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Idaho and Montana Procedures for Obtaining Water Use Permits - Possible Sources for Improvement of Wyoming Law, The

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COMMENTS

THE IDAHO AND MONTANA PROCEDURES FOR OBTAINING WATER USE PERMITS--POSSIBLE SOURCES FOR IMPROVEMENT OF WYOMING LAW*

INTRODUCTION

The states of Montana and Idaho have recently drawn much attention as a result of certain statutory changes made by these states to their water laws. In Idaho, the significant development has taken the form of a statute which directs that all future water rights shall be acquired only by complying with a statutory permit procedure which had previously been optional to the appropriator.[1] In Montana, the changes have been much more widesweeping and have resulted in the enactment of an entire new water code which has as its central feature a mandatory permit system for the initiation of water rights in that state.[2]

The obvious impact of these developments is to extend the permit system as the exclusive means of acquiring appropriative rights in water to two more states, leaving Colorado as the only prior appropriation state which does not resort to a permit procedure.[3] In the interest of providing for the most efficient and effective management of water resources, the Idaho and Montana permit systems should be examined with the intention of ascertaining whether the procedures adopted by those two states contain any features which facilitate realization of this objective.[4] This comment will at-

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1. IDAHO CODE § 42-101 (Supp. 1974) (enacted as ch. 177, § 1, [1971] Idaho Sess. Laws 844).
2. MONT. REV. CODES ANN. §§ 89-101.1 *et seq.* (Supp. 1974) (enacted as ch. 253 [1974] Mont. Sess. Laws 513-613).
3. The Colorado procedure consists of applications made by appropriators to a "water judge" who then renders various decrees which are determinative of the nature of the appropriator's rights. *See* F. TRELEASE, WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION 137-39 (2d ed. 1974).
4. The inclusion of the Idaho statutory scheme in this analysis may seem somewhat questionable in view of the fact that the current Idaho permit system has been in existence in its basic form since 1903. Hutchins, *The Idaho Law of Water Rights*, 5 IDAHO L. REV. 1, 21 (1968). However, the recent shift in Idaho to an exclusive permit system would seem to give new vitality to the old law to the point that an examination of its provisions at this time is justified.

tempt to make such an analysis of the Idaho and Montana laws pertaining to the acquisition and consequences of a permit for an appropriative water right with an eye toward the existing water law of the state of Wyoming. It is hoped that this process will result in either constructive suggestions for improvements in Wyoming law or a reaffirmation of the desirability of the existing Wyoming provisions. The methodology to be employed in the following treatment will consist generally of an identification of areas of statutory differences with an explanation of the possible reasons for and consequences of such variances.

EXCLUSIVITY OF THE PERMIT SYSTEM AS A MEANS OF ACQUIRING AN APPROPRIATIVE WATER RIGHT

As mentioned previously, the primary significance of the Idaho and Montana legislation is to install the permit system as the exclusive means of initiating future water rights in those two states.[5] In this respect, the statutory scheme of the two systems is made more consistent with that of Wyoming, which is recognized as originating the permit concept for acquiring water rights.[6] It has been said that the primary benefit of a permit system is the opportunity it affords to facilitate a state's attempt to maximize the use of its water resources by providing a readily available catalogue of currently unappropriated water[7] and by requiring that a deter-

5. IDAHO CODE § 42-201 (Supp. 1974) provides:
> All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation.

MONT. REV. CODES ANN. § 89-880(1) (Supp. 1974) provides:
> After the effective date of this act, a person may not appropriate water except as provided in this act. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription or estoppel; the method prescribed by this act is exclusive.

6. W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 75 (1942).
7. Comment, *Idaho—The Constitutionality of a Mandatory Permit System and Denial of a Water Use in the Public Interest*, 4 LAND & WATER L. REV. 487, 489 (1969).

mination be made of a proposed water use's relationship to the public interest at a time when the use is sought to be initiated.[8] Moreover, a permit system also accommodates present and future uses of water in that it establishes a mechanism whereby the extent of existing uses can be accurately ascertained thereby allowing a determination of the permissible extent of a use by a new appropriator.[9]

Given the frequently stated advantages of a permit system, it may be somewhat difficult to understand the reasons why Idaho and Montana have only recently taken steps which align them with the overwhelming majority of prior appropriation states. The answer is found within the constitutions of each of these states. The Idaho constitution provides that: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, *shall never be denied,* except that the state may regulate and limit the use thereof for power purposes . . ."[10] In 1903 the Idaho legislature enacted a statute which, on its face, purported to require that all future appropriations of water be made in accordance with a permit system.[11] Subsequently, the Idaho Supreme Court, in *Nielson v. Parker,*[12] expressed its belief that the constitutional proscription against denying the "right to divert and appropriate the unappropriated waters of any natural stream to beneficial use"[13] precluded the legislature from imposing a mandatory permit system.[14] Although this statement by the court is arguably merely dictum,[15] the *Nielson* decision is regarded as the primary justification for the his-

8. Stone, *Montana Water Rights—A New Opportunity,* 34 MONT. L. REV. 57, 72 (1973).
9. *Id.*
10. IDAHO CONST. art. 15, § 3 (emphasis added).
11. The 1903 statute remained in effect in substantially its original form until the amendment effected by the 1974 legislation. *Compare* IDAHO CODE § 42-201 (1932) which stated:
> All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter. And after the passage of this title all the waters of this state shall be controlled and administered in the manner herein provided.

with IDAHO CODE § 42-201 (Supp. 1974), the text of which appears note 5 *supra.*
12. 19 Idaho 727, 115 P. 488 (1911).
13. IDAHO CONST. art. 15, § 3.
14. Nielson v. Parker, 19 Idaho 737, 115 P. 488 (1911).
15. *See* Barber, *Statutory Water Rights Permits: A Necessary Problem in Real Property Conveyancing,* 9 IDAHO L. REV. 1, 4 (1972).

torical recognition in Idaho of two types of water rights, the "constitutional right" which is perfected by actual diversion and application of the water to a beneficial use and the "statutory right" which is marked by compliance with the statutory permit procedure.[16]

Having once been frustrated in its attempt to implement a mandatory permit system, the Idaho legislature has, by its 1971 action, once again expressed its intention to provide the state with the means to effectively and efficiently administer that state's water resources. It remains to be seen whether the new Idaho statute will withstand the constitutional attack it is almost certain to face. However, it has been persuasively argued that such a mandatory permit system should be upheld as merely a means of regularizing the process of obtaining a water right and not a mechanism to deny the constitutionally protected right to divert and appropriate the waters of the state.[17] Notwithstanding the fact that constitutional restrictions on the power of the state engineer to deny permits may impair efforts to attain maximum use of Idaho's waters,[18] Idaho's adoption of a mandatory permit system must be regarded as a step toward more effective utilization of that state's water.

The situation in Montana prior to the recent legislation was not the result of an express constitutional ban on imposing a permit system as it was in Idaho.[19] Rather, the Montana legislature had simply failed to act except to require the posting and filing of a notice of appropriation to acquire a right in an unadjudicated stream[20] and to provide a means of obtaining rights in adjudicated streams by means of a petition

16. Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931). The major difference between the two rights as to an appropriator is the fact that the priority date of a statutory right relates back to the time of application for a permit while the priority of a constitutional right is determined as of the date the water is applied to a beneficial use. Barber, *supra* note 15, at 6.

17. Barber, *supra* note 15, at 5.

18. *See* text p. 443-44 *infra*. Although the designation of the administrative official or agency varies from state to state, the term "state engineer" will herein be used.

19. The former Montana Constitution merely stated that the use of water appropriated for a beneficial use "shall be held to be a public use." MONT. CONST. art. III, § 15 (1889).

20. MONT. REV. CODES ANN. § 89-810 (1964 Repl. Vol.) (repealed 1973).

to the court.[21] However, in 1972 the state of Montana adopted a new constitution which included a specific directive to the legislature to "provide for the administration, control, and regulation of water rights."[22] In 1974, the Montana legislature accepted its mandate and enacted a comprehensive new water code for that state which embodies a mandatory permit scheme for the initiation of all future appropriative water rights.[23]

APPLICATION OF THE IDAHO AND MONTANA PERMIT SYSTEMS

Both the Idaho and Montana systems are expressly made applicable only to the acquisition of future water rights.[24] This is a tacit recognition of water rights acquired in those states by means of the actual application of water to a beneficial use prior to the time when compliance with the statutory scheme was a necessary prerequisite to the initiation of a right. In order to provide a means of ascertaining and recording previously existing rights both states have provided for the adjudication of such rights.[25]

Idaho and Montana both include rights in ground water within the ambit of the mandatory permit system although Montana excepts appropriations of ground water outside the boundaries of a "controlled ground water area."[26] In similar fashion, Wyoming requires that a permit be obtained from the state engineer before the commencement of construction of any well or the utilization of ground water.[27] The inclusion of ground water within the permit system allows for the complete administration of a state's water resources in view of the demonstrated interrelation of surface and subterranean water within the hydrologic cycle.[28]

21. MONT. REV. CODES ANN. § 89-829 (1964 Repl. Vol.) (repealed 1973).
22. MONT. CONST. art. IX, § 3(4).
23. MONT. REV. CODES ANN. §§ 89-880 to -888 (Supp. 1974).
24. IDAHO CODE § 42-201 (Supp. 1974); MONT. REV. CODES ANN. § 89-880(1) (Supp. 1974).
25. IDAHO CODE §§ 42-1401 to -1414 (Supp. 1974); MONT. REV. CODES ANN. §§ 89-870 to -879 (Supp. 1974).
26. IDAHO CODE § 42-103 (Supp. 1974); MONT. REV. CODES ANN. § 89-880 (Supp. 1974).
27. WYO. STAT. § 41-138 (Supp. 1973).
28. NATIONAL WATER COMMISSION, A SUMMARY-DIGEST OF STATE WATER LAWS 49 (1973).

The Idaho and Montana codes expressly indicate that the permit system is the exclusive means of acquiring a water right. The Idaho statute states that rights shall be acquired by the permit system and "not otherwise"[29] while the Montana enactment provides that no right may be acquired by "adverse use, adverse possession, prescription or estoppel."[30] These statements would seem declarative of existing Wyoming law since the Wyoming Supreme Court has held that the permit is the exclusive means of acquiring a water right in Wyoming[31] and that the doctrine of prescription may not be invoked to acquire a right in the waters of the state.[32] Consequently, the express preclusion of prescriptive rights would not seem to add much to current Wyoming law although it would serve to avoid "another possible undesirable exception to a system of state-granted rights."[33]

NOTICE AND HEARING REQUIREMENTS UPON THE STATE ENGINEER'S RECEIPT OF AN APPLICATION FOR A PERMIT

A conspicuous feature of the Idaho and Montana codes that is absent from Wyoming law is the requirement that notice be given of the state engineer's receipt of an application for a permit to various parties who are then afforded an opportunity for a hearing prior to the issuance of the permit. Wyoming makes no such provision and allows for publication of notice and a right to contest by a party claiming an interest only when an appropriator has perfected his appropriation and is seeking to obtain a certificate of appropriation.[34]

In contrast, the Idaho and Montana provisions both require that notice of an application for a permit be published in a newspaper of general circulation.[35] In addition, Montana provides for service of notice on any state agency or other

29. IDAHO CODE § 42-201 (Supp. 1974).
30. MONT. REV. CODES ANN. § 89-880(1) (Supp. 1974).
31. Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 P. 764 (1925).
32. Campbell v. Wyoming Development Co., 55 Wyo. 347, 100 P.2d 124 (1940).
33. F. TRELEASE, A WATER CODE FOR ALASKA 39 (1962).
34. WYO. STAT. § 41-211 (Interim Supp. 1974).
35. IDAHO CODE § 42-203 (Supp. 1974); MONT. REV. CODES ANN. § 89-881 (Supp. 1974).

person the Department of Natural Resources and Conservation feels may be interested in or affected by the proposed appropriation.[36] In all cases the purpose of such notice is to afford an opportunity for adverse parties to protest the issuance of a permit to the intending appropriator. In Montana, the statute expressly provides for objections based upon the lack of unappropriated waters in the proposed source, the inadequacy of the proposed means of appropriation, or an adverse effect on the property, rights, or interests of the objecting party.[37] Idaho, on the other hand, does not enumerate specific objections which may be advanced by a party protesting the issuance of a permit. However, it may be assumed that such protests will most likely embrace one or more of the specific grounds on which an application for a permit may be refused.[38]

The desirability of incorporating similar notice and hearing provisions into the application stage of the Wyoming permit procedure merits some consideration. As previously discussed, the underlying rationale for the permit system is that it allows for the maximization of the use of water by providing for the regulation of individual uses in the form of a denial or issuance of a permit. Theoretically, therefore it would seem that any device which would tend to provide more information at the application stage would serve to shed light on the public interest considerations which exist in regard to any given proposed water use. However, the types of notice and hearing provisions found in the Idaho and Montana laws may not be conducive to a meaningful examination of the public interest. As noted above, the grounds of protest are most often associated with a concern for the protection of the vested rights of senior appropriators. Such protests should not be afforded significance in view of the fact that the basic tenet of the prior appropriation doctrine is that no new right may be established in derogation of an existing one. Consequently, a party protesting on the grounds of a possible in-

36. MONT. REV. CODES ANN. § 89-881 (Supp. 1974).
37. MONT. REV. CODES ANN. § 89-882 (Supp. 1974).
38. IDAHO CODE § 42-203 (Supp. 1974). Upon a hearing findings are to be made regarding the sufficiency of water in the proposed source, the effect of the proposed appropriation on existing rights, the good faith of the applicant as well as his financial ability to accomplish the proposed appropriation.

jury to his rights actually should have no reason for concern if the proposed use is allowed.

The objections which are likely to be raised in Idaho in regard to the good faith of an applicant and his ability to complete the appropriation[39] arguably could have a more direct bearing on the public interest factors involved in any given proposed use. Quite certainly maximum use of water in the public interest would preclude the holding of a water right merely for speculation or profit. The good faith of an applicant would be relevant in this regard. Similarly, the ability to complete a proposed appropriation would be essential to make any use of water which would be prerequisite to overall maximum use. However, it should be noted that absent a completed appropriation, no water right will be acquired and consequently the major injury will be the proposed appropriator's waste of effort and expense. The only effect on the public interest in maximum use would be the possible deleterious result of a delay or decision not to prosecute another proposed use which would have been in the public interest.

Therefore, in determining whether Wyoming s h o u l d adopt notice and hearing provisions for its permit procedure, one must consider the type of notice and hearing contemplated. It would seem of little value to enact a procedure which merely provides a forum for the owners of existing rights to express their concerns over the state's enforcement of the prior appropriation doctrine. Rather, the notice and hearing requirements should serve the objective of assisting in exposing the public interest considerations which will be affected by the granting or denial of a proposed water use. Therefore, standing to object at a hearing on a permit application could be limited to a person or entity in a position to raise one or more of the issues which might be said to comprise the public interest.[40] The corresponding notice provisions should there-

39. *See* text accompanying note 38 *supra*.

40. Professor Trelease suggests, *supra* note 33, at 51-52 that the "public interest" should include consideration of:
(1) the values to the applicant resulting directly from the proposed use of the water,
(2) the benefits to the state and to the locality resulting indirectly from the economic activity that will result from the proposed appropriation and use of the water,

fore be structured so as to insure the notification of those who will have standing to contest the application.

GROUNDS FOR ISSUING OR REFUSING A PERMIT

It has been previously stated that one of the major justifications for the permit system is that it facilitates maximization of the use of water by channeling such use on the basis of public interest.[41] Consequently, any such system which does not provide for weighing the public interest considerations involved in any proposed appropriation falls short of its full potential for efficient administration of a state's water resources. Unfortunately, the water codes of both Idaho and Montana are deficient in this very important aspect. Conversely, the Wyoming state engineer by constitutional fiat may refuse to allow any appropriation "when such denial is demanded by the public interests."[42]

In Idaho the obstacle is once again constitutional in nature and stems from the same language which for so long was thought to be a barrier to the adoption of a mandatory permit system in that state. It will be recalled that the Idaho Constitution states:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes . . .[43]

(3) the benefits, if any, resulting to the public from improvement of or increased opportunities for fishing, hunting and recreation,
(4) the loss of the benefits of alternate uses of the water, if any, that would probably be made within a reasonable time if not precluded or hindered by the proposed use of the water,
(5) the loss of, harm to, or impairment in value of the property and rights of other persons that would result from the proposed appropriation and the use of the water,
(6) the loss and harm to the public that would result from loss of, harm to or impairment of fish, wildlife and recreational values,
(7) the good faith, intent and ability of the applicant to successfully complete the appropriation and to carry on the proposed development.

41. *See* text p. 436-37 *supra.*

42. WYO. CONST. art. 8, § 3. In addition, the Wyoming state engineer is given direct statutory authority to reject applications which are "detrimental to the public welfare." WYO. STAT. § 41-203 (1957).

43. IDAHO CONST. art. 15, § 3.

This language is considered to mean that the state engineer may only deny a permit when either there is no unappropriated waters or the proposed use is not beneficial.[44] Accordingly, a constitutional amendment would be required to give the Idaho state engineer the express power to deny a permit for an appropriation from a natural stream when to do so would be in the public interest.[45]

The situation is somewhat different in Montana in that there appears to be no constitutional impediment to the denial of applications for proposed appropriations which would conflict with the public interest. Rather the Montana Legislature has seen fit to restrict the considerations which are relevant to the issuance of a permit by requiring issuance if:

(1) there are unappropriated waters in the source of supply,

(2) the rights of a prior appropriator will not be adversely affected,

(3) the proposed means of diversion or construction are adequate,

(4) the proposed use of water is a beneficial use,

(5) the proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved.[46]

Thus it is seen that essentially the same considerations are involved in the issuance of a permit in Montana as in Idaho, *i.e.* the existence of unappropriated waters and the beneficial nature of the proposed use.

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44. Harvey, *A Mandatory Permit System for the Acquisition of Water Rights in Idaho*, 2 IDAHO L. REV. 42, 56 (1965).

45. *Id.* It should be noted that the constitutional proscription against denying appropriations is only invoked when the proposed source is a "natural stream". IDAHO CONST. art. 15, § 3. Accordingly, with respect to ground water, the state engineer (director of the Department of Water Resources) is empowered by statute to "protect the people of the state from depletion of ground water resources contrary to public policy." IDAHO CODE § 42-231 (Supp. 1974).

46. MONT. REV. CODE ANN. § 89-885 (Supp. 1974).

It is evident therefore that neither state allows an overall examination of the proposed use in the light of the public interest. Rather, the relevant criteria are reduced to an enumeration of specific considerations each of which may bear on the nature of the public interest but lacking the overall totality required for effective water administration. Instead, in acting upon an application, the state engineer is permitted to consider only the situation of the particular applicant in question by determining if his proposed use is beneficial and the extent of any adverse effects on other appropriators. This essentially precludes any attempt to bring individual water uses into conformity with any mode of planned development for, as Professor Trelease states, "The self-interest of the intending appropriator gives no guaranty that the water he seeks will serve the public as well as himself."[47]

The argument has been made that the inquiry into the beneficial nature of a proposed use may provide a vehicle for considering the public interest even in the absence of express authority to do so. If this proved to be true, then a serious deficiency in the laws of Idaho and Montana would be remedied. The doctrinal underpinnings of this argument lie in distinguishing between two concepts embodied in the notion of a beneficial use.[48] On one hand, a use may be beneficial in the abstract sense. For example, no one would argue that domestic, stock-watering, or irrigation uses are not per se beneficial. On the other hand, however, the beneficial nature of a proposed use may be said to depend upon its "comparative reasonableness when viewed in the light of other uses."[49] Thus it has been said that in a dispute between two water users when one argues that another's use is not beneficial he is simply saying that his own use is *more beneficial.*[50] Accordingly, by introducing the notion of comparative reasonableness the focus of the inquiry shifts from merely considering the application

47. Trelease, *Desirable Revisions of Western Water Law*, PAPERS OF THE WESTERN RESOURCES CONFERENCE 203, 213 (1959).
48. *See* Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L. J. 1 (1957).
49. *Id.* at 14-15.
50. *Id.*

at hand to an examination of some of the alternative uses. Two Idaho cases[51] have been cited for the proposition that comparative reasonableness of a use is a factor which bears on whether such use is beneficial.[52] In these cases, the Idaho court is said to have required an inquiry into whether the proposed use is economically sound in light of other uses and thus to have expressed a concern for "acquiring the most benefit from available water supplies."[53]

Notwithstanding the logic and persuasiveness of this argument, it would seem much more desirable to give express authority to consider the public interest factors attendant upon any proposed appropriation as is currently done in Wyoming,[54] whenever to do so would be constitutionally permissible.[55] By providing such authority, the actions of the state engineer in considering the public interest would be isolated from attacks on the ground that they constitute an abuse or overreach of administrative discretion. Moreover, it could not be argued that comparative reasonableness is only to be determined with respect to alternative uses for which a permit has actually been sought or which have reached a certain stage of planning or implementation. By allowing the state engineer to consider each proposed use in relation to an overall plan of water development rather than as one use which is, or may be, competing with other uses, the interests of maximization of water use will be served.[56]

It therefore appears that Wyoming law provides a far better mechanism for considering the public interest in the use of water than does the water code of either Idaho or

51. Beasley v. Engstrom, 31 Idaho 14, 168 P. 1145 (1917); Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915).

52. Comment, *supra* note 7, at 495-96.

53. *Id.* at 496.

54. WYO. STAT. § 41-203 (1957).

55. *See* text p. 443-44 *supra.*

56. The Wyoming state engineer is required to "formulate and from time to time review and revise water and related land resources plans for the State of Wyoming." WYO. STAT. § 41-1.18 (Supp. 1973). Although there is no express requirement that such plans be consulted when taking action on an application for an appropriation, the state engineer would seem to have the authority to do so in view of the fact that "The plans shall implement the policies stated in the Wyoming constitution and in statutes pertaining to the state's water and related land resources." WYO. STAT. § 41-1.18 (Supp. 1973).

Montana. By restricting the factors relevant to the issuance of a permit, these two states potentially have failed to serve the stated primary objectives of their water laws to provide for "economical use"[57] of water and to put water to the "optimum beneficial use."[58] In failing to allow for the full consideration of the public interest, Idaho and Montana have placed an obstacle in the path of comprehensive, efficient administration of their water resources by taking away an effective method of directing development along planned lines (*i.e.* the denial of permits).[59] By not allowing for the denial of permits for appropriations which conflict with the public interest as expressed in an overall plan of development it thus becomes possible for small projects to "cut the heart out of large projects and make the remainder infeasible"[60] and for future costs to be imposed on "presently unidentified persons who may later seek to use the waters."[61] Moreover, the power to deny or condition permits in the public interest has been said to contain "the seed of a greater power—the power to formulate a master plan for the water resources of a state and to subordinate individual projects to the master plan."[62] With this power over the initiation of water uses, the state will be able to more effectively control and plan water resource development.

THE POWER TO RESTRICT OR CONDITION PERMITS

If the power to deny a permit in the public interest is an earmark of effective water management, then so also should be the power to grant restricted or conditional permits. In such manner proposed uses which in their original form would be inconsistent with the public interest may be so modified or restricted as to eliminate any derogatory effect

57. IDAHO CODE § 42-101 (1947).
58. MONT. REV. CODES ANN. § 89-101.2 (Supp. 1974).
59. Trelease, *Policies for Water Law: Property Rights, Economic Forces and Public Regulation*, 5 NATURAL RESOURCES J. 1, 45 (1965).
60. Trelease, *supra* note 47, at 213-15. *See also* Harvey, *supra* note 44, at 45.
61. *Id.*
62. Trelease, *supra* note 47, at 213. Professor Trelease has referred to Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943) as the "sleeping beauty of Western water law." *Id.* In *Tanner v. Bacon*, the court upheld the rejection of a permit for a power generation facility in favor of a planned multipurpose project which would result in substantially greater overall benefit to the people of the state.

on an overall plan of development. Thus the interests and objectives of both the individual appropriator and the general public will be accommodated. Such conditional or restricted permits may very well afford an effective aid to the enforcement of pollution laws.[63]

The water codes of both Idaho and Montana contain this very desirable feature of expressly allowing the imposition of conditions or restrictions on permits or the granting of partial permits.[64] Wyoming, however, makes no such express authorization for the exercise of such discretionary power by the state engineer. By statute, the Wyoming state engineer appears to be given only the option of either approving or rejecting in its entirety an application for a proposed use.[65] The courts however have recognized that the power to deny a permit when it is in the public interest includes the power to impose conditions or restrictions on such permits. Thus, in *Big Horn Power Co. v. State,*[66] the state engineer, in approving a permit for a dam, conditioned his approval on construction of the dam so as not to interfere with an adjacent railroad installation. The state engineer noted that "any obstacle which threatens to add to the cost of transportation must be considered as coming under the terms of the statute which provides that the state engineer is to reject any application which 'threatens to prove detrimental to the public interest' ".[67] Similarly, permits have been granted in Wyoming subject to such conditions as the subsequent obtaining of a federal right of way,[68] the assigning of such permits to a third party,[69] and the use of impounded waters only in accordance with the terms of a secondary permit for a dam.[70]

Therefore, it would appear that an express authorization for the state engineer to condition or restrict permits is not absolutely necessary to provide this additional measure of flex-

63. *See* Trelease, *supra* note 47, at 215.
64. IDAHO CODE § 42-203 (Supp. 1974); MONT. REV. CODES ANN. § 89-884(2) (Supp. 1974).
65. WYO. STAT. § 41-203 (1957).
66. 23 Wyo. 271, 148 P. 1110 (1915).
67. *Id.* at 286, 148 P. at 1113.
68. *In re* Utah-Idaho Sugar Co., 57 Wyo. 425, 120 P.2d 601 (1942).
69. *Id.*
70. Condict v. Ryan, 79 Wyo. 211, 333 P.2d 684 (1959).

ibility for Wyoming law. The courts have apparently seen fit to logically expand on the statutory language to find this discretionary power. Notwithstanding this fact, it might still be desirable to incorporate in the Wyoming statutory scheme the express power to grant conditional or restricted permits as has been done in Idaho and Montana. This would serve to secure, without possibility of loss, a very significant tool for efficient administration of the state's water resources.[71]

TIME LIMITS WITHIN WHICH ACTION MUST BE TAKEN ON AN APPLICATION

The Montana water code requires that an application for a permit must be granted, denied or conditioned within a specified period of time.[72] Neither Idaho nor Wyoming has a similar provision.[73] In fact, it would appear to be the practice in Wyoming for the state engineer to delay action upon an application for various reasons. The cases demonstrate instances where such delays have occurred because of complications in the ownership of the ditch,[74] conflicts with earlier permits,[75] and impending litigation.[76]

The primary consequence of a lapse between the filing of an application and action on such application results from the fact that the period within which the works must be con-

71. An analogous situation was presented in United States v. Bennewitz, 72 I.D. 183 (1965), where the Solicitor held that under the Power Site Restoration Act, 30 U.S.C. § 621 (1970), the Secretary of the Interior was only authorized to either prohibit all placer mining operations or to permit unrestricted placer mining. Thus, in *Bennewitz*, there was no authority to condition the permission to mine by imposing restrictions on the operations to safeguard the recreational values of the area. This type of result is of course precluded when the administrative official has the express power to grant conditional or restricted permits.

72. MONT. REV. CODES ANN. § 89-884(1) (Supp. 1974) provides:

> The department shall grant, deny, or condition an application for a permit in whole or in part within one hundred twenty (120) days after the last date of publication of the notice of application if no hearing is held, and within one hundred eighty (180) days if a hearing is held.

73. In Idaho if no protest to an application is filed, then the state engineer "*may* forthwith approve the application." IDAHO CODE § 42-203 (Supp. 1974) (emphasis added). In the event that a protest is filed, however, the defined procedure would appear to contemplate action upon the application in conjunction with the hearing which results from the filing of the protest. IDAHO CODE § 42-203 (Supp. 1974).

74. Collett v. Morgan, 21 Wyo. 117, 128 P. 626 (1912) (for year delay).

75. Whalon v. No. Platte Canal & Colonization Co., 11 Wyo. 313, 71 P. 995 (1903).

76. *Id.*

structed and the water applied to a beneficial use does not begin to run until the permit is issued.[77] Consequently, after the application has been filed and while it is pending, the intending appropriator is allowed to reserve water for some time without making a diligent effort to effect his appropriation and without a loss in priority of right since such priority dates from the time of the filing of the application[78] and not from the time the permit is granted. This situation encourages the holding of inchoate rights in water for speculation and impairs future development by raising doubt in regard to a prospective appropriator's ability to acquire unappropriated waters. Although it might be argued that this reservation of water might be in the public interest when the proposed use is consistent with an overall development plan, a preferable approach, consistent with the public interest, might seem to be the denial of all permits received in the interim before the proposed use is to be implemented which would jeopardize the proposed use.[79] This would eliminate all pending applications where the applicant never intends to actually use the water or seeks to hold some sort of inchoate right to the water for mere speculation yet would still provide a mechanism to obtain optimum development, *i.e.* the state engineer's power to deny permits in the public interest.

Consequently, an approach somewhat similar to that taken in Montana whereby action must be taken upon an application within a certain period of time might very well be desirable for Wyoming. However, the stringent requirements imposed by the Montana statute[80] may be too restrictive and force decisions in cases where a more thorough examination of the situation might be desirable. Therefore, a better approach would probably be to allow a somewhat longer period of time, say six months, for the state engineer to act on an application with provision for an extension of such period where the delay is not due to the actions of the applicant and

77. WYO. STAT. § 41-206 (Supp. 1973).

78. WYO. STAT. § 41-212 (1957).

79. *See* text p. 446 *supra.*

80. MONT. REV. CODES ANN. § 89-884(1) (Supp. 1974) the text of which appears in note 72 *supra.*

where the applicant is diligently proceeding to have a permit granted.

REQUIREMENTS RELATING TO DILIGENCE IN THE CONSTRUCTION OF WORK AND APPLICATION OF THE WATER TO A BENEFICIAL USE

It is frequently stated that in order to obtain a valid appropriative right, the appropriator must proceed with due diligence to effect his diversion and application of the water to a beneficial use.[81] As is the case in many states, including Wyoming, Idaho has codified the due diligence requirement into a specific time-table within which certain acts must be performed in order to retain a valid right to an appropriation. For example, Idaho requires that actual construction work and application of the water to a beneficial use be complete within a period specified up to a maximum of five years.[82] Moreover, cancellation of a permit may be sought when the intending appropriator has failed to complete one-fifth of the construction work within one-half of the total time allotted.[83] Idaho allows for very limited extensions of the time period in cases where there are extenuating circumstances which prevent completion within the requisite period.[84]

Wyoming follows a procedure similar to that of Idaho except that extensions are more liberally granted. The state engineer must set a period for completion of the construction which is not to exceed five years.[85] However, "for good cause shown," this time period may be extended.[86] No limit is placed upon the number or length of the extensions allowable.

Although the Wyoming procedure does not appear as rigid as that of Idaho, it is in drastic contrast to the broad

81. *See* Clyde, *Practical Aspects of Water Litigation*, 6 WATERS AND WATER RIGHTS § 514.1 (R. Clark ed. 1972).
82. IDAHO CODE § 42-204 (Supp. 1974).
83. IDAHO CODE § 42-301 (1947); IDAHO CODE § 42-311 (Supp. 1974).
84. IDAHO CODE § 42-204 (Supp. 1974). One seven year extension is allowed for certain large projects if at least $100,000 has been spent on the project. A single five year extension may be granted for other, presumably smaller, projects upon good cause shown. Unlimited extensions may be given for state and federal government projects in the discretion of the state engineer.
85. WYO. STAT. § 41-206 (Supp. 1973).
86. *Id.*

discretion given the Montana administrator in this regard. In Montana, a time limit *may* be imposed upon the commencement and completion of construction and actual application of the water to the proposed beneficial use.[87] The statute imposes no limits on the allowable time period and permits reasonable extensions of such periods.[88] In fixing any time period, factors to be considered include "the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use."[89]

The Montana approach has much to commend itself by reason of the tremendous flexibility which it allows. It makes possible a case-by-case determination of just what degree of effort will be necessary to meet the requirement of due diligence in each particular situation. Such discretionary treatment is far more preferable than having the legislature establish arbitrary time frames for all projects, large or small, simple or complex, as has been done in Idaho and, to a somewhat lesser degree, in Wyoming. It seems highly inconsistent to give the state engineer the broad discretionary power to deny permits in the public interest while at the same time requiring him to impose limits set by the legislature for the completion of projects.

FINAL PROOF OF APPROPRIATION

At some point in the permit procedure, there must come a time when the appropriator, having complied with all the requirements imposed by law, perfects his appropriative right. This point may be called "final proof" and marks the transition of his formerly inchoate right into one which is vested and equivalent to "a property right of high order."[90] The appropriator is then entitled to a certificate or license which evidences this right as well as verifies a recognition by the state of his full compliance with the required procedure.

87. MONT. REV. CODES ANN. § 89-886(2) (Supp. 1974).
88. *Id.*
89. *Id.*
90. King v. White, 499 P.2d 585, 588 (Wyo. 1972).

In the water codes of Idaho and Montana, final proof is a required step in the appropriative process. After applying the water to a beneficial use, the appropriator notifies the state engineer that the appropriation has been completed.[91] A subsequent examination of the appropriation may be mandatory or discretionary with the state engineer.[92] Following the examination, if any, a certificate or license is issued to the appropriator which confirms and evidences his use.[93]

In Wyoming, final proof of an appropriation is optional with the appropriator[94] except where a ditch permit is involved in which case the state engineer is approving the application must require final proof of appropriation within five years of the time allowed for completion of construction.[95] In cases where other than a ditch permit is involved, the statute simply says that "the appropriator may submit final proof of appropriation."[96] Consequently there is no impetus for the appropriator to make final proof until such time as it serves his own interests to have evidence that his right has been recognized by the state.[97] Accordingly, the Wyoming procedure affords no way of determining which permit has actually been followed by development.[98] The record only shows new rights claimed and thus the determination of actual water usage may become exceedingly difficult. In order to eliminate these "paper rights," which may serve as a deterrent to the initiation of new water uses, Wyoming should adopt a procedure which requires final proof of an ap-

91. IDAHO CODE § 42-218 (Supp. 1974); MONT. REV. CODES ANN. § 89-888 (Supp. 1974).

92. In Idaho the examination is required. IDAHO CODE § 42-218 (Supp. 1974). In Montana an inspection would appear to be discretionary by virtue of the statutory statement that it "may be held." MONT. REV. CODES ANN. § 89-888(1) (Supp. 1974).

93. IDAHO CODE § 42-219 (Supp. 1974); MONT. REV. CODES ANN. § 89-888(1) (Supp. 1974). In Montana, however, the certificate may only be issued if the source of the appropriation has been the subject of a prior determination of existing rights. MONT. REV. CODES ANN. § 89-888(2) (Supp. 1974).

94. Trelease, *supra* note 47, at 206.

95. WYO. STAT. § 41-206 (Supp. 1973).

96. WYO. STAT. § 41-211 (Interim Supp. 1974).

97. In Anita Ditch Co. v. Turner, 389 P.2d 1018 (Wyo. 1964), the permit was obtained in 1899 but proof of the appropriation was not filed until 1961 when the appropriator sought to obtain and publicly record evidence of his title and right.

98. Trelease, *supra* note 47, at 206.

propriation. Failure to make such proof should result in a loss of the appropriative right. The apparent harshness of such a rule could be tempered somewhat by requiring the state engineer to serve notice on the appropriator shortly before the final proof is due or by allowing reinstatement of the permit if final proof is made within a certain period after the original date set for final proof.[99]

CONCLUSION

In 1929, a commentator stated that "[I]n the Wyoming [water law] system we find an administrative and legal development that must command the world's praise . . ."[100] In comparing it to the laws of Idaho and Montana with regard to the mechanics of its permit system, one is justified in concluding that the Wyoming procedure remains a viable and effective means of providing for efficient administration of the state's water. This is particularly so in the very important aspect of the role of public interest considerations in the initiation of new water uses. There are, however, some areas in which Wyoming could possibly improve its permit system by adopting devices from the laws of the two neighboring states discussed herein. These include a notice and hearing requirement upon receipt of applications for permits, requiring the state engineer to act on applications within a reasonable time, expressly allowing the issuance of conditional or restricted permits, permitting the discretionary determination of the time period within which an appropriation must be effected and providing for mandatory final proof of appropriations.

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99. *E.g.*, IDAHO CODE § 42-218a (Supp. 1974).
100. *Lasky, From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 ROCKY MT. L. REV. 161, 162 (1929).