imported water would further Wyoming's goals of efficiency, maximum use, and fairness.

The legislature could eliminate the complete ban on protected rights of subsequent users of others' imported water. But this may discourage water importation. A middle ground must be achieved. This consists of the Board of Control weighing competing interests on a case-by-case basis and determining the best allocation of imported water. If the Board of Control fails to do this in the first place, courts come in after the fact to determine on a case-by-case basis the best allocation of imported water. Such case-by-case decisions would be guided specifically by the policy objectives of maximum conservation within the entire water system, maximum beneficial uses of water, and fairness. The balancing test for imported water should consider placing limitations on water importers salvaging their imported water. Salvaged imported water should be subject to the same balancing and case-by-case analysis factors used to determine the use of reused and recaptured water native to the system as set forth above.²²¹ While a balancing test may disincentivize importation of water, the focus should be on maximizing efficiency and number of water uses. Subjecting water importers to this balancing test promotes more efficient water use and therefore helps preserve this scarce resource.

IV. CONCLUSION

As water is a scarce resource, especially in the arid West, the goal of all water users should be using water as efficiently as possible and maximizing water utilization, while not forgetting about equity when using, appropriating, and

²¹⁹ See WYO. STAT. ANN. § 41-3-102(d) (2013).

²²⁰ See FIRST DAY GENERAL SESSION OF THE SENATE SIXTY SECOND STATE LEGISLATURE, *supra* note 11, at 320; see also *Thayer v. City of Rawlins*, 594 P.2d 951, 955 (Wyo. 1979).

²²¹ *Supra* notes 188–90 and accompanying text.

apportioning water rights.²²² The proposed Wyoming salvage water legislation harmoniously fits into the current contours of Wyoming water laws.²²³ But any subsequent proposed salvage water legislation should address the nuances discussed above.²²⁴ While salvaged water would be subject to current water laws, some of which are explicitly written into the proposed legislation, any future proposed legislation must more explicitly and specifically ameliorate and eliminate some of the inefficiencies of the current system, suggestions for which have been made throughout this comment.²²⁵

The proposed Wyoming salvage water legislation was a good first step in the right direction. But any future legislative proposals for salvage water should specifically address changes to the imported water structure and implement an analysis to balance injury to others with the use of reused and recaptured salvage water.²²⁶ Promoting use of salvage water leads water users to maximize the number and extent of water uses, meeting the important goal of conserving and promoting the efficient use of water, the lifeblood of the American West, and part of the foundation of our economy.²²⁷

²²² See *supra* notes 1–16 and accompanying text.

²²³ See *supra* notes 150–221 and accompanying text.

²²⁴ See *supra* notes 17–221 and accompanying text.

²²⁵ See *supra* notes 156–57, 188–90, 207–08, 220–21 and accompanying text.

²²⁶ See *supra* notes 188–90, 220–21 and accompanying text.

²²⁷ See *supra* note 5 and accompanying text.